Clean Water Rule Comment Compendium
Topic 12: Implementation Issues

The Response to Comments Document, together with the preamble to the final Clean Water Rule, presents the responses of the Environmental Protection Agency (EPA) and the Department of the Army (collectively "the agencies") to the more than one million public comments received on the proposed rule (79 FR 22188 (Apr. 21, 2014)). The agencies have addressed all significant issues raised in the public comments.

As a result of changes made to the preamble and final rule prior to signature, and due to the volume of comments received, some responses in the Response to Comments Document may not reflect the language in the preamble and final rule in every respect. Where the response is in conflict with the preamble or the final rule, the language in the final preamble and rule controls and should be used for purposes of understanding the scope, requirements, and basis of the final rule. In addition, due to the large number of comments that addressed similar issues, as well as the volume of the comments received, the Response to Comments Document does not always cross-reference each response to the commenter(s) who raised the particular issue involved. The responses presented in this document are intended to augment the responses to comments that appear in the preamble to the final rule or to address comments not discussed in that preamble. Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself remains the definitive statement of the rationale for the revisions adopted in the final rule. In many instances, particular responses presented in the Response to Comments Document include cross references to responses on related issues that are located either in the preamble to the Clean Water Rule, the Technical Support Document, or elsewhere in the Response to Comments Document. All issues on which the agencies are taking final action in the Clean Water Rule are addressed in the Clean Water Rule rulemaking record.

Accordingly, the Response to Comments Document, together with the preamble to the Clean Water Rule and the information contained in the Technical Support Document, the Science Report, and the rest of the administrative record should be considered collectively as the agencies' response to all of the significant comments submitted on the proposed rule. The Response to Comments Document incorporates directly or by reference the significant public comments addressed in the preamble to the Clean Water Rule as well as other significant public comments that were submitted on the proposed rule.

This compendium, as part of the Response to Comments Document, provides a compendium of the technical comments about implementation issues submitted by commenters. Comments have been copied into this document "as is" with no editing or summarizing. Footnotes in regular font are taken directly from the comments.

Topic 12. IMPLEMENTATION ISSUES

Summary Response

The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Furthermore, the final rule will not directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the Clean Water Act definition of waters of the U.S.

The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public.

The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule limits CWA jurisdiction only to those types of waters that have a significant

nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It improves efficiency, clarity, and predictability for all landowners as well as permit applicants.

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, Section 401 certifications, water quality standards or section 311 requirements which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule improves consistency and predictability for all CWA programs and provides needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays.

The rule does not have an effect on farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the proposed rule. Consistent with current practice, the final rule does not obviate the requirement for landowners to operate in accordance Clean Water Act mandates which require landowners to be cognizant of potential waters of the U.S. within their property boundaries.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The agencies are developing guidance specific to facilitate effective, consistent, and

efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles. The exemptions under Section 404(f)(1) of the Clean Water Act, as well as nationwide general permit thresholds for impacts, are outside the scope of this rulemaking. This rule does not impact the citizen suit provisions under the Clean Water Act.

Specific Comments

National Association of State Foresters (Doc. #14636)

12.1 We recognize that the EPA proposed this new definition in response to direction from the Supreme Court of the United States and in hopes of providing more clarity for stakeholders. However, we have concerns that the proposal as written will do just the opposite and generate uncertainty and complicate existing procedures under the CWA. As such, NASF does not support the proposed rule as it currently is drafted and offers these comments on ways to improve the portions of the rule that we find particularly problematic. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Committee on Space, Science, and Technology (Doc. #16386)

12.2 Please provide detailed metrics related to the jurisdiction this rule claims:

a. How many miles of streams does this rule say the CWA covers?

b. How many miles of shoreline?

c. How many acres of "waters"?

d. How many acres of "wetlands"?

e. Are there any additional types of waters that may not be accounted for by those numbers? If so please provide appropriate metrics.

Agency Response: The rule does not project the miles or acres of waters that are or are not jurisdictional. That is outside the scope of the rulemaking. There is no existing ground-truthed wetland, stream, or water body mapping that comprehensively covers the entire area and thus no source of data from which to determine such metrics.

12.3 f. Does the EPA and CORPS have the resources to evenly and fairly enforce this rule across the entire country?

g. How many people enforce the CWA? (p. 9)

Agency Response: Since the rule provides greater clarity and reduces the extent of waters that may be jurisdictional based on a case-specific evaluation of significant nexus, the agencies do not anticipate a demand for increased resources for making jurisdictional determinations. Ideally, the greater clarity will also reduce the number of enforcement actions resulting from ignorance about regulatory requirements. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA

programs. CWA enforcement and agency funding/staffing are, however, outside the scope of this rule.

12.4 Has the EPA ever used drones for identification of "waters," surveillance, enforcement or other purposes? Can you commit to that the EPA will never use drones of any type over private property? (p. 10)

Agency Response: This question is outside the scope of the rulemaking which is limited to defining "waters of the U.S." Although EPA has access to various types of remote aerial imagery, EPA is not aware of drones being used for any purpose by the EPA. Future decisions to use or refrain from using developing technologies is beyond the scope of this rule and, accordingly, it incorporates no changes addressing such decisions.

12.5 How does EPA intend to regulate activity involving thousands of dry washes and arroyos in the West? Everyday activities like maintaining a private road by backfilling a persistent washout or replacing a culvert for a stream could require a permit. This seems to raise safety concerns if roads can't be maintained without first obtaining permits. (p. 12)

Agency Response: By clarifying the definition of "tributary," the agencies' intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries. The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

12.6 Has the agency thought through the practical realities associated with what it is proposing? For example, how will line crews, construction crews, and the like string or replace power lines and poles, repair substations, etc. in the midst of all these "tributaries" without a permit? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 12)

Agency Response: See the Technical Support Document. The rule does not change permitting requirements with regard to discharges of fill and other pollutants into jurisdictional tributaries and makes no change from the existing rule with regard to tributaries being jurisdictional. The rule does provide greater clarity and certainty by defining "tributary" and by requiring jurisdictional tributaries to possess the physical characteristics of a bed, banks, and an ordinary high water mark. Many activities associated with installation, replacement, or repair of utility

lines, poles, and substations are already authorized by Corps of Engineers nationwide permit #12; maintenance and emergency reconstruction of currently serviceable structures may be exempt from permitting pursuant to 33 C.F.R. §323.4(a)(2).

12.7 If people honestly don't know that they need to get a permit, can they still be subject to penalties for violations of the Clean Water Act? (p. 12)

Agency Response: **Enforcement is outside the scope of this rule. That said, the factors for determining a penalty are identified in Sections 309(d) and (g). The degree of culpability is a key factor in determining penalties under the Clean Water Act.**

12.8 What jurisdiction does the Forest Service have under the Clean Water Act beyond assuring, as a land manager, that its employees aren't violating the Act? (p. 13)

Agency Response: **The U.S. Forest Service does not have any "jurisdiction" under the Clean Water Act, the regulatory authority of which rests only with the U.S. Army Corps of Engineers (Corps) and EPA, as well as any states or tribes to which EPA has delegated authority. As referenced, the Forest Service bears the same responsibility of any land manager—or landowner or project proponent—for complying with the Clean Water Act, to include requirements associated with permits issued by the Corps, EPA, or a delegated state, as well as requirements associated with exemptions from permitting requirements, such as the Clean Water Act Section 404(f) exemptions for discharges of dredged or fill material resulting from normal silviculture activities (see 33 C.F.R. §323.4(a)(1)) and for construction or maintenance of forest roads (see 33 C.F.R. §323.4(a)(6)). The latter, for example, requires design, construction, and maintenance of road crossings such that they not disrupt the migration or other movement of aquatic species inhabiting the water body. In addition, as a federal agency, the Forest Service also bears specific responsibilities for the protection of wetlands and management of floodplains under Executive Orders No. 11990 and 11988, respectively.**

12.9 Has EPA consulted with any other federal agencies that have administrative responsibilities under the Clean Water Act? Please submit all written input that you solicited or received from other agencies thought this entire rulemaking process. (p. 13)

Agency Response: **Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly the EPA and the Corps submitted this action to the Office of Management and Budget (OMB) for review and any changes made in response to OMB recommendations have been documented in the docket for this action.**

12.10 Are all enforcement decisions left up to EPA, the Corp, or a State Regulator?

a. If EPA says an individual is violating the Clean Water Act, who bears the burden of proof? Does the EPA have to first prove that the creek in your back yard is a "water" and therefore covered? Or does the homeowner bear the burden of proving that the water should not be under EPA jurisdiction?

b. If fines were levied for an alleged violation, when do they begin to accrue? After EPA proves its case? After EPA sends a notice to the homeowner? Or do they potentially

start at the time of the violation-before the homeowner even knows that the EPA or the Corps is asserting jurisdiction?

c. Can a neighbor or environmental group sue EPA to force the Agency to enforce against a person? Has this ever happened before? Please provide detailed statistics for all instances of third party complaints.

d. Who currently uses these third-party enforcement mechanisms?

e. Who pays for the legal fees when a third-patty sues EPA to enforce against someone?

f. If a court ultimately vindicates the accused, detail all remunerations paid to make the aggrieved accused whole. Where does this money come from?

g. Do third party complainants also compensate EPA and DOJ for resources the government has expended in defense of these suits? (p. 14-15)

Agency Response: **While the decision to pursue an enforcement action rests with EPA, the Corps, or a delegated state or tribe, there are five elements of proof for which the responsible adjacency bears the burden, one of which is that the discharge occurred into a water of the United States. Clean Water Act Section 309 establishes that penalties may accrue for each day of violation. For purposes of calculating a penalty, the violation begins on the day of the unauthorized discharge into waters of the United States EPA applies the statutory factors identified in Section 309. A citizen can only sue the EPA under the citizen suit provisions for failure to perform a non-discretionary duty. Enforcement is discretionary. A citizen can take action against a violator directly under the citizen's suit provisions. Various entities use the citizen suit provisions. A third party cannot sue EPA to take enforcement actions. If a party sued is vindicated in court, they can seek attorney's fees against the party suing them. If the government is sued, and the courts finds in favor of the government, the government could seek fees from the party that filed the suit.**

12.11 If certain interpretations are beyond EPA and Corps intent, then how will you prevent third parties from suing to force a more expansive interpretation? (p. 15)

Agency Response: **The clarity provided by the new and refined definitions should minimize the potential for misinterpretation of the rule language. In addition, the agencies have provided extensive discussion of rationale and intent in the preamble, Technical Support Document, and this document. The agencies do not, however, have the authority to "prevent" litigation seeking either a more expansive or a narrower interpretation of jurisdictional waters.**

Illinois House of Representatives (Doc. #7978)

12.12 Most egregious is the fact that the rule throws into confusion extensive state regulation under various CWA programs. Implementation of this rule will have significant implications on most if not all of the 14 Statewide Permits authorized and under the administration of the Division of Water Resource Management, Illinois Department of Natural Resources. (p. 2)

Agency Response: **See the Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States which is available in the docket for this rule.**

State of Iowa Office of the Governor (Doc. #8377)

12.13 NPDES general permitting may be impacted by. This would result in much heavier workloads and resource demands for Iowa's counties and the State – the rule as currently proposed would be an unfunded mandate on local, state, and private sector entities. Further, stakeholders are concerned that collaborative relationships, such as the relationship between the Natural Resources Conservation Service (NRCS) personnel and land owners would be jeopardized, as NRCS personnel would shift their focus from the promotion of best practices to the enforcement of Federal permits. Such a chilling effect would have negative consequences on advancing water quality efforts.

If the scope of the "waters of the U.S." expands to include all intermittent and ephemeral waters, this would appear to expand the application of the rebuttable presumption that CWA section 101(a)(2) uses to apply to these waters. If so, Iowa may have 46,000 intermittent and ephemeral stream miles which are suddenly presumed to be fishable and swimmable after EPA has previously approved a determination that they are not. This would create an incredible burden on our Water Quality Standards, NPDES Permitting, Water Quality Assessment (305b), Impaired Waters Listing (303d), and Total Maximum Daily Load (TMDL) programs in Iowa and across the country. Permits would be delayed for years while use attainability analyses were completed and streams re-designated, often back to their current designations. (p. 11)

Agency Response: **The rule does not create any unfunded mandate under Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), creates no enforceable duty on any state government, and contains no regulatory requirements that might significantly or uniquely affect small governments. Similarly, the rule creates no new or expanded enforcement responsibility for the NRCS. Concern related to the NRCS role in implementation of the Interpretive Rule is moot due to its withdrawal. The rule only provides a definition for "waters of the U.S." Implementation of the rule is outside the scope of the rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Science Report and Science Advisory Board review confirmed that tributaries, including not only perennial, but also intermittent and ephemeral, streams, are chemically, physically, and biologically connected to downstream waters and affect the integrity of those waters (see the Technical Support Document). While the rule eliminates the need for case-specific evaluation of the significant nexus of ephemeral tributaries, it also includes a definition clarifying that, to be jurisdictional, tributaries must not only contribute flow, either directly or indirectly, to downstream traditional navigable waters, interstate waters, or the territorial seas, but must also exhibit the physical characteristics of a bed, banks, and ordinary high water mark. Given the first requirement—contribution of flow to downstream jurisdictional waters—the agencies disagree that the rule increases the number of facilities that would be**

subject to NPDES permitting, because a discharge to a tributary would, by definition, also result in a discharge to a downstream jurisdictional water, meaning that the facility making such discharge is already subject to NPDES requirements.

Georgia Department of Agriculture (Doc. #12351)

12.14 Responsible policies for the conservation of our water resources are a priority for GDA. However, the impending regulatory burdens that our communities face under the revised rule severely outweigh its benefits. The elimination of water pollution should be considered a time-intensive objective that should be addressed in consideration of financial and social costs. Steps should be taken in moderation. (p. 3)

Agency Response: The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. Consistent with Executive Orders 13563 and 12866, the agencies also conducted an economic analysis to provide the public with information on the potential indirect costs and benefits associated with this definitional rule. The agencies' analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Riverside County Farm Bureau (Doc. #12729)

12.15 Of (…) concern is the inconsistency that would be created by regional offices having discretion to interpret and apply the vague definitions in the proposed rule – "uplands," "floodplain," "subsurface connection," "waters" and "waste treatment." This would create confusion and additional burdens, require more federal permits, and increase possible litigation for both state permit programs and individual landowners. (p. 1)

Agency Response: To provide greater clarity, the agencies deleted the term "uplands" from the rule in response to comments such as this one. Similarly, the agencies also eliminated subsurface hydrologic connectivity as a basis for adjacency. In addition, EPA has adopted the Corps of Engineers' definitions of "ordinary high water mark" and "high tide line" to increase understanding of the lateral and upstream extent of non-wetland waters. With regard to waste treatment systems, the agencies proposed and made no substantive changes to the previous exclusion for such waters, so comments on that issue are outside the scope of the rule, and the final rule does not reflect such comments.

New Mexico Department of Agriculture (Doc. #13024)

12.16 Though the inclusion of *tributaries* is not a new jurisdictional feature of the definition of *Waters of the U.S.,* the definitional inclusion of ditches is problematic for the Southwest's agricultural community. (p. 5)

Agency Response: The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. The final rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further

reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches, thereby appropriately reducing regulatory burdens.

12.17 The Agencies have not been consistent in the predicted changes of jurisdiction as a result of this proposed rule. The Agencies have variously said that jurisdiction will increase,[1] [2] decrease[3] and will not change.[4] NMDA cites this inconsistency as proof of the ambiguity created by the creation of the *other waters* category among other problems with the wording of this proposed rule.

The source of this confusion is that this category would require a prescribed action for every jurisdictional determination (i.e., the definition requires determinations to be made on "a case-specific basis."). Currently, there is no such category that requires as extensive attention for every determination. This change would clearly result in less consistency and less clarity for waters that would belong in the new *other waters* category. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Agency Response: Executive Order (E.O.) 13563, signed by President Obama in 2011, requires the regulatory system to "promote predictability and reduce uncertainty" and "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."[5] Therefore, it is important to increase clarity in actions taken by the Agencies. Currently, EPA conducts jurisdictional determinations based on the CWA itself, alongside three key Supreme Court precedents, which is confusing to the regulated public. The intention of the new definition of *Waters of the U.S.* was to increase clarity by combining the previous definition of *Waters of the U.S.* with these interpretations from the Supreme Court.

12.18 However, the language in the proposed definition, for reasons listed in sections above, may, in fact, reduce clarity and cause confusion and frustration among regulated stakeholders. (p. 14-15)

Agency Response: The agencies have made extensive changes to reduce ambiguity and increase clarity about jurisdiction beyond traditional navigable waters, interstate waters, the territorial seas, tributaries, adjacent waters, and

[1] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.,"* March 2014. http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf

[2] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S."* May 15, 2014. Available at: http://www.brattle.com/news/-and-knowledge/publications/archive/2014.

[3] Stoner, Nancy. "Setting the Record Straight on Waters of the US." EPA Connect, July 7, 2014. http://blog.epa.gov/epaconnect/author/nancystoner/.

[4] Environmental Protection Agency. "Clean Water Act Exclusions and Exemptions Continue for Agriculture," http://www2.epa.gov/sites/production/files/2014-03/document/cwa_ag_exclusions_exemptions.pdf.

[5] Executive Order 13563: Improving Regulation and Regulatory Review. Signed January 18, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf

impoundments. These changes include specifying five specific types of waters in certain parts of the country that are, by rule, similarly situated for purposes of significant nexus evaluations. The rule also incorporates a geographic limit—4,000 feet—on jurisdiction over other waters. In addition, while the rule does not provide a decision tree for significant nexus evaluations, it does provide specific direction for determining which waters are similarly situated, defines the region in which the significant nexus evaluation will assess similarly situated waters together, specifies the functions to assess as part of that evaluation, and includes a detailed discussion of the process for considering the significance of the nexus. The agencies believe that the rule meets the goals of E.O. 13563.

Alaska State Legislature (Doc. #13566)

12.19 Additional expenses will occur because of CWA Section 404 permitting, permitting for development/construction activities, additional requirements for oil discharge and facilities needing to develop spill prevention, control and countermeasure plans. Information gaps and uncertainty lead many in the Senate to question whether the agencies alleged "calculated benefits" outweigh the burden imposed to our constituents. (p. 4)

Agency Response: This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs. Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes. In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. The existing regulations represent one appropriate baseline for comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline.

State of Montana Department of Justice (Doc. #13625)

12.20 Our State […] may choose to protect water quality in such broad areas as these in a different fashion than would be imposed on us by the "one size fits all" requirements of the CWA as implemented by your agencies. Hence, under your proposal, we lose the ability to fashion our own remedies on lands and waters that are truly remote from traditional navigable waters, a result that violates Congress' expressed intent in enacting the CWA as well as the pronouncements of the U.S. Supreme Court. (p. 4)

Agency Response: EPA and the Corps recognize that the establishment of "bright line" thresholds in the rule does not in any way restrict states from considering state specific information and concerns, as well as emerging science to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states' specific-circumstances are properly considered to complement and reinforce actions taken at the national level. The

agencies are committed to working with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.

Illinois Farm Bureau (Doc. #14070)

12.21 As proposed, the WOTUS rule fails to provide any clarity or predictability for farmers. It raises serious practical concerns with regard to its direct implementation by EPA and the Corps; its impact on the long-standing relationship between farmers and the U.S. Department of Agriculture; and on the ability of farmers to manage their land and grow the feed, food, fiber and fuel that are essential to America's economy. Finally, the rule will have significant direct impacts in areas well beyond the scope of the proposal or the jurisdiction of EPA or the Corps. These include, but are not limited to, decisions on which crops to plant and which fertilizers and pesticides are best for those crops in light of ever-changing environmental and marketplace conditions; farmers' ability to access credit and their relationship with bankers and lenders; and the nationalization of what have always been local decisions on the use of private lands. It also likely will subject farmers across the country to abusive activist lawsuits that benefit neither the environment nor local economies. (p. 2)

Agency Response: **The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. To that end, the rule establishes that not only are normal farming, ranching, and silviculture activities exempt from Section 404 permitting requirements, but also that wetlands, ponds, and other waters in use for those activities will no longer be jurisdictional by rule as "adjacent" waters; that ditches with only ephemeral flow are jurisdictional only where they are rerouted or altered streams; and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. It also retains the previous exclusion for prior converted croplands and codifies the previously uncertain exclusions for areas that are wetland only due to irrigation and for lakes and ponds created in dry land that have a primarily agricultural use such as stock watering, irrigation, or rice growing. In contrast, the rule does not add new categories of waters that have not been jurisdictional before. Moreover, consistent with Executive Orders 13563 and 12866, the agencies also conducted an economic analysis to provide the public with information on the potential indirect costs and benefits associated with this definitional rule. The agencies' analysis indicates that indirect incremental benefits exceed indirect incremental costs. The EPA cannot predict or control litigation.**

12.22 There also is the uncertainty and potential liability from the likelihood that farmers will face citizen suits alleging that drainage features on their farms are, in fact, tributaries. Those suits will be able to claim, following the logic of the proposed rule, that such features not only are directly WOTUS, but that the agricultural fields surrounding them have a "significant nexus" to a WOTUS and are, therefore, critical to the "chemical,

physical and biological integrity" of the nation's jurisdictional waters. Further following the logic of the proposed rule and the structure of the CWA, these suits also likely will claim that such drainage features require their own CWA "water quality standards," that they must be "assessed" to determine whether they are "attaining" their "designated use" and if "impaired," must have a "TMDL" applied to them. Setting aside, for a moment, whether such suits have any legal merit, the costs to farmers to defend against such claims, merited or otherwise, would be enormous. Altogether, of course, this will fundamentally alter the manner in which farmers farm, removing significant tools farmers have used to make America the world's leading agricultural producer. It also will change how lenders assess potential risk, both from direct litigation and potential enforcement actions, as well as from crop failures because of the lack of flexibility that farmers will have to address the impacts of constantly changing weather patterns on their crops and animals. (p. 2-3)

Agency Response: **The rule promulgates a definition of "tributary" clarifying that, to be jurisdictional, tributaries must not only contribute flow, either directly or indirectly, to downstream traditional navigable waters, interstate waters, or the territorial seas, but must also exhibit the physical characteristics of a bed, banks, and ordinary high water mark. The rule does not change the jurisdictional status of perennial and intermittent streams that flow through agricultural areas. It does establish that ephemeral streams are no longer subject to case-specific significant nexus evaluation, because the Science Report and Science Advisory Board review confirmed that they are chemically, physically, and biologically connected to downstream waters and affect the integrity of those waters. However, the rule also clarifies that ditches with only ephemeral flow are not jurisdictional unless they are rerouted or altered streams and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. The rule also establishes that wetlands, ponds, and other waters in use for normal farming, ranching, and silviculture activities are not jurisdictional by rule as "adjacent" waters. Such waters could be jurisdictional if they, either alone or in combination with similarly situated waters in the region, have a significant nexus to a nearby traditional navigable water, interstate water, or territorial sea, and the contribution of flow via a jurisdictional tributary or non-jurisdictional conveyance would be a factor in the significant nexus evaluation. It is important to note that the significant nexus assessment applies only to the integrity of traditional navigable waters, interstate waters, or the territorial seas, rather than to other jurisdictional waters such as tributaries, and that it considers only wetlands and other waters, not all agricultural fields.**

Commonwealth Pennsylvania Department of Agriculture (Doc. #14465)

12.23 Pennsylvania is not experiencing the purported confusion that is one of the drivers for the rule. Our state law jurisdiction is common-sense in application and does not generate confusion. As the foundation of our delegated NPDES program and the basis for the ACOE's Pennsylvania State Programmatic General Permit, our state law based programs are effective. Clarification or expansion of federal CWA jurisdiction is not needed from Pennsylvania's perspective. (p. 3)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

12.24 The proposed rule will have direct and substantial effects on other state programs, such assoil conservation, nutrient management, pesticide regulation, etc. Examples include the following:

State conservation programs that stress edge-of-field practices to limit flooding, contaminated runoff and soil erosion could be adversely affected if in-field conveyances are deemed WOTUS under one of the new categories or through BPJ determination of a "significant nexus." Farm Bill stewardship programs administered at the state level will have to be evaluated to properly embrace the expansion of jurisdictional waters under this proposed rule.

State pesticide programs and regulations will need to be reevaluated under the proposed WOTUS rule. Some labeled uses of pesticide products could be jeopardized by the proposed federalization of ephemeral conveyances and ditches; for example, when farmers, natural resource managers and others seek to use terrestrial pesticides with labels that state "do not apply to water" or require no-spray setbacks from jurisdictional waters to avoid potential spray drift. Confusion over what are federal "waters" may expose pest-control operators to legal uncertainty under CWA and/or FIFRA, and threaten effective pest management in certain topographies. (p. 6)

Agency Response: **The final rule reflects the intent of the agencies to improve clarity over what waters are jurisdictional and to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. With regard to in-field conveyances, the rule promulgates a definition of "tributary" clarifying that, to be jurisdictional, tributaries must not only contribute flow, either directly or indirectly, to downstream traditional navigable waters, interstate waters, or the territorial seas, but must also exhibit the physical characteristics of a bed, banks, and ordinary high water mark. It also clarifies that ditches with only ephemeral flow are not jurisdictional unless they are rerouted or altered streams and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. Finally, the rule provides specific direction for conducting significant nexus evaluations, including a definition of "significant nexus" and descriptions of how to determine which waters are similarly situated, how to identify the region in which the**

significant nexus evaluation will assess similarly situated waters together, and which functions to assess as part of that evaluation. See the Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States which is available in the docket for this rule.

State of Oklahoma (Doc. #14625)

12.25 It is telling that the preeminent cases driving the Agencies' decision to revise the WOTUS rule involve improper application of CWA authority under Section 404, yet the agency charged with primary responsibility for implementing this Section has been noticeably in the background or completely absent from the discussions that have taken place since the proposed rule's release. Interestingly, it is the States that assign designated uses of regulated waters and the criteria to protect those uses under Section 303 of the CWA, as well as work with watershed stakeholders to reduce nonpoint source impacts to water quality under Section 319. Under Section 401 of the CWA, it is the States that review Federal actions and certify whether those actions will meet State water quality standards. Under Section 402 of the CWA, Oklahoma and forty-five other States implement the NPDES permitting program. Yet under Section 404 of the CWA, only two States implement the dredge and fill permitting program. Perhaps the Agencies' efforts would be better spent working with Corps of Engineers Divisions and Districts in order to avoid the misapplication of WOTUS protections that ultimately led to Supreme Court decisions in *Bayview Homes, SWANCC* and *Rapanos* that resulted in the confusion your Agencies are trying to address in this action. (p. 3)

Agency Response: EPA took the lead in developing the rule because the agency's responsibilities related to waters of the United States are far broader than those of the Corps of Engineers. However, because, as noted, the Corps plays a substantial role in implementation of Section 404 of the Clean Water Act, EPA worked very closely with them in the rule's development since well before publication of the proposal. Interagency coordination has extended to evaluating and responding to comments and will continue into the outreach, training, and implementation phases as the rule takes effect.

12.26 Instead of focusing on a more effective, efficient way to address disparate decisions by the Corps of Engineers in implementing Section 404, we fear this rulemaking will create additional disorder in implementing Sections 303, 319, 401 and 402 where none exists currently. Despite the Agencies' stated intent to define more clearly the extent of WOTUS jurisdiction, the already fuzzy line of jurisdiction has been shifted without making the line any less fuzzy. We and most other States have learned to adapt, overcome confusion, and succeed in restoring water quality through our delegated authorities to implement Section 303, 319, 401 and 402 programs. However, this effort to fix problems that really only exist within Section 404 authorities will have repercussions in the other, more settled programs that States are largely responsible to implement. Rather, we suggest a national priority be placed on providing more clear guidance and training to Corps of Engineers Divisions and Districts on how to uniformly apply the provisions of Section 404. If coupled with deference to each State on WOTUS delineation that parallels the deference already shown to States on Section 401 certifications, we believe confusion and litigation can be dramatically reduced. (p. 3)

Agency Response: **It is the agencies' intent that implementation of the rule will include interagency training of field staff and, if necessary, development of additional guidance to the field. The rule also reflect an intent to clarify jurisdiction to reduce confusion and the potential for misinterpretation. The agencies also recognize that, in establishing "bright line" thresholds for tributary, adjacent, and case-specific jurisdictional waters, we are carefully applying the available science. As such, the agencies will work with states to evaluate more closely state-specific circumstances and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. However, given the national applicability of the federal laws that address waters of the United States, it is necessary to establish a single, national definition thereof, rather than defer to each state for its own definition.**

North Carolina Department of Agriculture and Consumer Services (Doc. #14747)

12.27 While EPA and USACE have stated that they intend to implement narrow interpretations of the proposed rule, there are citizen groups and individuals that could sue seeking broader interpretations of jurisdiction in the courts, resulting in many more waters coming under jurisdiction. This is another reason why the rule must be withdrawn or revised in order to clearly state which waters are under jurisdiction. (p. 4)

Agency Response: **EPA and the Corps have used the feedback we received on the proposed rule both to identify more clearly the categories of jurisdictional waters and non-jurisdictional features and to clarify the definitions and concepts that apply to them.**

12.28 In addition to exposure of private landowners to enforcement, an expansion of CWA jurisdiction, combined with confusion related to the Interpretive Rule, could potentially lead to a reduction in the implementation of conservation practices on agricultural lands. Landowners may avoid the use of conservation practices if they are concerned about potential permitting issues. Agricultural conservation practices are major factors in nutrient reduction strategies for several water bodies in North Carolina, including the Neuse and Tar-Pam river basins. A reduction in conservation practice implementation will delay cleanup of these vital water resources in North Carolina. (p. 5)

Agency Response: **By more clearly defining jurisdictional waters, including "bright line" thresholds for tributaries, adjacent waters, and case-specific jurisdictional waters, the rule should reduce the likelihood of inadvertent unauthorized activities resulting from confusion about jurisdiction. In addition to adding the thresholds, the rule also establishes that not only are normal farming, ranching, and silviculture activities exempt from Section 404 permitting requirements, but also wetlands, ponds, and other waters in use for those activities will no longer be jurisdictional by rule as "adjacent" waters; that ditches with only ephemeral flow are jurisdictional only where they are rerouted or altered streams; and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. The rule also retains the previous exclusion for prior converted croplands and codifies the**

previously uncertain exclusions for areas that are wetland only due to irrigation and for lakes and ponds created in dry land that have a primarily agricultural use such as stock watering, irrigation, or rice growing. In contrast, the rule does not add new categories of waters that have not been jurisdictional before. Finally, withdrawal of the Interpretive Rule also eliminates confusion associated with it.

South Carolina Forestry Commission (Doc. #14750)

12.29 Not only does the proposed rule have the potential to impact forest managers and timber harvesters, but it also could be detrimental to the forest landowner. Site preparation and tree planting will be affected due to a more limited use of herbicides for vegetative control. Mechanical methods of site preparation for planting pines will be subject to greater scrutiny, especially in marginally wet areas, resulting in fewer acres of productive forestland. Expanded jurisdiction could also negatively a property values giving landowners less options for forest management and limiting them in their abilities to use their land as they desire. (p. 2)

Agency Response: **The rule does not add new categories of waters that have not been jurisdictional before. Instead, the rule establishes that wetlands, ponds, and other waters in use for normal silviculture activities are not jurisdictional as "adjacent" waters; that ditches with only ephemeral flow are jurisdictional only where they are rerouted or altered streams; and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. In addition, the rule also retains the previous exclusion for prior converted croplands and codifies the previously uncertain exclusions for areas that are wetland only due to irrigation and for lakes and ponds created in dry land that have a primarily agricultural use such as stock watering, irrigation, or rice growing. Finally, the rule makes no change to the existing exemptions under Section 404(f) of the Clean Water Act for normal silviculture activities and, instead, establishes that wetlands and other waters under such use are not jurisdictional by rule as "adjacent" waters, but only if a case-specific evaluation determines—based on detailed direction provided in the rule—that those waters have a significant nexus to the integrity of a nearby traditional navigable water, interstate water, or territorial sea.**

Office of Water Management, Pennsylvania Department of Environmental Protection (Doc. #14845)

12.30 Overcoming structural and authority limitations of the Clean Water Act through the revision of the definition of "Waters of the United States" is not appropriate. Pennsylvania recognizes that the challenges in protecting water resources have evolved since passage of the Clean Water Act in 1972. However, trying to address the problems of 2014 (which are largely wet weather driven and/or are associated with nonpoint sources) by changing the definition of "Waters of the United States" is not appropriate. The proposed definition will expand jurisdiction over stormwater related systems, which is particularly inappropriate after EPA has chosen not to proceed with the national stormwater rulemaking. Further, using this new definition in the existing permitting programs under Sections 402 and 404 will render both of these programs more cumbersome and confusing. Expansion of federal regulatory oversight through a

definitional change is not appropriate, but more significantly, will not be effective. The permitting authorities (state and federal) will be mired in litigation and disputes related to the proper interpretation of the proposed re-definition of "Waters of the United States." (p. 3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. With respect to stormwater control features, please see summary response at 7.4.4. in Compendium 7.**

Arctic Slope Regional Corporation (Doc. #15038)

12.31 At 172 million acres, Texas is a very big state, but its *total* acreage is still less than the number of acres of *wetlands* in Alaska. According to the U.S. Fish and Wildlife Service ("USFWS"), "Alaska encompasses an area of 403,247,700 acres, including offshore areas involved in this study. Total acreage of wetlands is 174,683,900 acres. This is 43.3 percent of Alaska's surface area. In the lower 48 states, wetlands only occupy 5.2 percent of the surface area."[6] Put differently, nearly half of Alaska – the largest state in the United States, by a wide margin – stands to be affected by this Proposed Rule. Alaska has more wetlands than all of the other states combined.[7] (p. 4)

Agency Response: **Thank you for this added perspective. The State of Alaska does indeed have a large and important role in protecting its wetlands. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

12.32 Unlike the many exceptions in the Proposed Rule created for agricultural (among other) uses,[8] the Proposed Rule creates no exception for any material portion of the wetlands in Alaska. Yet Alaskan waters are unusual in many respects that make them unsuitable for this broad assertion of jurisdiction by the Agencies. Many of Alaska's wetlands are frozen for nine months out of the year and lie on top of a layer of permafrost. Their hydrologic functions are different from those in other parts of the country. The water table is also commonly situated on permafrost, resulting in saturated soils that support hybrid vegetation, but there is no real connection to navigable waters, which leaves them outside of CWA jurisdiction under *SWANCC*. Unlike wetlands in temperate zones, arctic wetlands, lying above of thousands of feet of frozen permafrost, are not connected to aquifers. Because water on top of permafrost travels across the frozen tundra surface in "sheet flow," these wetlands provide little function in controlling runoff.

[6] Jonathan V. Hall, W.E. Frayer and Bill O. Willen, Status of Alaska Wetlands at 3 (U.S. Fish and Wildlife Service 1994).
[7] Id.
[8] 79 Fed. Reg. at 22,264.

The Proposed Rule reflects no consideration for any of these unique aspects of Alaskan wetlands. Indeed, neither the word "tundra" nor the word "permafrost" appears anywhere in the 88 pages of the Proposed Rule. (p. 6-7)

Agency Response: **The agencies recognize that there is substantial regional variability in the nature and extent of wetlands and other waters across the country, including Alaska, and that, just as elsewhere in the country, certain attributes of Alaska waters are unique. The agencies also recognize that the growing season is only three to six months long in the Alaska, as it is in other parts of the country (e.g., the upper Midwest and northern New England). While the changes in the rule will result in different classifications of jurisdictional waters (e.g., some waters currently considered tributaries will be adjacent instead, while others considered adjacent will be subject to case-specific evaluation of significant nexus), the rule will result in very little, if any, change in the overall extent of jurisdictional waters in Alaska. While permafrost functions as an aquitard that blocks the downward movement of water either regionally or locally, the same impermeability often cases a lateral redirection of flow, which, where the overlying substrate is sufficiently porous and/or there is water above ground, may move to the tributary network or other jurisdictional waters. Thus, while waters overlying continuous permafrost may be hydrologically isolated from regional aquifers underlying the permafrost, they often are not at all isolated from the surface water network. Accordingly, the agencies disagree not only that *SWANCC* requires a hydrologic connection to other jurisdictional waters, but also that wetlands overlying permafrost necessarily lack a hydrologic connection. The agencies also disagree that the nexus necessary for wetlands to be jurisdictional requires performance of any one particular function or suite of functions, such as controlling runoff. In fact, as confirmed in the Science Report and consistent with Justice Kennedy's decision in *Rapanos*, functions that significantly affect nearby traditional navigable waters, interstate waters, or territorial seas may be either beneficial or detrimental. Many different functions, as described in the rule, factor into the significant nexus evaluation, and it may be any one or a combination of those functions that result in the waters in question, either alone or together with other similarly situated waters, having a significant nexus to the chemical, physical, or biological integrity of the nearby traditional navigable water, interstate water, or territorial sea. The agencies did recognize the potential for confusion created by the addition of "bright line" thresholds for adjacent waters and case-specific jurisdictional waters and the application of those thresholds in Alaska and other northern states. To minimize that ambiguity the agencies specifically identified two types of northern wetlands—low-centered polygonal tundra and patterned ground bogs—as examples of waters that the distance thresholds would not bifurcate.**

12.33 The problems the Proposed Rule creates for Alaska Natives throughout the State of Alaska are especially stark on Alaska's North Slope. The USFWS calculates that 46.9 million acres in the Arctic Foothills and Coastal Plain are wetlands. Together these areas correspond roughly with the borders of the North Slope Borough. This is 83.1% of the

total acreage (56.4 million acres) of those two areas.[9] In other words, more than four-fifths of the entire NSB is potentially affected by the Proposed Rule.

While 47 million acres on the North Slope are wetlands according to the USFWS, only a small fraction of these are "traditional navigable waters." The North Slope has 23,300 lakes, from a few yards to over 20 miles, and seldom deeper than 10 feet.[10] There are 2,450,858.5 acres of lakes on the North Slope larger than 50 acres.[11] There are another 260,629 acres of rivers.[12] Not all of these larger lakes and rivers are "traditional navigable waters," but their total acreage – 2.7 million acres – represents the outside limit of what conceivably could be regarded as "traditional navigable waters."

This high-end estimate of "traditional navigable waters" is less than 6% of the total wetlands identified by the USFWS. The possibility that the Proposed Rule will expand USFWS's jurisdiction from these 2.7 million acres of "traditional navigable waters" to 47 million acres of jurisdictional or "other" waters is a demonstration of the massive overreach represented by the Proposed Rule. Put differently, the Proposed Rule has the potential to multiply the area of federally regulated "waters" by more than sixteen hundred percent (1600%)! (p. 9-10)

Agency Response: **The agencies anticipate that the rule will result in little, if any, change in the extent of jurisdictional waters in the Arctic Foothills and Coastal Plain and certainly not an expansion of the scope described by the commenter. The agencies have never limited the definition of "waters of the United States" to traditional navigable waters and all three applicable Supreme Court decisions confirm the agencies' approach.**

12.34 For those wetlands that are not jurisdictional waters, are they "other waters" because they are within a "single landscape" and are or may "opportunistically" be visited by migratory birds or insects? The North Slope – although it is larger than the State of Utah – is largely a single unified, relief-free geographic area. Does that make it a "single landscape"? If not, what are the clear demarcations in the Proposed Rule that relieve these lands of that regulatory burden and that will prevent Agency officials from misconstruing the Proposed Rule?

How is it possible to plan development for the economic betterment of the people living on the North Slope, the majority of whom are Alaska Natives and ASRC shareholders, in the face of these uncertainties? (p. 10-11)

Agency Response: **EPA and the Corps have used the feedback we received from written comments to provide both greater certainty and additional clarity not only in the descriptions of the categories of jurisdictional waters, but also in the definitions associated with those categories. For waters that are not traditional navigable waters, interstate waters, territorial seas, or tributaries of, adjacent to, or**

[9] Status of Alaska Wetlands, at 20.
[10] "Digital Data Base of Lakes on the North Slope, Alaska," U.S. Geological Survey Water-Resources Investigations Report 86-4143 (1986).
[11] Estimated by Marie Walker, a remote sensing consultant and principal author of the USGS Water Resources Division report cited above.
[12] Estimated by the Arctic Slope Consulting Group based on Lands at image maps.

impoundments of those waters, the rule identifies two limited categories of additional waters over which jurisdiction will depend on a case-specific significant nexus evaluation. The first of those two categories—waters that are similarly situated by rule—does not occur in Alaska. For both it and the other case-specific category of waters—those located at least in part within 4,000 feet of traditional navigable waters, interstate waters, territorial seas, or tributaries or impoundments thereof—the rule clarifies both how to identify which waters, if any, to consider together and how to evaluate significant nexus. Specifically, the rule includes a detailed discussion about determining what are "similarly situated waters," describing them as those that perform similar functions and are located either sufficiently close together or sufficiently close to the other jurisdictional water to function together to affect the integrity of the nearby traditional navigable water, interstate water, or territorial sea. Similarly, the rule specifically identifies the geographic area in which the significant nexus evaluation would assess any similarly situated waters together as the watershed that drains to the traditional navigable water, interstate water, or territorial sea in question. Finally, the rule also specifically identifies the functions that the significant nexus evaluation will consider and describes how the agencies will conduct the evaluation. Thus, where possible, the rule provides much clearer demarcations than the proposed rule (i.e., the 4,000-foot distance threshold and the watershed boundaries) and, where not possible, provides much more definitive direction on the significant nexus evaluation.

National Association of State Departments of Agriculture (Doc. #15389)

12.35 Should states be required to develop and enforce water quality standards under CWA §303, §304 and §305 for marginal waters newly (or potentially) regulated under the categories proposed by the agencies in this rule, this would become an impossible task. We have significant concerns that this proposal will dramatically expand the circumstances under which the federal requirement for development of numeric criteria, water quality standards, expanded monitoring and impairment determinations, and enforcement actions will be extended. (p. 6)

Agency Response: **The agencies do not anticipate an increase in the extent of waters in agricultural areas that would be subject to water quality standards. While the rule eliminates the need for case-specific evaluation of the significant nexus of ephemeral tributaries—because the Science Report and Science Advisory Board review confirmed that they are chemically, physically, and biologically connected to downstream waters and affect the integrity of those waters—it also includes a definition clarifying that, to be jurisdictional, tributaries must not only contribute flow, either directly or indirectly, to downstream traditional navigable waters, interstate waters, or the territorial seas, but must also exhibit the physical characteristics of a bed, banks, and ordinary high water mark. In addition, the rule also clarifies that ditches with only ephemeral flow are not jurisdictional unless they are rerouted or altered streams and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional.**

Georgia Environmental Protection Division (Doc. #16348)

12.36 The proposed rule and preamble do not specifically address any potential implications of the rule on state water quality standards or TMDLs (CWA Section 303). The preamble merely acknowledges that "[s]tates and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state." 79 F.R. 22194. A footnote to the preamble also provides a summary of the relevant regulations. Additionally, a July 1, 2014 press release from EPA stated that the proposed rule will not "federalize state waters and make states set water quality standards for them," and recognized that states are "best equipped to determine" water quality standards based on designated uses. Without more specific information in the language of the proposed rule's preamble, this still leaves some ambiguities. (p. 2)

Agency Response: The rule does not change how designated uses, water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Allen Boone Humphries Robinson LLP (Doc. #19614)

12.37 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 11budgets" that may significantly impact facility operations. (p. 6)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Georgia Environmental Protection Division (Doc. #16348)

12.38 Obtaining a permit under Section 404 of the CWA is a complex process that often takes years and is extremely costly. Discharging into "waters of the U.S." can subject a property owner to costly fines and penalties. These factors are a concern to the citizens of Georgia, particularly as they relate to Georgia's agricultural industry (features on farmland such as wetlands, farm ponds and ditches), transportation infrastructure (stormwater infrastructure), private property impacts and the increased burden to EPD's workforce. (p. 3)

Agency Response: The agencies disagree that obtaining a Section 404 permit "often" entails extensive time and expense. While a small proportion of permit applications involve large, complex, or otherwise controversial projects that require lengthier evaluation periods, the Corps of Engineers issues or verifies the vast majority of authorizations in fewer than four months, and many activities are

eligible for already-issued nationwide or other general permits, for which verification is usually even quicker. With regard to unauthorized activities, the agencies anticipate that the greater clarity provided in the rule's definition of jurisdictional waters will reduce the occurrence of inadvertent unauthorized discharges. It is also important to note that penalty amounts are tied in part to the degree of culpability of the respondent. Some of the additional clarity provided by the rule relates to agricultural and transportation activities. Specifically, the rule establishes that not only are normal farming, ranching, and silviculture activities exempt from Section 404 permitting requirements, but also wetlands, ponds, and other waters in use for those activities will no longer be jurisdictional by rule as "adjacent" waters. (Instead, they will subject to case-specific evaluation of significant nexus.) In addition, the rule establishes that ditches with only ephemeral flow are jurisdictional only where they are rerouted or altered streams; and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. It also retains the previous exclusion for prior converted croplands and codifies the previously uncertain exclusions for areas that are wetland only due to irrigation and for lakes and ponds created in dry land that have a primarily agricultural use such as stock watering, irrigation, or rice growing. As for transportation infrastructure, it is important to note that many such activities have been and continue to be either exempt from Section 404 permitting (see, e.g., 33 C.F.R. §§323.4(a)(2)) or eligible for any of a number of nationwide and other general permits that authorize such activities, including nationwide permits #3 (maintenance), 6 (survey activities), 13 (bank stabilization), 14 (linear transportation projects), 15 (U.S. Coast Guard-approved bridges), 18 (minor discharges), 19 (minor dredging), 23 (approved categorical exclusions), 25 (structural discharges), 33 (temporary construction, access, and dewatering), 41 (reshaping existing drainage ditches), 43 (stormwater management facilities), and 46 (discharges in ditches). In addition, the rule continues the long-standing exclusion of waste treatment systems from jurisdictional waters and codifies the previously uncertain exclusions for artificial lakes and ponds created in dry land primarily for use as settling basins and for water-filled depressions created in dry land incidental to construction activity. It also adds new exclusions for ditches with less than perennial flow that drain roads maintained by federal, tribal, state, county, or municipal agencies, as long as such ditches are not rerouted or altered streams and for features constructed in dry land to convey, treat, or store stormwater. The clearer definitions of jurisdictional and non-jurisdictional waters and the expanded list of exclusions will also benefit private property owners and state environmental programs. Besides the clarifications noted above, the rule also reduces uncertainty about jurisdictional waters by providing "bright line" thresholds for identifying tributaries, adjacent waters, and case-specific jurisdictional waters, while also limiting the extent of waters subject to case-specific evaluation and providing detailed direction for conducting case-specific significant nexus evaluations. In addition, it also codifies previously uncertain exclusions for reflecting pools, swimming pools, and small ornamental waters constructed in dry land and establishes exclusions for ditches with only ephemeral flow that aren't rerouted or altered streams and ditches that do not contribute flow

to another jurisdictional water. For additional information on consultation with states, see the Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States which is available in the docket for this rule.

State of Oklahoma et al. (Doc. #16560)

12.39 Instead of focusing on a more effective, efficient way to address disparate decisions by the Corps of Engineers in implementing Section 404, we fear this rulemaking will create additional disorder in implementing Sections 303, 319, 401 and 402 where none exists currently. Despite the Agencies' stated intent to define more clearly the extent of WOTUS jurisdiction, the already fuzzy line of jurisdiction has been shifted without making the line any less fuzzy. We and most other States have learned to adapt, overcome confusion, and succeed in restoring water quality through our delegated authorities to implement Section 303, 319, 401 and 402 programs. However, this effort to fix problems that really only exist within Section 404 authorities will have repercussions in the other, more settled programs that States are largely responsible to implement. Rather, we suggest a national priority be placed on providing more clear guidance and training to Corps of Engineers Divisions and Districts on how to uniformly apply the provisions of Section 404. If coupled with deference to each State on WOTUS delineation that parallels the deference already shown to States on Section 401 certifications, we believe confusion and litigation can be dramatically reduced. (p. 3)

Agency Response: The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The rule only provides a definition for "waters of the U.S." The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA programs for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization.

State of South Dakota (Doc. #16925)

12.40 (…) while I appreciate EPA's efforts to reach out to the agricultural community following the rule's release, the "Ditch the Myth" campaign appears to be more about selling a proposal than enhancing understanding of a complex rule. The agencies' proposal has created significant concerns for South Dakota's farmers and ranchers that these attempted explanations have not eased. I can appreciate that statements made by EPA officials have been intended to clarify the rule; however, these statements provide a new interpretation of key terms that should have been included in the proposed rule itself. Future legal challenges and regulatory decisions will turn on the actual language of the final rule, not an EPA blog post. (p. 3)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the

public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. For example, the rule codifies the previously uncertain exclusions for areas that are wetland only due to irrigation and for lakes and ponds created in dry land that have a primarily agricultural use such as stock watering, irrigation, or rice growing. It also establishes that not only are normal farming, ranching, and silviculture activities exempt from Section 404 permitting requirements, but also wetlands, ponds, and other waters in use for those activities will no longer be jurisdictional by rule as "adjacent" waters. (Instead, they will subject to case-specific evaluation of significant nexus, for which the rule provides extensive detailed direction.) In addition, the rule establishes that ditches with only ephemeral flow are jurisdictional only where they are rerouted or altered streams and that neither lawfully constructed grassed waterways nor groundwater directed through subsurface drainage systems such as tile drains are jurisdictional. Finally, the rule includes a definition clarifying that, to be jurisdictional, tributaries must not only contribute flow, either directly or indirectly, to downstream traditional navigable waters, interstate waters, or the territorial seas, but must also exhibit the physical characteristics of a bed, banks, and ordinary high water mark.

State of Alaska (Doc. #19465)

12.41 EPA and the Corps failed to consider the consequences of a proposed rule that seeks to impose a broad array of CWA requirements.

EPA and the Corps have promulgated a rule that applies not only to Section 404 permitting, but to other aspects of the CWA, including 402 permitting and regulatory requirements under Section 303. Thus, for example, for every water (including wetland) that the proposed rule would sweep under CWA jurisdiction as a water of the U.S., state water quality standards would then apply. That is because there is the potential that the states will have to classify the uses of newly jurisdictional waters for application of State water quality standards. (p. 17)

Agency Response: **The rule does not change how designated uses, water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.42 Will new jurisdictional waters require preparation of Spill Prevention, Control, and Countermeasures (SPCC) plans? Will green infrastructure projects, not exempted under the rule, also become subject to CWA requirements? Will existing jurisdictional determinations and uses in waters that will fall under the proposed rule be grandfathered in, or will new jurisdictional determinations or CWA requirements be imposed? What

regulatory costs and burdens will be created for states in light of their 401 certification authority in approving projects requiring either a 402 or 404 permit? What will be the costs and impacts to the state and federal regulatory authorities for enforcing compliance under CWA programs? (p. 17)

Agency Response: **This action does not change an owner/operator's ability to determine whether there is a reasonable expectation that an oil discharge from a facility could reach waters of the U.S. or adjoining shorelines, as part an applicability evaluation if the facility's aggregate oil storage capacity exceeds the applicable thresholds in Spill Prevention, Control and Countermeasure (SPCC) rule at 40 CFR part 112. This determination is a site-specific evaluation by the owner/operator and is important consideration in determining whether a facility is subject to the SPCC rule. However this determination must exclude man-made features such as existing secondary containment structures (dikes or remote impoundments) that may serve to restrain, hinder, contain or otherwise prevent an oil discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). The owner/operator should consider the potential oil pathways once discharged oil has left the facility, including an evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters. Further, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Partially to address green infrastructure projects, the rule adds two new exclusions, one for features constructed in dry land to convey, treat, or store stormwater and the other for features such as detention and retention basins, groundwater recharge basins, and percolation ponds created in dry land for purposes of wastewater recycling. In accordance with Regulatory Guidance Letters 2005-02 and 2008-02, approved jurisdictional determinations under Section 404 of the Clean Water Act are valid for five years from the date of the letter conveying the determination to the requesting party. (The expiration date does not apply to preliminary jurisdictional determinations.) Accordingly, existing approved jurisdictional determinations that are five years old or less will remain in effect until they expire. The same is true of existing, unexpired Clean Water Act permits. With regard to the effects of the rule on state programs, the clearer definitions of jurisdictional and non-jurisdictional waters and the expanded list of exclusions will assist state regulatory agencies in making jurisdictional determinations and reduce the number that require a case-specific evaluation. The agencies recognize that, in establishing "bright line" thresholds for tributary, adjacent, and case-specific jurisdictional waters, we are carefully applying the available science. As such, the agencies will work with states to evaluate more closely state-specific circumstances and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. See the Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the**

United States which is available in the docket for this rule, for additional information on state programs.

Lee County, Florida (Doc. #1346)

12.43 The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load ("TMDL") programs. We do not believe the agencies have fully considered the implications of these changes to all of the CWA programs. (p. 2)

Agency Response: The rule only provides a definition for "waters of the U.S." The rule does not change how designated uses, water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule.

Marion County Board of Commissioners (Doc. #1450)

12.44 It is our belief that changes to the Clean Water Act (CWA) definition of "waters of the U.S." will have far-reaching effects and could have unintended consequences to a number of our CWA programs, including the National Pollutant Discharge Elimination System, total maximum daily load (TMDL) and other water quality standards programs, arid Spill Prevention, Control, and Countermeasure (SPCC)·programs. Our agency needs additional time to further evaluate and assess the impact on our community. (p. 1)

Agency Response: The clearer definitions of jurisdictional and non-jurisdictional waters and the expanded list of exclusions will assist state regulatory agencies in making jurisdictional determinations and reduce the number that require a case-specific evaluation. The agencies recognize that, in establishing "bright line" thresholds for tributary, adjacent, and case-specific jurisdictional waters, we are carefully applying the available science. As such, the agencies will work with states to evaluate more closely state-specific circumstances and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. See the Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States which is available in the docket for this rule, for additional information on state programs.

Hinsdale County Board of Commissioners (Doc. #1768)

12.45 The Draft Guidance Fails to Consider the Effects on All Clean Water Act (CWA) Programs. According to the Draft Guidance, the definition of "waters of the U.S." applies consistently to CWA programs. We are very concerned that the Draft Guidance and supporting economic analysis focuses primarily on the 404 permit program but fails to give consideration to the effects the change will have on other CWA programs, such as the National Pollution Discharge Elimination System (NPDES), Total Maximum Daily Load (TMDL) and other water quality standards programs, or Spill Prevention, Control

and Countermeasure (SPCC) programs. We believe an omission of this magnitude will have significant unintended financial consequences for federal, state and local governments, as well as businesses and private entities. We urge you to withdraw the Draft Guidance until a comprehensive and detailed analysis is made on how the proposed changes would impact all CWA programs beyond the·404 permit program. (p. 1)

Agency Response: The rule does not change how designated uses, water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule.

Skamania County Board of Commissioners (Doc. #2469)

12.46 Water reuse facilities are being built across the country to generate an additional water supply for irrigation purposes and sometimes drinking water. It is unclear how the proposed definitional changes would impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. Additional clarification is needed by the agencies. (p. 5-6)

Agency Response: The rule adds a new exclusion clarifying that features such as detention and retention basins, groundwater recharge basins, and percolation ponds created in dry land for purposes of wastewater recycling are not waters of the United States. The final definitional rule does not change CWA permitting requirements regarding the application of pesticides, or establish new requirements for complying with the pesticide general permit (PGP). However, the rule adds a new exclusion clarifying that features such as detention and retention basins, groundwater recharge basins, and percolation ponds created in dry land for purposes of wastewater recycling are not waters of the United States. The final rule also includes revised and expanded exclusions for many ditches. See summary responses for Topic 6: Ditches and Topic 7: Features and waters not jurisdictional, for more information about excluded waters in the final rule.

Nye County Board of County Commissioners (Doc. #3255)

12.47 It is not clear how the proposed changes will impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, among other things. Additional permitting requirements will add unnecessary time and cost to the maintenance of ditches and control of weeds. (p. 2)

Agency Response: The final definitional rule does not change CWA permitting requirements regarding the application of pesticides, or establish new requirements for complying with the pesticide general permit (PGP). The final rule includes revised and expanded exclusions for many ditches. See summary responses for Topic 6: Ditches and Topic 7: Features and waters not jurisdictional, for more information about excluded waters in the final rule. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches will remain in effect, when applicable.

Sheridan County Commission (Doc. #3271)

12.48 The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject county governments to increasingly

complex and costly federal regulatory requirements under the proposed rule which impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure and water reuse. (p. 2)

Agency Response: **See Summary Response. See exclusions for stormwater control wastewater control features. This rule is a definitional rule, intended to clarify the scope of waters subject to the CWA, and does not change existing CWA regulatory and permitting requirements, including NPDES permitting for stormwater systems and discharges of pesticides directly into waters of the U.S., many of which are covered by a pesticide general permit (PGP). However, many ditches, stormwater conveyances, water reuse systems are excluded from waters of the U.S. See summary responses for Topic 6: Ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters. See also summary response essays 12.3.1, 12.3.2, and 7.4.4 regarding stormwater, MS4s, and green infrastructure.**

Washington Association of Conservation Districts (Doc. #3272)

12.49 Clearly, conservation districts prefer (and even require) that cooperators implement conservation practices according to NRCS technical standards when working with conservation programs (e.g., EQIP contracts). However, not every practice is installed under a cooperator contract. Many states have conservation practice standards of their own. Further, *voluntary* conservation programs do not include sufficient resources to allow follow-up *at* a *regulatory scope and scale* at every site where a practice is installed upon which to base a determination that the practice is implemented in conformance with [listed] NRCS technical standards. Neither rule should be structured or construed to mandate a regulatory compliance role by NRCS (or others) in voluntary programs or independent producer activities employing NRCS practices. WACO understands that nothing is proposed to be changed in terms of certification for exemptions. Again, these conservation activities exemptions are self-implementing. (p. 3)

Agency Response: **See Summary Response. The Interpretive Rule for conservation practices under 404(f)(1)(A) has been withdrawn, per Section 112 of the Consolidated and Further Continuing Appropriations Act of 2015. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for ongoing agricultural activities. The rest of this comment is outside the scope of this rulemaking.**

12.50 Our national affiliate, NACO, has recommended that the agencies consider applying the *general permit* concept to conservation districts and their cooperating landowners in performing conservation work in WOTUS. WACO supports your consideration of that tool as a less confusing means of promoting landowners conservation efforts and recognizing the benefits of NRCS and locally-recognized conservation practices. (p. 4)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting**

tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. This comment is outside the scope of this rulemaking; however, the Corps Nationwide permits will be reauthorized in 2017 via the public notice and comment rulemaking process and comments regarding appropriate activities for inclusion are welcomed during that process. In addition, regional general permits can be discussed with local Corps districts.

Minnehaha County (South Dakota) Board of Commissioners (Doc. #4116)

12.51 Regarding TMDL standards and potential regulation thereof, the only nutrient loading that I am concerned about is salt. This is the only nutrient we apply to our roadways. However, what comes off of farmer's fields is a different story and out of our control. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States. These comments are outside the scope of the rule. The agencies are not affecting permitting mechanisms under this rule; this rule only defines "waters of the U.S." and does not impact any permitting tools, such as National Pollutant Discharge Elimination System permits regarding TMDL standards. This comment is outside the scope of this rulemaking

Wayne County (Ohio) Commissioners (Doc. #4226)

12.52 Currently, counties face tremendous challenges in receiving federal permits approved in a timely manner. This (proposed rule) would intensify, as additional waters falling under federal jurisdiction would force us to submit more permits, which would cause confusion and longer delays in the determination and permitting process. The permit itself is not a problem, but the process used can be challenging, as they are time-consuming and expensive to obtain. Many counties experience delays in the years – three to five – with significant overhead costs associated with consultants, lawyers, engineers, and special conditions attached to the permit. This also makes counties vulnerable to citizen suits if the federal permit process is not streamlined. (p. 1)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and

predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The citizen suit provisions of the CWA are unaffected by the final rule.

Rio Blanco County, Colorado, Board of County Commissioners (Doc. #4679)

12.53 The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the Section 402 National Pollutant Discharge Elimination System permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load programs. We do not believe the agencies have fully considered the implications of these changes to all of the CWA programs. (p. 1)

Agency Response: See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

Fairfield County, Ohio, Board of Commissioners (Doc. #4775)

12.54 The proposed rule relates to Section 404 permits and other Clean Water Act programs. These programs would subject county governments to increasingly complex and costly federal regulatory processes. (p. 1)

Agency Response: See Summary Response. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Bonner County Board of Commissioners (Doc. #4879)

12.55 In general, the federal system of mapping and identifying wetlands is already inadequate. Further expansion of the wetlands definition will make it even more difficult for landowners to predict where wetlands may be encountered. The gap in accurate mapping will widen with the proposed amendment to the wetlands definition, putting landowners at risk of disturbing wetlands unknowingly and unintentionally. (p. 1)

Agency Response: See Summary Response. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters in response to a request from a landowner asking the agencies to make such a determination. The rule does not address or change already established wetland identification and delineation

methodology under the Corps1987 Wetland Delineation Manual and its regional supplements but rather addresses jurisdiction of waters of the U.S. The agencies note that they do not have the authority to map all waters of the U.S. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

Office of County Manager, New Hanover County, North Carolina (Doc. #5609)

12.56 The definition of what is considered "tributary" under the proposed rule is extremely broad. The declaration of non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally is broad reaching and would affect most of New Hanover County. Waters that fall under the "other waters" category of the regulations is even more broad-reaching and casts a very large net. Under the proposed rule "a water may be tributary if it contributes flow to a traditional navigable water or interstate water, either directly or indirectly by a means of other tributaries. A tributary can be natural, man-altered, or man-made water body." This could place all man-made stormwater conveyances within New Hanover County under the control of jurisdictional waters. (p. 2-3)

Agency Response: See Summary Response. Refer to the tributary, ditch, and exclusion sections of the proposed rule and preamble for further information and clarification on tributaries and man-made stormwater conveyances. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only water features that meet the definition of "tributary" contained in paragraph (c) qualify as a tributary and are jurisdictional by rule. The science demonstrates that all tributaries, as defined by the rule, have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule provides specific parameters that must be met in order to fall under the (a)(7) or (a)(8) category of waters which require case-specific significant nexus determinations. The preamble sections specific to case-specific determinations provides further discussion of such case-specific waters. The Economic Analysis provides discussion on changes in jurisdiction.

White Pine County (Nevada) Board of County Commissioners (Doc. #6936)

12.57 This measure of identifying upland streams and deciding to implement regulation that will cause additional permit fees and processes to the business community needs to be debated by all interested parties to insure all view points and potential hurdles have been fairly discussed and mitigated.

It is important to not put the burden on industry and local farmers and ranchers to defend their view points at a time an issue is raised due to the lack of clarity of new regulation being imposed on business. The burden needs to be placed on the federal government to

prove damages are incurring or the potential of damage can incur within realistic conditions that may be developed with future growth. (p. 3)

Agency Response: **See Summary Response. The agencies recognize the importance of public input on the content of the rule; thus, input was solicited via the public comment process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. The final rule was modified, based on public input, and improves CWA program predictability and consistency by increasing the clarity of the scope of "waters of the United States" covered by the Act. The Economic Analysis provides information on the potential costs/benefits to landowners and businesses. Also, when requesting a jurisdictional determination from the Corps, a landowner can provide information for consideration.**

Black Hills Resource Conservation and Development (Doc. #7090)

12.58 The proposed expansion would significantly and negatively impact our six county area of the Black Hills region. In addition to tourism, agriculture is a critical and vital piece of our local economy. We promote conservation practices in the agricultural community through the Conservation Districts, non-governmental organizations, etc. This proposal would cause significant hardships to local farmers and ranchers by taking away local control of land uses. The costs to the local agricultural community would be enormous. This would lead to food and cattle prices increasing significantly. It significantly expands the scope of government oversight, effectively restricts the normal farming exemption, and creates new regulatory hurdles. In addition, it increases time and costs to landowners, and would require additional federal funding, not previously required, to provide technical assistance to insure compliance with new requirements. Unintended consequences of the application of this IR will be a net reduction in conservation activities. Individuals will face additional time, cost, and complexity in planning and applying conservation practices in farming and ranching operations, if they wish to have assurance that they are in compliance with agency requirements. The hurdles created are a hindrance to applying any of the identified practices. The effects will continue to magnify from there. The overall costs to the counties, municipalities and ultimately the taxpayers will be disadvantageous.

Let local government regulate themselves. We know what our localized needs are better than the Federal Government. Our counties would experience a major impact as more waters would become federally protected and subject to the new rules, regulations, or standards. We acknowledge that being proactive in protecting water quality is far more cost-effective than remediation. We have taken a proactive approach to protecting our water resources and are committed to continue to into the future, without the need for additional federal regulation. We supported and funded water projects throughout the Black Hills Region and are currently involved with Spring Creek, Rapid Creek, and Spearfish Creek watershed projects. Black Hills RC&D is strongly opposed to further regulations as proposed in the Clean Water Act expansion. (p. 2)

Agency Response: **See Summary Response and the Economic Analysis which discusses costs/benefits and changes in jurisdiction. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of**

"waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. Comments specific to conservation practices are outside the scope of this rulemaking. Please note that the Interpretive Rule for conservation practices under Section 404(f)(1)(A) has been withdrawn, per Section 112 of the Consolidated and Further Continuing Appropriations Act of 2015.

Murray County (Minnesota) Board of Commissioners (Doc. #7528)

12.59 The general tone of the proposed rule is to achieve clarity through over-inclusiveness based on categorical determinations. We caution the agencies' approach in the proposed rule as it exacerbates an already existing problem: over regulation of non-navigable waters under the Clean Water Act and costly and time consuming over exertion of jurisdiction. (p. 3)

Agency Response: See Summary Response. The rule limits CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It improves efficiency, clarity, and predictability for all landowners as well as permit applicants.

Iowa Department of Agriculture and Land Stewardship (Doc. #7642)

12.60 We want to avoid putting the Natural Resources Conservation Service (NRCS) in a stronger regulatory role than they already are. We value NRCS partnerships in promoting conservation in local communities and making them serve a stronger regulatory role erodes the trust farmers put into them. They handle a great deal of private information in their work that is essential to getting conservation on the ground.

We would encourage use of state or regional advisory boards, utilizing input from local sources such as Soil and Water Conservation Districts, to expedite any permitting process at the initial level in circumstances where WOTUS have not been clearly defined. This advisory board could also be convened in a case of appealing determinations. (p. 1-2)

Agency Response: See Summary Response. The rule will not have an effect on the relationship between the Natural Resources Conservation Service (NRCS) and landowners. The NRCS does not administer any part of the Clean Water Act and therefore the rule cannot directly affect any of their missions. Please note that the Interpretive Rule for conservation practices under Section 404(f)(1)(A) has been withdrawn, per Section 112 of the Consolidated and Further Continuing Appropriations Act of 2015. Comments on the NRCS are outside the scope of this

rulemaking. Only the Corps and EPA have the authority to determine jurisdiction under the CWA. The agencies efficient permitting mechanisms will not be affected by this rule. Only affected parties as discussed in 33 CFR part 331 can administratively appeal a jurisdictional determination and administrative appeals are handled solely by the Corps.

Baldwin County (Alabama) Commission (Doc. #7940)

12.61 Because the proposed rule applies to all Clean Water Act programs, not just the Section 404 program, Baldwin County would be subject to increasingly complex and costly federal regulatory requirements, including local storm water and pesticide programs, state water quality standards designations, green infrastructure and water reuse. (p. 1)

Agency Response: See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and water recycling features. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Moffat County (Colorado) Board of Commissioners (Doc. #7987)

12.62 It has been our experience that EPA and Army Corps regulators regularly interpret the same rule differently. We have experienced very similar road construction projects being regulated differently based on which office or regulator we are interacting. Similar concerns have risen from other agencies dealing with the Corps and the EPA. Clarity in rules and leaving less interpretation to field regulators can be a double edged sword, in that it reduces flexibility but also provides more consistent application of rules. (p. 4)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the

ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

La Plata Water Conservancy District (Doc. #8318)

12.63 The LPWCD respectfully requests that the Agencies withdraw the proposed Rule and draft a new rule that (1) lawfully adheres to the plurality opinion of the Supreme Court in Rapanos and asserts jurisdiction on much narrower, more predictable grounds and (2) acknowledges the nature of water use and infrastructure in the western United States by categorically distinguishing between man-made water delivery structures for agricultural and other purposes and excluding such structures from jurisdiction, consistent with the intent of Congress espoused in Section 404(f) of the Clean Water Act. (p. 2)

Agency Response: See Summary Response and the Technical Support Document. In addition, the final rule includes several water features that are excluded from jurisdiction by rule; see the preamble section, "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as water recycling features.

Southern California Association of Governments (Doc. #8534)

12.64 The definition of "tributary" in the proposed rule is likely inappropriate as applied to stormwater discharges from property throughout Southern California. The Proposed Rule will categorize roadside drains and ditches as Waters of the U.S. if they have perennial flow, or the EPA or Army Corps determines that there is a significant nexus to a traditional navigable water. (p. 2)

Agency Response: See Summary Response. In addition, see the Tributary section in the preamble for further discussion on tributaries and the characteristics required to meet the definition. Also, see the preamble section, "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features.

Director of Public Services for the City of Portland, Maine (Doc. #8659)

12.65 Increasing the broad regulatory reach seems counterproductive to integrated planning, which EPA has been promoting as a means for a municipality or utility to combine all of its CWA permits into a single permit and determine priorities that best meets CWA goals for a community. (p. 3)

Agency Response: See Summary response. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. See summary responses for Topic 7: Features and waters not jurisdictional, for further discussion of exclusions. The EPA continues to recommend integrative planning for communities to meet CWA requirements and achieve water quality goals.

Hampton Roads Planning District Commission (Doc. #9612)

12.66 The HRPDC does not support the Waters of the US Rule as proposed. Staff has reviewed the proposed Rule and is concerned that it extends the EPA's and U.S. Army Corps of Engineers' (Corps) regulatory oversight further into the watershed, extending across uplands through groundwater and ephemeral pathways, systems that were not previously regulated as Waters of the US (WOTUS). The proposed definitions may cause conflicts amongst the various federal regulatory programs mandated through the Clean Water Act (CWA). Because the proposed exemptions to the Rule are not comprehensive, localities fear that the Rule may inhibit their ability to effectively maintain their public stormwater infrastructure and comply with federal and state stormwater regulations. (p. 1)

Agency Response: See Summary Response. The preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as groundwater and erosional features including ephemeral features that don't meet the definition of tributary. See the activity exemptions under section 404(f)(1) of the Clean Water Act regarding exemptions for certain maintenance activities. The agencies believe the exclusions in the rule are comprehensive and note that the exclusions are applicable to all Clean Water Act programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits or Section 311 requirements which require authorization. The agencies do not regulate dry land, only those aquatic resources that are "waters of the U.S." See tributary definition in rule and discussion in preamble.

12.67 The Rule places too much reliance on individual COE staff members' best professional judgment when making jurisdictional determinations. Over many years, the Region's localities have experienced a lack of consistency between different regulators within the Norfolk District. The HRPDC is concerned that the Rule relies on interpretation by local Corps staff in the field which may lead to less clarity, certainty and predictability for the regulated public, possibly leading to resource demanding case-specific analyses. (p. 3)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies

believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Pike Peak Area Council of Governments (Doc. #9732)

12.68 Adoption of these new rules requires an increase in funding and staff for both the federal agencies who implement these rules and their state counterparts. State health departments will face the burden of additional section 401 certifications and, in certain situations, additional standard setting proceedings, TMDL allocations, and section 402 permit actions. If such funding is not forthcoming, it will cause projects to be delayed even further. (p. 3)

Agency Response: See Summary Response. See the Economic Analysis for discussion on costs/benefits and jurisdictional changes. The rule is a definitional rule and does not affect the current implementation of the various CWA programs such as the development of water quality standards or sections 303, 402 and 404, which are outside the scope of the rule. However, overall the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. Therefore, the agencies do not anticipate an increase in CWA regulatory actions during implementation of the rule.

Dayton Valley Conservation District (Doc. #10198)

12.69 DVCD is concerned that the proposed rule changes will extend the jurisdiction of the Corps' regulatory authority and thereby increase their workload and duplicate regulations that the State of Nevada currently administers. (p. 1)

Agency Response: See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or

on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

12.70 We are aware of projects in our area that are dependent upon Corps' permits, which have been delayed because the Corps was unable to issue permits in a timely manner due to its workload. In the past I 0 years there have been several times when proposed water quality improvement projects in the Carson River were delayed a year or two because of the Corps' backlog of pending permits. If the current backlog is one to two years, what will the backlog be when additional projects identified by the proposed rule will need Corps approval? (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The agencies will develop the tools necessary to assist with the jurisdictional determination process in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Pleasant Vale Township Supervisor's Office, Pike County, Illinois (Doc. #10200)

12.71 Statewide permits for certain construction and maintenance activities within 'waters of Illinois' will no longer be available for use by townships. (p. 2)

Agency Response: See Summary Response. Statewide permits are outside the scope of this rulemaking effort. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Kendall County Board, Illinois (Doc. #10965)

12.72 We are concerned that the already tedious, time consuming and expensive process of establishing jurisdiction will become less defined by the proposed rule and open Kendall County to potential litigation in order to maintain or improve the county highway system. (p. 2)

Agency Response: See Summary Response. The Clean Water Act Section 404(f)(1) exemptions still remain available for use when applicable. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under

the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

City of Escondido Public Works Office (Doc. #11116)

12.73 We are required through our 401 permit to install BMPs to protect water quality. However under the 404 permit this is considered to be "temporary fill" thereby requiring regulation. The implementation of proper BMPs should not trigger more Clean Water Act requirements. It also causes confusion with the public who see an application for "temporary fill" and think that we are damaging a watercourse. This aspect of the 404 permit should be eliminated. Will the revision in the definition of Waters of the U.S. also result in the provision of additional staffing to manage the increased demand for permits? In an attempt to keep applications progressing we have paid consultants to complete work that should be provided by the resource agencies. (p. 3)

Agency Response: The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits or Section 311 requirements which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Iowa Drainage District Association (Doc. #11924)

12.74 In Iowa, the state has recently put in place a Nutrient Reduction Strategy, which involves voluntary practices by landowners and farmers to clean up their water. Our interpretation of the rule is that these practices would cease because they would require a CWA permit.

The net result will be that the Nutrient Reduction Strategy, and the benefits of cleaner water that it is designed to achieve, will grind to a halt. (p. 1)

Agency Response: **See Summary Response. See the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as groundwater and erosional features including ephemeral features that don't meet the definition of tributary and grassed waterways. The activity exemptions under section 404(f)(1) of the Clean Water Act regarding exemptions for normal farming, silviculture, and ranching activities provide additional information that may be helpful pertaining to exclusions regarding ditches, erosional features, and grassed waterways. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation.**

Urban Drainage and Flood Control District (Doc. #12263)

12.75 The proposed rule would broaden the geographic scope of waters that can be jurisdictional through establishment of a significant nexus. This would result in a heavier workload on the already-overtaxed regional USACE offices and on the communities who must request a determination for each project and will delay work done by agencies like UDFCD to protect streams. (p. 2)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations for certain categories of waters jurisdictional by rule. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

Mesa County, Colorado Board of County Commissioners (Doc. #12713)

12.76 The EPA is moving forward with a pesticide/herbicide permit for all "Waters of the U.S." within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near a "Waters of the U.S." a permit will be required. This permit includes tight documentation requirements for communities of over 10,000. Under the proposed rule, if

counties have "Waters of the U.S." ditches, they will be required to follow strict program and paperwork requirements for pesticide use. (p. 4)

Agency Response: **See Summary Response. The rule would not change existing CWA permitting requirements regarding the application of pesticides. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves waters of the U.S., are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. The EPA has a pesticides general permit (PGP) that covers many discharges for areas in which EPA is the NPDES permitting authority. In addition, all states with permitting authority have a PGP. However, the final rule includes exclusions for many ditches and certain other waters. For further discussion of these exclusions, see summary responses for Topic 6: Ditches and Topic 7: Features and waters not jurisdictional. Discharges to features that are not waters of the U.S. would not require NPDES permit coverage.**

Uintah County, Utah (Doc. #12720)

12.77 In the arid climates of the western United States this proposed rule will add to the complexity of many proposed projects. Prior to the proposed rule, in Uintah County, there were only two conditions which needed to be evaluated as part of a proposed project. It was quite simple to identify potential impacts on navigable waters or identify exempted uses. (p. 3)

Agency Response: **See Summary Response. The rule will provide greater predictability and certainty regarding which waters are jurisdictional. Consistent with case law and historical interpretation, the jurisdiction of "waters of the U.S." extends beyond navigable waters. The Clean Water Act Section 404(f)(1) available exemptions do not change as a result of the final rule and additional exclusions have been provided in the final rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The agencies recognize that regional variations occur in water resources and may need to be addressed in implementation guidance; however, the rule language is applicable nationwide.**

Board of Commissioners of Carbon County, Utah (Doc. #12738)

12.78 Under current regulations, some counties have been required to obtain federal permits for any type of construction or maintenance activities on these ditches, appallingly called jurisdictional ditches. Obtaining the federal permits can be very expensive, cumbersome and time-consuming. Some counties have waited years for federal permits at a significant cost. Counties have been unable to issue permits for structures and missed building seasons waiting for federal permits to be approved. Federal permit requirements for ditch maintenance activities also vary from area to area. No real consistency exists to help streamline this process. The National Association of Counties (NaCo) has documented numerous examples of problems that exist under the current "Waters of the

U.S." regulations. The new addition of areas to permit will further worsen an already stationary bureaucracy. (p. 5)

Agency Response: **See summary response. The tributary and ditch definitions in the final rule and discussions of those subjects in the preamble under the "Tributary" section and the "Waters and Features that Are Not Waters of the United States" section provides discussion on tributaries and ditches. The final rule has included additional clarity regarding ditches that are excluded by rule and ditches that may be considered a tributary. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

California Central Valley Flood Control Association (Doc. #12858)

12.79 The Sacramento-San Joaquin River Delta contains approximately 738,000 acres. Of these, just 266,000 acres (less than 37% of the Delta) have been characterized as "uplands." This means at least 63% percent of the Delta is either lowlands or actually underwater.[13] The first two prongs of the proposed exclusion permit only uplands drainage ditches to be excluded. Thus, solely because of their elevation, drainage ditches in at least 63 percent of the region would become automatically jurisdictional – regardless of any actual nexus to a navigable waterway. (p. 3-4)

Agency Response: **See the Summary Response. The tributary and ditch definitions in the final rule and discussions of those subjects in the preamble under the "Tributary" section and the "Waters and Features that Are Not Waters of the United States" section provides discussion on tributaries and ditches. The final rule has included additional clarity regarding ditches that are excluded by rule and ditches that may be considered a tributary. The term "upland" was removed from the ditch exclusion language, based on comments received, and to provide increased clarity.**

12.80 Because much of the Delta consists of lands reclaimed a hundred years ago being used for farming, and because Delta farmers rely on ditches to both irrigate and drain their crops, there is often "perennial flow" in Delta ditches. This flow is necessary because the Delta requires constant drainage to make the land usable for crop production. Additionally, failure to keep these lands drained could lead to public health risks from the presence of stagnant water, which contributes to West Nile and other ailments. Finally and most importantly, constant flows may be needed in order to accommodate and address flood flows. Here, the "perennial flows" aspect of the definition penalizes the

[13] Department of Water Resources *Report on 1956 Cooperative Study program - Water Use and Water Rights Along Sacramento River and in Sacramento-San Joaquin Delta, Vol. 1* (March 1957)

very conditions that protect the Delta's economic well-being, physical health, and public safety. (p. 4)

Agency Response: **See Summary Response. The tributary and ditch definitions in the final rule and discussions of those subjects in the preamble under the "Tributary" section and the "Waters and Features that Are Not Waters of the United States" section provides discussion on tributaries and ditches. The final rule has included additional clarity regarding ditches that are excluded by rule and ditches that may be considered a tributary. Certain ditches with perennial flow, and those excavated from a tributary, may be considered a tributary; the rule has concluded that ditches that are not excluded and do meet the definition of tributary have a significant nexus with (a)(1) to (a)(3) waters.**

12.81 The Corps and EPA stated in their "Supplementary Information" document that **90 percent** of Delta lands were diked or leveed.[14] The document goes on to say that construction of a levee or dike does not remove the "adjacent waters" status of the waters.[15] This potentially means that 90 percent of the Delta or more can be governed under the "adjacent waters" segment of the definition despite the presence of levees often constructed more than 100 years ago. (p. 4)

Agency Response: **See Summary Response. The final rule and associated preamble sections contain discussion specific to for further discussion on which waters are considered adjacent with the addition of "bright lines" to allow the agencies and the regulated public further predictability and consistency. It is correct that adjacent waters include those separated by constructed dikes, barriers, natural river berms, beach dunes, and other similar features.**

Roosevelt Soil and Water Conservation District (Doc. #13202)

12.82 Inclusion of ephemeral gullies is problematic because of the nature of such gullies. Depending on soils and location the Total Maximum Daily Load (TMDL) may be exceeded during isolated events (rainfall and/or snowmelt) from bank to bank erosion regardless of the condition of the upper watershed (p. 1)

Agency Response: **See exclusions regarding erosional features. The final rule does not change how TMDLs and permitting required by the CWA are implemented, which is outside the scope of this rule. Ephemeral streams that meet the definition of "tributaries" are regulated as waters of the U.S. under the final rule. However, many ephemeral waters are excluded from waters of the U.S., including ephemeral ditches that are not excavated in or relocating a tributary, and ephemeral erosional features that lack bed and banks and ordinary high water mark, including gullies, rills and non-wetland swales. See summary response essays for Topic 6.2: Excluded ditches and Topic 7.3.7: Gullies, rills and non-wetland swales, for more information.**

12.83 The Amendment will affect state permitting actions for pollution discharge as well as water quality standards and oil spill programs. While it is claimed that agriculture

[14] 79 FR 22243

[15] *Id.* See more discussion of levee adjacency, *supra.*

(farming and ranching) will be protected the amended definitions will allow regulation by EPA and Corp of Engineers on small waterways on private property. Current practices on cropland such as deep breaking, root plowing, and even grazing could result in regulation preventing agriculturists from providing affordable food and fiber to a hungry America. (p. 2)

Agency Response: See Summary Response. The rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities. Where are determined jurisdictional under the Clean Water Act, applicable exemptions in the CWA would continue to preclude application of CWA permitting requirements. The rule is a definitional rule to clarify the scope of waters of the U.S., and the final rule does not change state permitting requirements and processes for the CWA regulatory programs. The final rule includes expanded exclusions from waters of the U.S. for many ditches, and certain features constructed in dry land, erosional features and artificially irrigated features that would revert to dry land if irrigation were to cease. See summary responses for Topic 6.2: Excluded Ditches and Topic 7: Features and waters not jurisdictional, for further discussion, for more discussion. Agricultural practices that do not result in discharges to waters of the U.S. are not regulated by the CWA. Finally, there are a number of agricultural activities exempted from CWA 404 permit requirements, under CWA 404(f)(1)(A), which are not changed by the rule.

Northeastern Soil and Water Conservation District (Doc. #13581)

12.84 This interpretative rule does not make clear which agency will be the enforcers of compliance. If the NRCS is made to be the enforcers of this rule we fear that the relationship between the agricultural producers and the NRCS, which is strong and beneficial to both, will be eroded and strained. Currently, the NRCS provides excellent technical guidance on a wide range of farming practices. As was stated by NRCS field personnel at a recent meeting in New Mexico, their job is to *assist agricultural producers.* The NRCS field personnel have not traditionally had a regulatory or policing role, rather they have helped farmers solve technical problems, improve farming practices and access resources of the United States Department of Agriculture (USDA). This provides benefits to farmers and ranchers, the natural resources upon which farming and our nation depend. (p. 2)

Agency Response: See Summary Response. The Interpretive Rule for conservation practices under 404(f)(1)(A) has been withdrawn, per Section 112 of the Consolidated and Further Continuing Appropriations Act of 2015. The EPA, the Corps, and applicable states and tribes, are the only agencies with authority to implement the Clean Water Act. The final rule does not affect the authorities of the NRCS under their programs and NRCS does not have any authority under the Clean Water Act.

County Commissioners Office of Big Horn County, Wyoming (Doc. #13599)

12.85 When federal agencies new rule has the power to grant, deny, or veto a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease-control products on crops, that is regulatory authority over land use, and qualifies as A Major Federal Action. (p. 2)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including the longstanding permitting exemptions in the CWA for farming, silviculture, and ranching. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.**

Pocahontas County, Iowa (Doc. #13666)

12.86 Concern for the competency of the USEPA to do what it seeks: We are convinced that the US EPA does not have an inkling of understanding for how it will identify new waters of the United States and manage the expanded jurisdiction they seek over isolated farmed wetlands. The NRCS, has an office and staff in our county, has had the same job for more than 25 years and it is still stumbling to get it done. How is it that an agency with no Iowa presence or knowledge can expect to do better? You cannot due to the lack of knowledge and understanding! (p. 1)

Agency Response: **See Summary Response. The agencies have been identifying waters of the US for over 30 years and will continue to implement a national program at the local level via Corps district offices and EPA Regional offices. The EPA, the Corps, and applicable states and tribes, are the only agencies with authority to implement the Clean Water Act. The final rule does not affect the authorities of the NRCS under their programs and NRCS does not have any authority under the Clean Water Act.**

Palo Alto County Board of Supervisors (Doc. #14095)

12.87 **Concern that regulatory takings will occur**. The subversion of vested drainage rights by farm program rules have routinely been justified by the claim that farm program participation is voluntary. But identical Clean Water Act subversions of the same rights cannot be poo-pooed in that way because it does not offer voluntary participation. We assert that a regulatory taking will occur when the new rules first prevent the improved drainage of a single, long-ago converted and continuously cropped farmed wetland assessed for relative benefits by an Iowa drainage district. We note that the proposed rules give no consideration to how the rule may adversely impact owners of wetlands hydrologically altered to allow conversion to crop production and other beneficial uses. (p. 2)

Agency Response: **See Summary Response. See Technical Support Document. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including the longstanding permitting exemptions in the CWA for farming, silviculture, and ranching. The agencies do not have authority to regulate**

a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

Pinellas County Board of County Commissioners (Doc. #14426)

12.88 If the proposed new definition requires that water quality standards and TMDLs be applied to stormwater conveyances and storage systems not currently classified as WOTUS, the additional costs may make TMDL compliance unattainable. Furthermore, construction and maintenance of stormwater BMPs needed to meet TMDLs will require additional permitting under the proposed rule, increasing both time and expense for complying with TMDLs as described in the following sections. (p. 3)

Agency Response: See Summary Response. This rule will not affect the current implementation of the various CWA programs including water quality standards program, TMDLs and permitting required by the CWA, which are outside the scope of the rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. Many stormwater conveyance, water reuse and waste treatment systems constructed in dry land are excluded from waters of the U.S. under paragraph (b) of the rule. However, features constructed in waters of the U.S. would remain jurisdictional and are subject to CWA permitting. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.

Waters of the United States Coalition (Doc. #14589)

12.89 Critically, states are prohibited from adopting "waste transport or waste assimilation as a designated use for any waters of the United States." (40 C.F.R. § 131.10(a).) The prohibition is designed to ensure that waters of the United States are not used for waste treatment and that the basic fishable swimmable standard can be attained. However it prevents treatment systems that could improve water quality from being constructed within waters of the United States. As a result, inappropriately designating water infrastructure, and specifically flood control infrastructure, as waters of the United States will severely hinder the ability of downstream waters to ever attain the applicable Water Quality Standards.

What is more, when waters of the United States do not attain their designated Water Quality Standards, the states or EPA are required by Clean Water Act section 303(d) to adopt a TMDL for the pollutant causing nonattainment. TMDLs are a zero sum game between the Waste Load Allocation (limits on NPDES discharges); the Load Allocation (non-NPDES discharges); and a margin of safety. States are required to impose limits on activities that do not require Clean Water Act permits to ensure that the Load Allocation of any applicable TMDL is attained. So again, even if an NPDES or other permit is not required for a given activity, through the TMDL process, designation of a water body as waters of the United States can result in significant limitations. (p. 17-18)

Agency Response: See Summary Response. The rule does not change how designated uses, water quality standards, TMDLs and permitting required by the

CWA are implemented, and these comments are outside the scope of the rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. Many stormwater conveyance, water reuse and waste treatment systems constructed in dry land are excluded from waters of the U.S. under paragraph (b) of the rule. However, features constructed in waters of the U.S. would remain jurisdictional and are subject to CWA permitting. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. TMDLs do not impose regulatory requirements or controls on discharges. A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that load among the various sources of that pollutant. Pollutant sources are characterized as either point sources that receive a wasteload allocation (WLA), or nonpoint sources that receive a load allocation (LA). Approved wasteload allocations for point sources must be implemented in applicable NPDES permits (CWA Section 402). Load allocations for nonpoint sources are implemented through a wide variety of state, local, and Federal programs, which are primarily voluntary or incentive-based (e.g., CWA Section 319).

12.90 Moreover, the Proposed Rule's broad and expansive definition of a "tributary" would potentially trigger the consultation requirements of section 7 of the Endangered Species Act ("ESA"), which provide that federal agencies that propose to take a federal actions that may affect endangered species must consult with the U.S. Fish and Wildlife Service ("FWS"), which is authorized to impose alternatives to avoid such effects. (16 U.S.C. § 1536.) (p. 24)

Agency Response: **See Summary Response. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action, such as a permit decision, does. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.**

Marion County Board of County Commissioners (Doc. #14979)

12.91 In addition, it is our belief that changes to definitions within WOTUS will affect a number of state and local Clean Water Act programs, including the National Pollutant Discharge Elimination System (NPDES) and total maximum daily loads (TMDL). The Florida Department of Environmental Protection has confirmed there will be impacts but

has not communicated to the regulated community the details of what that will entail. (p. 2)

Agency Response: **See Summary Response. The rule does not change how water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.**

San Joaquin County Board of Supervisors (Doc. #15017.1)

12.92 The Agencies have not adequately analyzed the proposed rule's implications of the multiple CWA programs affected by the proposal. The proposed rule will replace the definition of "navigable waters" and "waters of the U.S." in the regulations for all CWA programs, including section 404 discharges of dredge or fill material, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load (TMDL) programs.

We do not believe the agencies have truly considered the complex implications that this proposed rule will have for the various CWA programs.

Although the EPA's Economic Analysis purports to analyze the costs of overlaying this new "waters of the U.S." definition onto other CWA programs, the analysis largely focuses on the section 404 program and essentially concludes that there will be no additional costs for other CWA programs. This cursory analysis seems inadequate. The agencies have not considered, for example, that many ditches and other water features, including intermittent or ephemeral streams and washes, may now meet the definition of "waters of the U.S.," thereby requiring these water features to achieve water quality standards, including numeric effluent limitations. The agencies have not looked at how this type of change may create confusion over whether an NDPES permit is required for certain features or may place an increased burden on states administering stormwater programs and setting water quality standards. The EPA and the Corps have not truly considered how the proposed rule may affect the states implementing the various CWA programs or the stakeholders regulated by these programs. Nor have the agencies analyzed how the proposed definition of "waters of the U.S." will affect their own administration of each of the CWA regulatory programs. (p. 1-2)

Agency Response: **See updated Economic Analysis for the final rule. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The rule defines the scope of waters of the U.S. subject to the CWA. It will not affect the current implementation of the various CWA programs; implementation of those**

programs are outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time, including many ditches and certain stormwater conveyance features. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations, and the agencies believe that revisions in the final rule respond to a number of concerns expressed by states and other stakeholders. In addition, the economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Agencies Economic Analysis document for details on the estimated costs and benefits of the rule.

Ramsey County Public Works (Doc. #16665)

12.93 [Regarding "simplification of the permit process"] The LGAC report states that the making of WOTUS jurisdictional decisions whether a water resource is exempt or not In a timely manner is critical to both protecting the water resource and providing predictability to local governments. LGAC recommendations include EPA and U.S. Army Corps of Engineers (USACE) developing a tool for use by local governments to assess jurisdictional status; EPA working with stormwater associations to provide guidance to address MS4 agencies, stormwater controls, and their jurisdictional determination; and EPA articulating jurisdictional waters in an outreach plan which describes these areas with a clear statement of why they need protection. The LGAC report recommends that the rule stipulate time frames for permit review and WOTUS jurisdictional determination. The EPA should work with the USACE to reduce delays in issuing Section 404 dredge and fill permits. The LGAC report identifies an ineffective permit process consumes local, state and federal staff and financial resources and recommends the EPA engage the USACE to ensure the permit process is predictable and value-added. Ramsey County supports these LGAC recommendations. (p. 2)

Agency Response: See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and water recycling features. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular

site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Hot Springs County Commissioners (Doc. #16676)

12.94 The EPA (…) failed to consider in its analysis the economic impact of required Endangered Species Act (ESA) consultations, National Environmental Policy Act (NEPA) directives requisite when a federal permit is issued. Wyoming is ground zero for the pending decision from the U.S. Fish and Wildlife Service on the listing of the greater sage grouse, and is home to several other threatened or endangered species. A county's ability to complete road and bridge work or other infrastructure projects is already hindered by the mitigation of impacts on these species. Any additional triggers imposed by this proposed rule that require further ESA and NEPA analysis is an unwelcome hindrance and poses an increased cost. (p. 9)

Agency Response: See Summary Response. See the updated Economic Analysis for additional information on costs/benefits of the final rule. It is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met. There are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Dolores Water Conservancy District (Doc. #19461)

12.95 Application of those regulatory provisions designed for bona fide "waters of the U.S." to dry arroyos, irrigation ditches, and other ephemeral or intermittent waters commonly found in the western U.S. will result in adverse economic impacts to landowners and communities in a vain attempt to "protect" non-navigable, intrastate waters that Congress nowhere evinced an intent to regulate in the Clean Water Act. Such waters will be subject to impairment listings and the imposition of TMDLs under Section 303 of the Act, restrictive effluent limitations under the Section 402 NPDES program, restrictive storm

water BMP requirements under Section 402(p), and compliance costs and restrictions under the Section 404 permitting requirements of the Act.[16]

Again, these issues were also identified by the Bureau of Reclamation in its 2008 letter to the Agencies:

The guidance adopts overly broad jurisdiction over seasonal flow tributaries and "ephemeral waters," declaring that water flow for only three months of the year is a sufficient basis for jurisdiction. Reclamation believes that the asserted jurisdiction over seasonal flow tributaries and ephemeral washes should be much narrower ....

Though this paragraph [about ephemeral waters] provides a good description of the function of ephemeral waters in the arid west, it does not state how the jurisdictional question will be applied to them. As this issue is relevant to many of the states within Reclamation's area of jurisdiction, it would be helpful if the paragraph ended with a clear statement regarding how the agencies will assert jurisdiction. Without clarification, additional consultations may need to be conducted.[17] (p. 9-10)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the scientific and legal basis of the final rule. See the tributary and ditch definitions in the final rule and discussions of those subjects in the preamble under the "Tributary" section and the "Waters and Features that Are Not Waters of the United States" section for discussion on ditches, erosional features, and wastewater recycling features. To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark, regardless of flow regime, which would distinguish them from non-jurisdictional features. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters.

Quay County, New Mexico (Doc. #19558)

12.96 The regulated community must still rely on the EPA or USACE to determine: (i) whether a water is jurisdictional by rule; (ii) if not, whether the water is an "other" water; and (iii) whether any exceptions apply. This is not a predictable, consistent or clear process and in the end it remains potentially arbitrary and onerous. (p. 4)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated

[16] We cannot help noting the irony of the Agencies expanding the jurisdiction asserted pursuant to the Rivers and Harbors Act, now Section 404 of Clean Water Act, through this administrative rulemaking. The entire purpose, and thus jurisdictional underpinning, of the Rivers and Harbors Act was for the U.S. Army to improve the navigability of genuinely navigable waterways through regulating dredging and filling activities, not to create a federal jurisdictional hook for any waters that might discharge a pollutant to a water tenuously connected to those genuinely navigable waterways.

[17] BOR 2008 Guidance Comments, at pp. 3 and 4.

Economic Analysis for additional discussion. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

12.97 Implications regarding the Endangered Species Act (ESA): We express extreme concern regarding the additional regulatory and economic burden that will be placed on Quay County, our landowners, businesses and residents in being forced complying with ESA Section 7 consultation requirements as a result of the Proposed Rule. When the Proposed Rule as written is broadly enforced by the EPA and USACE regarding permitting requirements, the ensuing federal nexus will require ESA Section 7 consultation across New Mexico for normal and customary county activities, road maintenance, construction, agricultural and ranching practices that is not required today, as there are no agricultural or ranching exemptions contained within the ESA. The additional burden and potential ESA take findings will undoubtedly cause irreparable economic harm to Quay County and threaten and potentially eliminate the customs and culture of their rural communities. (p. 4-5)

Agency Response: **See Summary Response. See the updated Economic Analysis for information on costs/benefits. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.**

12.98 There are hundreds of miles of roads maintained and repaired by the county that will fall under the control and jurisdiction of the broad and subjective authority of the proposed rule. These roads are essential to our residents for access to their homes and property, emergency services, fire protections and normal transportation and travel required by their lives and livelihoods. (p. 5)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. See the preamble**

section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features. The agencies believe the exclusions in the rule are comprehensive and note that the exclusions are applicable to all Clean Water Act programs. The final rule includes exclusions for certain ditches which are not jurisdictional even if they met the definition of "tributary". The agencies only have authority to regulate "waters of the U.S." and are not regulating all land.

12.99 There are thousands of other pre-existing, necessary and essential improvements both public and private that are built on or over land that will be affected by the control of the agencies under the proposed rule. These include the public infrastructure, public and private roads, transmission lines, power lines, telephone lines, pipelines, railroads, highways, water lines, fences and erosion control structures. These would all become subject to the arbitrary and subjective opinion and enforcement activities of EPA, USACE and others. The adverse and unreasonable effect of the proposed rule and enforcement actions would be harmful and counterproductive. (p. 5)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. See the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features, such as certain ditches and stormwater control features. The agencies believe the exclusions in the rule are comprehensive and note that the exclusions are applicable to all Clean Water Act programs. The agencies are not regulating all land, but only "waters of the U.S.". The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the proposed rule. The agencies believe the clarity and certainty provided in the rule will result in better identification of what is/is not a water of the U.S. which may result in reduced enforcement actions for unauthorized activities and reduced opportunity for litigation based on what is/is not a water of the U.S.

Butte County Administration, County of Butte, California (Doc. #19593)

12.100 The Agencies Have Not Adequately Analyzed the Proposed Rule's Implications on the Multiple CWA Programs Affected by the Proposal.

The proposed rule will replace the definition of "navigable waters" and waters of the United States in the regulations for all CWA programs, including section 404 discharges of dredge or fill material, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load (TMDL) programs. We do not believe the agencies have truly considered the complex implications that this proposed rule will have for the various CWA programs. (p. 3)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect

the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

Montana Wool Growers Association (Doc. #5912)

12.101 Neither the Proposed Rule nor its Preamble explains which regulations the Proposed Rule would replace. The Proposed Rule duplicates the definition twelve times, once for each section of regulatory text it would replace. The duplication is the only indication in the Federal Register that twelve regulations would be amended. The list of citations in the Federal Register header (print version) refers only to general parts in the Code of Federal Regulation. Similarly, the Preamble simply mentions that two current regulations define WOTUS and that "counterpart and substantively similar regulatory definitions appear" at ten other (named) locations. 79 Fed. Reg. at 2219S. The EPA does provide a separate copy of the Proposed Rule on its website with a list of the regulations the Proposed Rule will replace, but this explanation is reduced to a single sentence at the bottom of the document. The introductory text to the Proposed Rule should clearly state which regulations the Proposed Rule will replace. (p. 12)

Agency Response: The following entries in the Code of Federal Regulations (CFR) will be replaced: 33 CFR Part 328, 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

Area II Minnesota River Basin Projects, Inc. (Doc. #7185)

12.102 The Corps of Engineers, particularly the St. Paul District, cannot handle more permitting. The St. Paul District posted a news release on May 9, 2014 stating: " ... *timeframes for general permit decisions, those with impacts generally less than 0.5 acres are averaging 85 days. Timeframes for individual permit decisions, which include letters of permission, range from 4 months to more than a year, but are currently averaging around 8 months."* Given a short construction season in Minnesota of about five to six months, three to eight months for permit review by the Corps of Engineer is not only unacceptable, but not necessary for conservation practices that are vital to our landscape and agricultural economy. We cannot support further overload of a permitting system that is already overloaded and extremely slow. The St. Paul District office of the U.S. Army Corps of Engineers is three hours away from southwestern Minnesota making site visits and timely responses very difficult. (p. 2)

Agency Response: See Summary Response. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient

implementation of the rule. There are many desktop tools that can aid in making a jurisdictional determination; examples of those tools are described in the "Tributary" section of the preamble.

Pennsylvania Department of Environmental Protection Water Management Office (Doc. #7985)

12.103 Overcoming structural and authority limitations of the Clean Water Act through the revision of the definition of "Waters of the United States" is not appropriate. Pennsylvania recognizes that the challenges in protecting water resources have evolved since passage of the Clean Water Act in 1972. However, trying to address the problems of 2014 (which are largely wet weather driven and/or are associated with nonpoint sources) by changing the definition of "Waters of the United States" is not appropriate. The proposed definition will expand jurisdiction over stormwater related systems, which is particularly inappropriate after EPA has chosen not to proceed with the national stormwater rulemaking. Further, using this new definition in the existing permitting programs under Sections 402 and 404 will render both of these programs more cumbersome and confusing. Expansion of federal regulatory oversight through a definitional change is not appropriate, hut more significantly, will not be effective. The permitting authorities (state and federal) will be mired in litigation and disputes related to the proper interpretation of the proposed re-definition of "Waters of the United States." (p. 4)

Agency Response: See Summary Response and the Technical Support Document for a summary of the legal and scientific basis of the final rule. See the updated Economic Analysis for additional discussion on the potential costs/benefits associated with all authorities under the Clean Water Act. See the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as those for stormwater control features. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations.

Quapaw Tribe of Oklahoma (Doc. #7980)

12.104 There are a number of differences between existing regulations and the proposed rule that may result in higher costs for the regulated community, while increasing the burden on regulatory agencies whose staffing and budgets are already strained. The proposed change to the definition of "Waters of the U.S." will impact other CWA programs such as the Water Quality Standards program and the National Pollution Discharge Elimination System program, potentially adding regulatory requirements over a larger number of water bodies than are currently regulated. This may have the unintended consequence of actually increasing the risk to currently regulated waterways due to the added burden on regulatory agencies who are finding it difficult to effectively enforce, and/or facilitate compliance with, existing requirements related to the CWA. (p. 1)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The rule intends to clarify the scope of waters of the U.S. under CWA regulation, and provide greater certainty to the regulated community and states and tribes implementing CWA regulations, thereby reducing uncertainty in

CWA compliance. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations; however, the rule imposes no direct costs, but each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. The economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated indirect costs and benefits of the rule.

Nebraska Association of Resources Districts (Doc. #11855)

12.105 Furthermore, [aside from changes associated with the 404 program] changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process. (p. 3)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The rule intends to clarify the scope of waters of the U.S. under CWA regulation, and provide greater certainty to the regulated community and states and tribes implementing CWA regulations. The rule does not change existing CWA regulatory requirements for the various CWA permit programs. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations; however, the rule imposes no direct costs, but each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. The economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated indirect costs and benefits of the rule.

New York Farm Bureau et al. (Doc. #11922)

12.106 The proposed rule does not take into account the full effects it will have on other regulatory programs and the financial consequences to federal, state, and local governments, as well as the business community, will be tremendous. The proposed rule does not just apply to section 404 permits, but other Clean Water Act programs, such as Section 402 – National Pollution Discharge Elimination System (NPDES) Permits, Section 303 – Water Quality Standards (WQS) program and other programs including stormwater, green infrastructure, and pesticide permits. These additional layers of regulation will have unintended consequences and will be disruptive to our comprehensive water quality programs now in place and will stymie development and potentially hurt already precarious infrastructure projects in our rural communities. (p. 2)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The rule intends to clarify the scope of waters of the U.S. under CWA regulation, and provide greater certainty to the regulated community and states and tribes implementing CWA regulations. The rule does not change existing CWA regulatory requirements for the various CWA permit programs. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulation, and do not agree that the rule will prevent infrastructure development in communities, for the above reasons.

Ground Water Protection Council (Doc. #13055)

12.107 In the proposal preamble EPA recognizes the importance of connections provided by shallow subsurface groundwater and deeper groundwater. GWPC suggests that as EPA implements the proposed rules, a comprehensive and holistic grant guidance approach should allow for state groundwater protection projects that could contribute to the overall health and water quality in an impaired watershed. In addition, providing support for state requests for groundwater projects would allow for enhanced protection of aquatic resources and result in significant cost effectiveness in the prevention of contamination. In addition, many §319 funded prevention projects can coordinate well with source water protection efforts under the Safe Drinking Water Program, resulting in an additional water quality benefit for public health from all programs. (p. 2)

Agency Response: See Summary Response. The agencies only regulate those aquatic resources that are "waters of the U.S." and cannot extend agency authority to uplands or groundwater. Groundwater protection is outside the scope of this rule. The EPA agrees that protecting sourcewater, including groundwater, is an important component of water quality protection. However, the various EPA grant

programs and associated guidance are beyond the scope of this rule, which defines the scope of waters of the U.S. subject to the CWA.

Association of Clean Water Administrators (Doc. #13069)

12.108 ACWA would like to stress that for both significant nexus determinations and the desired clarifications described above, development of regional expectations (ecologically delineated) is a potential means of providing greater certainty. But in order for this to be useful, states must be involved in the development. As has been done for identification of regional hydric soils under the Section 404 program, we encourage the formation of regional committees, made up of EPA, the Corps and state partners, to develop any further definitions and guidance that may be needed in order to consistently implement the final rule. In addition to suggested guidance stated earlier, this should include guidance on water quality standards applicable to ephemeral streams. This is important because many of those streams are dry the great majority of the time and do not generally support the CWA rebuttably presumed uses under Section 101(a)(2) (i.e., "fishable and swimmable"), unlike streams and rivers that run for sustained periods (intermittent) or continuously (perennial) throughout the year. (p. 4)

Agency Response: See Summary Response. The agencies have and do engage in sustained coordination and partnerships with states and other partners. The rule public comment period was extended twice to ensure adequate time for comment and during that time the EPA hosted hundreds of stakeholder and outreach meetings, including some with state agencies. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The comment about water quality standards is outside the scope of this rulemaking effort.

Western Coalition of Arid States (Doc. #14407)

12.109 As proposed, the rule contains many defined and undefined terms that may inappropriately include many man-made features, man-made conveyances, and man-made impoundments as jurisdictional waters. These same man-made features are used by many WESTCAS members to carry out daily responsibilities, such as transmitting and distributing irrigation water, diverting and storing stormwater, and recharging or "banking" excess water for future use. Surely, the rulemaking did not intend to include groundwater recharge basins, even those located "adjacent" to tributaries or TNWs, as

jurisdictional waters. Also, groundwater recharge is an inherent activity performed in most arid States to manage water resources. (p. 3)

Agency Response: See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded man-made features such as stormwater control features, certain ditches, and water recycling features.

Georgia Municipal Association (Doc. #14527.1)

12.110 During recent presentations about the rule, EPA staff have stated projects "will be reviewed on a case by case basis jurisdictionally". When presenting information about the proposed rules to city officials, EPA representatives have indicated that "this is what we *think* will be covered", "we don't see that as being a scenario", or "we *anticipate* the rule will..." If EPA staff do not have a clear understanding of the terms and requirements in the rule, how can GMA provide guidance to cities to inform them of their responsibilities if the rule is implemented as written? This does not provide local officials with any clarity over the current process, and the rules could easily be interpreted to significantly expand the definition of Waters of the U.S. (p. 3)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

12.111 If ditches, curbs, gutters, and other system components throughout Georgia are jurisdictional, GMA is concerned that the Corps simply does not have enough manpower to review and make a determination for these facilities throughout the state. Significant delays are inevitable. Appendix A that accompanies this letter outlines local examples from the City of Griffin, Georgia, that illustrate the time and costs currently involved with a typical local project. (p. 3)

Agency Response: See Summary Response. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. See the updated Economic Analysis for additional discussion on costs/benefits. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures.

12.112 The proposed rule will result in the loss of local control over home rule authority to maintain, improve, and construct new facilities. GMA and city leaders throughout the

state are strongly supportive of the protection of water quality, public health, and the environment. Cities have demonstrated diligence in protecting bodies of water, streams and rivers. Cities try to be environmental leaders by following regulations, providing training and certification for public works officials, and engaging in innovative designs that are environmentally sensitive. Many cities are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. Georgia's local public works officials engage in best practices, working through professional organizations such as the Georgia Association of Water Professionals and Georgia Rural Water Association. *Unfortunately*, the Corps and EPA did not engage any of the states or local providers, the experts on the ground about how to fix these rules. (p. 4)

Agency Response: **See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures. The agencies recognize the importance of public input on the content of the rule. The agencies adequately allowed for such input through public participation in the nationwide comment process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. Additional outreach efforts were extensive and included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.**

12.113 GMA believes that the ambiguous terms in the proposed rule will result in more ditches, channels, conveyances, and treatment approaches being federally regulated. The outcome will be significant delays in completing projects, increased project costs, and the burden to pay will fall to the rate payers and taxpayers. (p. 5)

Agency Response: **See Summary Response. See the updated Economic Analysis for additional discussion on predicted change in jurisdiction and costs/benefits. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further**

information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public, including refinement and expansion of the features excluded from jurisdiction. It is important to note that unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8) waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b).

12.114 Under the proposed rule if a ditch is considered a Water of the United States then a sanitary sewer overflow to a dry ditch could create an enormous burden on the local utility. CWA regulates TMDL's and discharges to the Waters of the United States. Currently, if a system has an overflow reaching a stream it is required to follow protocol procedures in clean up and notification, and if significant a consent decree will be issued by state regulators. The protocol requires sampling and monitoring for an extended period of time, which is costly but usually easy to perform. If the overflow goes to a dry ditch but does not reach the stream, what new or additional requirements would the local provider be subject to if the proposed rule is adopted? If the proposed rule is adopted, what COE permit would be required in this case, how long would it take to address the spill in a dry ditch, and what parameters would be required for sampling and for and how long? Remember that to excavate the ditch would involve off-fall of dredging. (p. 8)

Agency Response: **See Summary Response. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, ditches, and man-made stormwater conveyances. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches will remain in effect, when applicable. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

12.115 How does a local jurisdiction maintain a dirt road and ditch under the proposed rule without getting a permit? Roads are bladed, creating off-fall many times into the ditch, and the ditch usually has to have sediment removed for the runoff to move in a positive direction, which is usually a stream or at minimum a channel that is dry and when wet lead s to the stream. As proposed it would appear to me that 402 permits would be required for maintenance of dirt roads. Permitting would become a nightmare for the local jurisdiction. (p. 9)

Agency Response: **See Summary Response. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, and excluded features such as certain ditches and man-made stormwater conveyances. The final rule includes specific characteristics that must be met in order to meet the**

definition of "tributary," including bed and banks and ordinary high water mark. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches will remain in effect, when applicable. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

12.116 Under the proposed rule the floodplains could and many cases would be redefined. Local government has spent an enormous amount of effort, time, and funds mapping and engineering floodplain management programs. Potentially building codes would have to be modified and land use in many cases be redefined. (p. 9)

Agency Response: **See Summary Response. Refer to the "Adjacent Waters" section of the proposed rule and preamble for further information and clarification on the use of floodplain information in making determinations of jurisdiction. Floodplain, as used in the final rule, applies only to the Clean Water Act definition of waters of the U.S. and as such, the agencies do not anticipate impacts to other local, state, or federal floodplain management programs. The agencies intend to utilize available floodplain mapping and floodplain determination methodologies for use in making jurisdictional determinations, including the FEMA 100-year flood risk zone maps as discussed in the preamble.**

Florida Rural Water Association (Doc. #14897)

12.117 FRWA member water utilities are concerned about the scope of what waters fall under federal regulation since many communities own and maintain public infrastructure ditch, swale and water channeling systems, flood control channels, storm water, and drainage that are used to channel water away from low-lying areas and water treatment infrastructure and prevent flooding.

In the proposed rule, EPA and the Corps offer new definitions for "tributaries," "other waters," etc. We are concerned that under ambiguous or undefined terms, definitions, and concepts used in the proposal, routine operation and maintenance of drinking water, wastewater, and storm water conveyances, aqueducts, canals, impoundments, and treatment facilities could potentially be subject to jurisdiction. The ACOEL analysis finds a similar dilemma in their reading of the proposed rule.

"Practitioners disagree about the extent to which the case-by-case determinations and exclusions outlined above reduced CWA jurisdiction as a practical matter. Some practitioners argue that, even with case-by-case determinations, the Agencies continued to assert jurisdiction over most if not all of the tributary system and only limited their jurisdiction over wetlands and other waters. Other practitioners believe that the case-by-case determinations resulted in more limited assertions of jurisdiction over more remote, less permanent tributaries, as well as wetlands and other waters that would be reversed by the proposed rule." (p. 3-4)

Agency Response: **See Summary Response. See the Economic Analysis for additional discussion on changes in jurisdiction. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" of the proposed rule and preamble for further information and clarification on tributaries and**

excluded waters and features including certain ditches, stormwater control features, and wastewater recycling structures. Features that meet the exclusions under the final rule cannot be jurisdictional even if they meet the terms of paragraph (a) waters. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The science demonstrates that all such tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters.

Western Urban Water Coalition (Doc. #15178 and #15178.1)

12.118 The Proposed Rule represents a significant expansion of the historical scope of federal jurisdiction. Under the proposal, all tributary and adjacent waters would now be "jurisdictional by rule," the definition of "tributary" and the scope of what is "adjacent" would both expand, a new concept of "neighboring waters" would be incorporated, and the significant nexus test would allow for a watershed scale determination of jurisdiction. Many of the dry arroyos, washes, ditches and ephemeral or intermittent water bodies so common in the arid West would become the subject of federal oversight.

This expansion of jurisdiction will significantly increase the burden on the regulated community, especially in the western U.S., as compared to the current rules and agency guidance for identifying waters subject to CWA protection. In the arid portions of the West, numerous ephemeral and intermittent drainages and wetlands exist that under the current agency guidance have been determined to be isolated or lacking a significant nexus to traditional navigable waters and thus are not subject to jurisdiction under Section 404 and other provisions of the CWA. The Proposed Rule is a marked departure from past practice because it would make ephemeral and intermittent tributaries jurisdictional and eliminate the concept of an isolated water or wetland, a concept that has been part of the agencies' approach to determining geographic jurisdiction since the 2003 agency guidance following the *SWANCC* decision.

The importance of this change to municipal utilities lies primarily in its relationship to sections 404 and 402 of the CWA. If a water feature is determined, either per se or on a case-by-case basis, to be a "water of the U.S.", the dredge and fill permit provisions of section 404 and the point source permit provisions of section 402 are potentially triggered by a variety of municipal undertakings. Invoking these provisions can, in turn, implicate the need for a section 401 water quality certification from the state and, more importantly, may necessitate a costly and time consuming review of the local initiative under the National Environmental Policy Act. Finally, the need for the issuance of federal approvals may, in turn, also trigger consultation requirements under the federal Endangered Species Act.

To meet water supply and wastewater treatment needs, as well as stormwater control requirements, Western municipal utilities must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will include new or expanded storage reservoirs; reuse facilities; desalinization plants; water

collection, delivery and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Many of these facilities will, of necessity, be in somewhat close proximity to the types of "waters" discussed in the current rule proposal. It is essential that these critical activities, many of which may be undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures. (Doc. #15178, p. 3-4)

Agency Response: **See Summary Response. See the Economic Analysis for additional discussion on changes in jurisdiction. Refer to the "Tributary", "Adjacent Waters", and "Case-Specific Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, adjacent waters including neighboring waters, and significant nexus determinations for case-specific waters. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches, stormwater control features, wastewater recycling structures, and erosional features. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. Erosional features that do not meet the definition of tributary that lack such indicators are excluded under paragraph (b) of the final rule. The final rule provides for specific parameters that must be met in order to fall under the (a)(7) or (a)(8) category of waters which require case-specific significant nexus determinations. Although outside the scope of the rule, the agencies continue to work to ensure accurate ordinary high water mark and bed and bank identification across the nation and particularly in the Arid West, including the manual for identifying the ordinary high water mark in the Arid West. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not**

remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. The Corps regulations define an "emergency" under the nationwide permit program as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."

12.119 The "jurisdictional by rule" presumption for all tributaries will have substantial unintended consequences, particularly in the arid West. Currently, when evaluating alternatives, many project proponents consider the ramifications of federal permitting as part of their project planning and alternatives evaluation and carefully weigh alternatives that do not require a federal action. Project proponents choose to avoid federal actions when they can because of the expense and time to process the reviews by multiple federal agencies triggered by a single federal nexus. The federal approval process also provides a forum for litigation and frequently undermines the predictability of the planning process. The only federal action for many proposed projects is authorization from the Corps for the discharge of dredged and fill material into a WUS. (Doc. #15178.1, p. 7)

Agency Response: **See Summary Response. Refer to the "Tributary" section of the proposed rule and preamble for further information and clarification on tributaries and ditches. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and erosional features. None of the existing procedures, permitting mechanisms, efficient**

permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Wyoming County Commissioners Association (Doc. #15434)

12.120 It is important to note that waters not currently found to be waters of the U.S. are in most cases claimed as "waters of the state." These waters are still subject to regulation by state departments of environment like Wyoming's Department of Environmental Quality (DEQ). As is the case in the entire semi-arid West, in Wyoming numerous innovative conservation practices have been employed by the state, local governments and private entities to ensure water quality and conservation. A federal presumption of this magnitude is counterproductive to these locally-driven efforts, and may in fact serve to diminish the public's willingness to employ voluntary conservation efforts. Individuals will be less likely to accept flexible regulations placed on water use and disturbance by the state or local jurisdictions because they cannot be assured that they will not also bear the burdens of a costly and lengthy federal permitting process. Further, a federal presumption places the burden on counties and landowners to prove that a water previously managed as non-jurisdictional is still classified as such. (p. 3)

Agency Response: **See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. Furthermore, the final rule will not directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the definition of waters of the U.S. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA**

sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

12.121 …the EPA has not defined what aerial photography, "reliable" remote sensing data, or "other appropriate information" will be allowed. The WCCA and its member counties have significant experience (both positive and negative) with the United States Department of Interior regarding the development (or lack thereof) of accurate, on-the-ground information used to develop federal policy. We strongly believe that any determination of land or water must first be vetted and proven by the local government as co-regulators. (p. 6)

Agency Response: The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The authority to make a jurisdictional determination lies with the agencies, or applicable state or tribe. Refer to the rule preamble discussion in the "Tributary" section for information on use of remote sensing data for making determinations of jurisdiction. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. In addition, such desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

12.122 In addition, the WCCA is also concerned that an expansion of federal jurisdictional waters will have the further unintended consequence of conflicting or duplicating floodplain development permits enforced by the Federal Emergency Management Agency (FEMA). (p. 10)

Agency Response: See Summary Response. Refer to the "Adjacent Waters" section of the proposed rule and preamble for further information and clarification on the use of floodplain information in making determinations of jurisdiction. Floodplain, as used in the final rule, applies only to the Clean Water Act definition of waters of the U.S. and as such, the agencies do not anticipate impacts to other local, state, or federal floodplain management programs. The agencies intend to utilize available floodplain mapping and floodplain determination methodologies for use in making jurisdictional determinations, including the FEMA 100-year flood zone maps as discussed in the preamble.

Idaho Association of Commerce & Industry (Doc. #15461)

12.123 Mining activities are covered under a MSGP for industrial activities. Furthermore, during some types of construction activities, mining operators would need to obtain a

General Permit for Discharges from Construction Activities (note some forms of construction are covered under the MSGP for mine sites). With the proposed rule the SWPPP and NOI would have to be revisited to identify status of receiving waters, as the application requires that the receiving water be defined as either water quality limited or not (303 listed). In many instances these other waters are created to comply with CWA requirements by managing water to avoid discharges to navigable waters. (p. 10)

Agency Response: **The rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. See the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features. The final rule does not alter implementation of the NPDES program, including MSGPs. See summary response at 12.3. With respect to the jurisdictional status of stormwater control features, please see summary response at 7.4.4.**

12.124 Most mining facilities have an SPCC plan. The plan, will need to be updated to reflect the location of jurisdictional water and reporting protocol. (p. 10)

Agency Response: **This action would not necessarily require facilities that have prepared SPCC plans to update these plans outside of the normal 5-year review cycle or complete a technical amendment to the plan unless there is a change in facility configuration, etc. that affects its potential for an oil discharge to waters to the U.S. or adjoining shorelines. See 40 CFR part 112.5 in the SPCC rule. The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b). Also, this action does not change the requirement under 40 CFR part 110 for a facility owner/operator to notify the National Response Center when an oil discharge to waters of the U.S. or adjoining shorelines has occurred.**

12.125 With the proposed rule, the Corps will likely argue they have clearer direction on classifying tributaries (which can be man-made features such as drains), adjacent waters, and "other waters." As such, mine sites will likely be required to conduct a greater number of delineations and seek additional Section 404 permits for mine activities, especially as it relates to "other waters" and significant nexus criteria. Important in this is the hydraulic connection between surface water and groundwater, and the amount of additional studies that will be required to comply with the proposed significant nexus evaluation. (p. 10)

Agency Response: **See Summary Response. See the "Tributary," "Adjacent waters," definitions and descriptions of (a)(7) and (a)(8) water bodies subject to case-specific significant nexus evaluations in the final rule and discussions of the tributaries, adjacent waters, case-specific waters, and significant nexus determinations in the preamble. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as water-filled depressions created in dry land incidental to mining activities, stormwater control features, certain ditches, and wastewater recycling structures. The final rule**

further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public. It is important to note that unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8) waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b).

12.126 The SPCC Rules are not jurisdictional when it has been determined, based on natural, unaltered topography, that there is not a likelihood, or pathway, of a spill reaching a WOTUS. However, the current proposal would require electric utilities to either reassess those facilities or determine they are jurisdictional based on a significant nexus of features, such as manmade ditches or other ephemeral features that were previously not WOTUS, but may be deemed jurisdictional by the Agencies where they discern a bed, bank, and ordinary high water mark or, in the absence of such, whether the feature is a wetland, lake, or pond and contributes overland or subsurface flow. The cost impact of creating and maintaining additional plans based on current estimates of these activities is projected to be at least $750,000 upfront and $150,000 annually. This is a limited analysis based on a single utility, and costs are likely to be higher. When extrapolated for each industry in Idaho, as well as nationally, the cost impact is significantly greater than imagined by EPA. (p. 14)

Agency Response: **See Summary Response. See the "Tributary," "Adjacent waters," and "Case-Specific Water of the United States" definitions in the final rule and discussions of tributaries, regulated and excluded ditches, case-specific waters, and significant nexus determinations in the preamble. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule provides for specific parameters that must be met in order to fall under the (a)(7) or (a)(8) category of waters which require case-specific significant nexus determinations. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as ditches and erosional features. See the Economic Analysis for additional discussion on changes in jurisdiction. Certain ditches and man-made impoundments may not considered waters of the U.S. in this final action. However, for applicability determinations, the owner/operator must determine if there is a reasonable expectation of an oil discharge to waters of the U.S. or adjoining shorelines, and this determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to waters of the**

U.S. or adjoining shorelines, land contour, drainage, etc.) and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain or otherwise prevent a discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). Once subject to the SPCC rule, an owner/operator to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b). EPA provided cost estimates in the most recent ICR renewal for the SPCC rule (2012) for plan preparation and maintenance. See EPA ICR No. 0328.15, OMB Control No. 2050-0021. Plan preparation costs generally range from $4,000 to $7,000 and plan maintenance costs range from around $900 to $1,200 annually for small- to medium-size facilities.

Massachusetts Water Resources Authority (Doc. #15573)

12.127 Water reuse facilities are being built across the country to generate an additional water supply for irrigation purposes and sometimes drinking water. It is unclear how the proposed definitional changes would impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. Additional clarification is needed by the agencies. Contrary to the agencies' assertions, the proposed rule does not provide certainty for our member counties. (p. 6)

Agency Response: See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as water- stormwater control features, ditches, and water recycling features. Please see summary response 12.3. The final definitional rule does not change CWA permitting requirements regarding the application of pesticides, or establish new requirements for complying with the pesticides general permit (PGP). However, the rule adds a new exclusion for features such as detention and retention basins, groundwater recharge basins, and percolation ponds created in dry land for purposes of wastewater recycling, which are not waters of the United States. The final rule also includes revised and expanded exclusions for many ditches. See summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for more information about excluded waters in the final rule.

The United States Conference of Mayors et al. (Doc. #15784)

12.128 Key terms used in the proposed rule such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" will be used to define what waters are jurisdictional under the proposed rule. However, since these terms are either broadly defined, or not defined at all, this will lead to further confusion over what waters fall under federal jurisdiction, not less, as the proposed rule aims to accomplish. The lack of clarity will lead to unnecessary project delays, added costs to local governments and inconsistency across the country.

Request: Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations. (p. 4)

Agency Response: See Summary Response. Refer to the "Tributary", "Adjacent Waters," and paragraphs (a)(7) and (8) sections of the proposed rule and preamble for further information and clarification on tributaries, floodplains, significant nexus, adjacent, and neighboring. The term "uplands" has been removed from the final rule language related to excluded ditches in response to public comments requesting clarification. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. Also, see responses to comments on suggested definitions, Compendium 14.3.

12.129 Many of the definitions in the proposed rule are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency jurisdictional determinations with having to go to court. (p. 7)

Agency Response: See Summary Response. The appeal procedure detailed in 33 CFR Part 331 is unchanged by the proposed rule. The Corps current regulations allow an affected party to appeal an approved jurisdictional determination, permit applications denied with prejudice, and declined proffered permits Please see 33 CFR Part 331 – Administrative Appeal Process for further information. As of the date of publication of the final rule, approved jurisdictional determinations are not considered "final agency action" and therefore cannot legally be challenged under the Administrative Procedures Act. Also, see responses to comments on jurisdictional determinations, section 12.4.3. As a definitional rule, the final rule does not establish a new process for appealing jurisdictional determinations.

Washington State Water Resources Association (Doc. #16543)

12.130 As more waters are deemed jurisdictional, state agency budgets may prove inadequate. More monitoring will need to be performed, more NPDES permits will need to be issued, more CAFOs will need to be regulated, more section 401 certification applications must be reviewed, and more TMDL calculations will need to be completed. (p. 8)

Agency Response: See Summary Response. See the Economic Analysis for costs/benefits and jurisdictional changes. The rule defines the scope of waters of the U.S. subject to the CWA. This rule will not affect the current implementation of the various CWA programs; implementation of those programs is outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Also, see summary response 12.3. See also Economics Analysis section 8 for a description of costs and benefits for the Section 402 program; summary response 12.2 for responses regarding 401 certifications.

12.131 There are many communities, primarily small towns, which employ lagoon treatment technology. They may find themselves facing new, more costly treatment requirements as, for the first time, they are found to be discharging to isolated ponds or dry arroyos/washes that are now considered jurisdictional. (p. 8)

Agency Response: See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, erosional features, and wastewater recycling features.

Michigan Association of Conservation Districts (Doc. #16583)

12.132 In several areas throughout the proposed rule, the terminology used is up to interpretation. For example, "ephemeral" should not be used as a definitive term, as there are different meanings of the word and those differences are creating a great deal of confusion. "Adjacent," "neighboring," "riparian areas," and "floodplain," and "other waters" are terms generally broad in scope, creating ambiguity and concern by those who believe the proposal reflects an expansion of jurisdiction. MACD requests that EPA and USACE specifically seek local input for the development of parameters, criteria, and defined standards for terminology within the proposed rule, including the above terms. (p. 2)

Agency Response: See Summary Response. The agencies recognize the importance of public input on the content of the rule. The agencies allowed for such input through public participation in the nationwide comment process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. Additional outreach efforts were extensive and included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others. This rule will increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. Refer to the "Tributary", "Adjacent Waters," and "Case-Specific Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, adjacent waters including neighboring waters and floodplains, and significant nexus determinations for case-specific waters. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. For example, the agencies considered scientific knowledge and literature regarding riparian areas in the formulation of the Adjacent Waters category; however, due to the difficulty in delineating the boundaries of riparian areas, the agencies determined that using riparian areas as a geographic limit of jurisdiction was too complicated for efficient implementation.

Oregon Association of Clean Water Agencies (Doc. #16613)

12.133 An area that ACWA would like to see addressed is the potential that certain defined terms may be read so broadly that limited resources could be squandered with no corresponding environmental benefit. For instance, Oregon ACWA sees benefit in making sure that the definition of "tributaries" is broad enough to allow local jurisdictions to provide adequate protection of waters that impact water quality, including the ability to regulate smaller drainage ways when appropriate. Oregon ACWA wants its members to have the ability, including regulatory tools, to fully implement the watershed approach that has been a focus in many Oregon communities. However, without some narrowing of the *"tributaries"* definition, there is a risk that inordinate amounts of regulator, permittee and developer time and effort will be spent on waters that have no impact on the health of the water environment. For instance, even if a scientific evaluation of a particular "tributary" (which arguably now may include ditches, canals, or culverts) would indicate that the water body has no impact on water quality, Oregon Department of Environmental Quality (DEQ) would perhaps be forced by a third party through litigation to add the "tributary" to the list of impaired waters in the state, require a use attainability study, identify designated beneficial uses, adopt site specific water quality objectives, apply numeric effluent limits, and work through a Total Maximum Daily Load allocation. The appropriate definition of tributary should drive smart decisions while avoiding illogical uses of limited resources. (p. 2-3)

Agency Response: **See Summary Response. See the tributary and ditch definitions in the final rule and discussions of those subjects in the preamble under the "Tributary" section and the "Waters and Features that Are Not Waters of the United States" section for discussion on tributaries and ditches. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule defines "tributary" by emphasizing physical characteristics created by water flow and requiring that the water contributes flow either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The agencies have found that ephemeral streams that meet the definition of "tributary" provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Therefore, the agencies do not agree that the rule would regulate waters that have no impact on water quality. See summary responses in Topic 8: Tributaries, including section 8.1.1 regarding the relevance of flow regime and the historical and proposed jurisdiction of ephemeral and intermittent tributaries. The final rule includes a revised and expanded exclusion for ditches. See summary response 6.2: Excluded ditches for**

further discussion. In terms of how CWA programs are implemented, the rule will not affect the current implementation of the various CWA programs, such as the water quality standards, TMDLs and permitting programs. Implementation of CWA programs is outside the scope of this rule.

Montana Association of Conservation Districts (Doc. #18628)

12.134 Many landowners do not see this clarification of WOTUS because the definition continues to include items that are on a case by case basis. For the waters where a case-by-case review is not needed, will a map be produced? How will an individual landowner determine which waters are WOTUS? If a landowner has to submit a permit, will the costs be reasonable? How can landowners request a permit and receive feedback in a timely manner? How will the self-verification process work? Does NRCS have a role in the determination of the 50+ practices regarding certification? (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies do not have the authority to map all waters of the U.S.; jurisdictional determinations are provided at the request of a landowner. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. The Interpretive Rule for conservation practices under 404(f)(1)(A) has been withdrawn, per Section 112 of the Consolidated and Further Continuing Appropriations Act of 2015. The remaining comments are outside the scope of this rulemaking effort.

12.135 MACD is concerned by the lack of early-on participation in the rulemaking process by the Army Corps of Engineers, as they are the agency that will be enforcing any changes to the definition of WOTUS. MACD has already seen variations in interpretation of the law from different Army Corps of Engineer employees, as Montana is located in two CoE districts. The rulemaking process highlighted WOTUS on a national scale. This will generate more landowner attention. Does the CoE have the staff to address what we expect to be a growing number of questions and concerns coming in? What will the response time be to these concerns? Are there any efforts afoot to improve response times? MACD recommends that the rule include a timeframe for the CoE to act on an application in a reasonable amount of time. Will the Corps be able to use local and state regulators as qualifiers/approvers for projects? (p. 2)

Agency Response: See Summary Response. The agencies recognize the importance of public input on the content of the rule. The agencies adequately allowed for such input through public participation in the public notice and rulemaking process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. Additional outreach efforts were extensive and included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others. The agencies

believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Georgia Municipal Association (Doc. #14527.1)

12.136 During recent presentations about the rule, EPA staff have stated projects "will be reviewed on a case by case basis jurisdictionally". When presenting information about the proposed rules to city officials, EPA representatives have indicated that "this is what we *think* will be covered", "we don't see that as being a scenario", or "we *anticipate* the rule will ... " If EPA staff do not have a clear understanding of the terms and requirements in the rule, how can GMA provide guidance to cities to inform them of their responsibilities if the rule is implemented as written? This does not provide local officials with any clarity over the current process, and the rules could easily be interpreted to significantly expand the definition of Waters of the U.S. (p. 3)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

12.137 If ditches, curbs, gutters, and other system components throughout Georgia are jurisdictional, GMA is concerned that the Corps simply does not have enough manpower

to review and make a determination for these facilities throughout the state. Significant delays are inevitable. (p. 3)

Agency Response: **See Summary Response. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. See the updated Economic Analysis for additional discussion on costs/benefits. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures.**

12.138 The proposed rule will result in the loss of local control over home rule authority to maintain, improve, and construct new facilities. GMA and city leaders throughout the state are strongly supportive of the protection of water quality, public health, and the environment. Cities have demonstrated diligence in protecting bodies of water, streams and rivers. Cities try to be environmental leaders by following regulations, providing training and certification for public works officials, and engaging in innovative designs that are environmentally sensitive. Many cities are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. Georgia's local public works officials engage in best practices, working through professional organizations such as the Georgia Association of Water Professionals and Georgia Rural Water Association. *Unfortunately,* the Corps and EPA did not engage any of the states or local providers, the experts on the ground about how to fix these rules. (p. 4)

Agency Response: **See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures. The agencies recognize the importance of public input on the content of the rule. The agencies adequately allowed for such input through public participation in the nationwide comment process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. Additional outreach efforts were extensive and included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water**

allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

12.139 GMA believes that the ambiguous terms in the proposed rule will result in more ditches, channels, conveyances, and treatment approaches being federally regulated. The outcome will be significant delays in completing projects, increased project costs, and the burden to pay will fall to the rate payers and taxpayers. (p. 5)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion on predicted change in jurisdiction and costs/benefits. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as stormwater control features, ditches, and wastewater recycling structures. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public, including refinement and expansion of the features excluded from jurisdiction. It is important to note that unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8) waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b).

12.140 **Section 303 WQS** – Under the proposed rule, if a ditch is considered a Water of the United States, then a sanitary sewer overflow to a dry ditch could create an enormous burden on the local utility. CWA regulates TMDL's and discharges to the Waters of the United States. Currently, if a system has an overflow reaching a stream it is required to follow protocol procedures in clean up and notification, and if significant a consent decree will be issued by state regulators. The protocol requires sampling and monitoring for an extended period of time, which is costly but usually easy to perform. If the overflow goes to a dry ditch but does not reach the stream, what new or additional requirements would the local provider be subject to if the proposed rule is adopted? If the proposed rule is adopted, what COE permit would be required in this case, how long would it take to address the spill in a dry ditch, and what parameters would be required for sampling and for and how long? Remember that to excavate the ditch would involve off-fall of dredging. (p. 8)

Agency Response: See Summary Response. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, ditches, and man-made stormwater conveyances. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches will remain in effect, when applicable. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

12.141 (…) does curb and gutter (flow), which contributes a significant amount of flow to receiving tributaries, now become a nexus and become Waters of the United States? It sounds a little far-fetched, but when you consider the volumes of flow contributing to wetlands, estuaries and tributaries, it questions where the proposed rule starts and stops with adjacent contributing factors. (p. 9)

Agency Response: **Please see Summary Response.**

12.142 [Regarding existing floodplains] Under the proposed rule, the floodplains could and in many cases would be redefined. Local government has spent an enormous amount of effort, time, and funds mapping and engineering floodplain management programs. Potentially building codes would have to be modified and land use in many cases be redefined. (p. 9)

Agency Response: **See Summary Response. Refer to the "Adjacent Waters" section of the proposed rule and preamble for further information and clarification on the use of floodplain information in making determinations of jurisdiction. Floodplain, as used in the final rule, applies only to the Clean Water Act definition of waters of the U.S. and as such, the agencies do not anticipate impacts to other local, state, or federal floodplain management programs. The agencies intend to utilize available floodplain mapping and floodplain determination methodologies for use in making jurisdictional determinations, including the FEMA 100-year flood risk zone maps as discussed in the preamble.**

12.143 A bigger question for the legal arena is how does the federal rule change affect USEPA getting into local land use regulating? (p. 10)

Agency Response: **See Summary Response. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the final rule. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

Waters Advocacy Coalition (Doc. #0851)

12.144 The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the section 402 National Pollutant Discharge Elimination System permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load programs. The EPA and the Corps (together, the agencies) have not truly considered the complicated implications that this proposed rule will have for the various CWA programs.

Although the EPA's Economic Analysis purports to analyze the costs of importing this "waters of the United States" definition into other CWA programs, the analysis largely focuses on the section 404 program and essentially concludes that there will be no additional costs for other CWA programs. This cursory analysis is inadequate. The agencies have not considered, for example, that many stormwater ditches and features may now meet the definition of "waters of the United States," thereby requiring the features to achieve water quality standards, including numeric effluent limitations. The agencies have not looked at how this type of change may create confusion over whether an NDPES permit is required for certain features or may place an increased burden on states administering stormwater programs and setting water quality standards. The EPA and the Corps have not truly considered how the proposed rule may affect the states implementing the various CWA programs or the stakeholders regulated by these programs. Nor have the agencies analyzed how the proposed definition of "waters of the United States" will affect their own administration of each of the CWA regulatory programs.

Because the agencies have not fulfilled their obligations to consider the implications to the various CWA programs, it falls to the public to address these implications in comments so that these issues are fully addressed by the agencies during the rulemaking process. Analyzing these implications is complicated, will require additional time, and, therefore, warrants an extension of the comment period. (p. 3)

Agency Response: **See Summary Response. See updated Economic Analysis for the final rule. The agencies recognize the importance of public input on the content of the rule. The agencies adequately allowed for such input through public participation in the notice and comment rulemaking process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. The agencies believe the final rule increases CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The rule defines and clarifies the scope of waters of the U.S. under CWA regulation, and revised definitions and exclusions in the final rule provide greater certainty to the regulated community and states and tribes implementing CWA regulations. The rule does not change existing CWA regulatory requirements for the various CWA permit programs. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For example, stormwater conveyance features constructed in dry land would not be jurisdictional. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations; however, the rule imposes no direct costs, but each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. The economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and**

the Economic Analysis document for details on the estimated indirect costs and benefits of the rule. Several sections of the Economic Analysis describes the costs and benefits for the non-404 CWA programs.

U.S. Chamber of Commerce (Doc. #2607)

12.145 Expanding the definition of "Waters of the U.S." will affect a wide variety of related permitting requirements, definitions, and CWA programs, and is likely to have a significant impact on an extensive range of current land uses affecting cities, counties, industries, and commercial interests of all sizes. (p. 2)

Agency Response: See Summary Response. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the final rule. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. under other provisions of the CWA which require authorization. In addition, the final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including the longstanding permitting exemptions in the CWA for farming, silviculture, and ranching. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

Greater North Dakota Chamber (Doc. #10850)

12.146 With the incredibly cyclical, unpredictable and ferocious nature of North Dakota's wet and dry season, expanding the definition of WOTUS would be damaging, difficult to track and highly impractical. The EPA would have jurisdiction over areas that are wet during some months, but dry during others. This impacts North Dakota's agricultural sector as farmers, ranchers and others who utilize the land will be unable to perform critical functions for fear of violating the Clean Water Act. (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and

certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1), including those for normal farming activities, will be modified as a result of this rulemaking. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

Northern Kentucky Chamber of Commerce (Doc. #13116)

12.147 The use of "significant nexus" is a vague term and offers minimal guidance to the agencies tasked with defining and enforcing the rule. The Commonwealth of Kentucky is managed by four separate US ACE districts. The lack of consistency and broad range of interpretation of the "404" program adopted for defining "waters of the US" is sufficient example to our members that there is not enough certainty in the proposed rule regarding the definition of these "waters." (p. 1)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

U.S. Chamber of Commerce (Doc. #14115)

12.148 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. (p. 8)

Agency Response: **Please see Summary Response.**

12.149 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. (p. 8)

Agency Response: **See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as ditches, stormwater control features, and water-filled depressions created in dry land incidental to construction. See the preamble for further discussion on the ditches that are not considered "waters of the U.S." The agencies believe the exclusions in the rule are comprehensive and note that the exclusions are applicable to all Clean Water Act programs. See the activity exemptions under section 404(f)(1) of the Clean Water Act regarding exemptions for certain maintenance activities. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

12.150 *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.[18] 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. (p. 19)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the**

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

scope of "waters of the United States" protected under the Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Previously issued permits and/or authorizations are unaffected by this rule. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

12.151 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 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.[19] (p. 21-22)

Agency Response: **See Summary Response. See the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and stormwater control features. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

John Deere & Company (Doc. #14136)

12.152 Continued progress is potentially compromised by the proposed rule which will discourage farmers and ranchers from employing new technologies that enhance productivity and reduce environmental impacts. (p. 1)

Agency Response: **See Summary Response. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public. See the preamble section "Waters and**

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

Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and stormwater control features. See the activity exemptions under section 404(f)(1) of the Clean Water Act regarding exemptions for certain activities; the exemptions included in 404(f)(1) are not being affected or modified by this rule. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

12.153 The agencies' proposed definitions for the terms: *tributary, adjacent waters, neighboring, riparian area,* and *other waters* lack sufficient clarity and, as such, significantly risk the expansion of jurisdictional waters on land over which CWA authority will be exercised. A determination that an area is a "water of the United States" immediately subjects that area to a number of legally-binding requirements. Enlarging the universe of what is considered jurisdictional under the CWA, and expanding the areas subject to the numerous programs, permits, and liability associated with such a classification, will introduce regulatory confusion, uncertainty and delay into the planting, cultivating and harvesting of crops, construction, forestry, golf and turf activities throughout the country. (p. 7)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Also see the activity exemptions under section 404(f)(1) of the Clean Water Act regarding exemptions for certain activities. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule and preamble each contain important information responsive to this comment.**

12.154 Broadening the Definition of WOTUS will Create Uncertainty and Delays for Ongoing Operation of Manufacturing Facilities and Future Expansion

The analysis of several manufacturing facilities suggests the proposed definitions will result in additional acreage falling within the jurisdictional waters of the United States. Depending on the facility's location, the additional acreage will likely fall under one or more of the proposed definitions for tributary, adjacent, neighboring, riparian, floodplain or other waters definitions.

As outlined above, under the proposed definitions, it is hard to imagine any parcel of land not containing a jurisdictional water or affecting one. If a land feature isn't a *tributary*, it might be part of a system indirectly draining to a *tributary*, or be *adjacent* to or *neighboring* a *tributary* or other jurisdictional water or otherwise be part of a group of lands in a watershed that together significantly affect a water of the U.S. It is the uncertain and potentially unlimited nature of the proposed definitions, where very few limits exist, that causes concern. Although the agency exempts ditches "that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," there are very few instances where a ditch on a developed site would qualify for this exemption.[20] Logistically, it is rare that a ditch drains to nowhere. On most sites, drainage ditches are by design connected to drainage systems so that the site drains effectively. Since the definition of tributary categorically claims everything connected to tributary, then all developed ditch systems will be categorically labeled waters of the United States if the drainage leaves the site and connects to any drainage system that eventually reaches a water of the US.

Our manufacturing facilities plan the development of sites, building and infrastructure years in advance, and these plans are incorporated into a Factory Master Plan. The increased acreage subject to the agencies' regulations under the proposed definitions is significant and will likely impact manufacturing operations, creating potential operational delays, limiting use of *access* ways and creating limitations on future factory expansions and Factory Master Plans. (p. 13)

Agency Response: **See Summary Response. See the updated Economic Analysis for additional discussion on predicted changes to jurisdiction. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, and excluded features such as certain ditches and stormwater control features. Refer to the "Adjacent Waters" section of the proposed rule and preamble for further information and clarification on adjacency and neighboring waters. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies only have authority to regulate "waters of the U.S." and are not regulating all land. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. The final rule includes specific characteristics that a landscape feature must meet in order satisfy the definition of "tributary" in paragraph (b) of the rule, including bed and banks and ordinary high water mark. The final rule excludes many ditches, including those ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary, and excluded ditches cannot be**

[20] 79 Fed. Reg. 22, 193 (April 21, 2014).

claimed as jurisdictional tributaries even if they meet one of the categories of jurisdictional waters under paragraph (a) of the final rule. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches is not affected by this final rule.

12.155 Service Roads and Normal Manufacturing Operations Near Wetlands. Some facilities will face increased jurisdiction because of their proximity to wetlands on or near the site. Any ditch contributing flow to these waters - directly or indirectly- becomes a *tributary* and its use and management is regulated, sometimes requiring permits. Property at elevations comparable to these wetlands could also be regulated if they are subject to minor flooding or have shallow subsurface connections. Again, working with the Corps, companies complete delineations to define the boundaries of jurisdictional waters, and create certainty that can support decisions regarding standard upgrades to facilities for regular operation.

In some facilities, projects such as building a loading dock and levelling a soil pile to reduce erosion have been reviewed by the Corps. They are not subject to jurisdiction under the current definitions. Under the proposed definitions, these same areas may be subject to CWA regulation, thus requiring permits and the potential for denial. (p. 14)

Agency Response: **See Summary Response. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries and ditches. The final rule includes specific characteristics that a landscape feature must meet in order satisfy the definition of "tributary" in paragraph (b) of the rule, including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The final rule excludes many ditches, including those ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary, and excluded ditches cannot be claimed as jurisdictional tributaries even if they meet one of the categories of jurisdictional waters under paragraph (a) of the final rule. The Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches is not affected by this final rule. The agencies only have authority to regulate "waters of the U.S." and are not regulating all land. The rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.156 (…) the impact on many manufacturing facilities is likely to include increased:

1. Acreage subject to regulation;
2. Challenges to making improvements when ditches are reclassified as *tributaries* or linear wetlands, resulting in increased costs and facility project delays; and,

3. Challenges in the form of delays and uncertainty to factory master planning processes when agency review becomes a necessary process step in the identification of regulated waters. (p. 15)

Agency Response: **See Summary Response. See the Economic Analysis for additional discussion on changes in jurisdiction. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries and excluded features such as certain ditches. The excluded ditches include ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary, and such excluded ditches cannot become jurisdictional even if they meet one of the categories of jurisdictional waters under paragraph (a) of the final rule. The final rule includes specific characteristics that must be met in order for a water feature to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.**

12.157 The proposed rule will directly and negatively impact both the golf and landscape industry by expanding jurisdictional waters to areas on or adjacent to new and existing golf courses and landscapes. Golf course and landscape managers would need to follow a federal permitting process under section 402 and 404 that were not previously required.

Under section 404, permits are required for the discharge of dredge and fill material into WOTUS. Golf courses would now be required to obtain new delineations and costly hydrologic evaluations to construct drainage, landscape features, grassy bio-swales, bridges and channelized areas, erosion control, culverts and other landscape features. The addition of expanded jurisdiction on golf course would also require more section 402 permits for the application of fertilizers and pesticides. In both cases, golf course superintendents and groundskeepers will face uncertainty on what land and ditches may be covered, halting routine maintenance and future development. (p. 15)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies only have authority to regulate "waters of the U.S." and are not regulating**

all land. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. Refer to the rule text and the "Tributary," "Adjacent Waters," "Case-Specific Waters," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, adjacent waters, case-specific waters, and excluded features such as certain ditches, artificial lakes and ponds, and stormwater control features. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Pennsylvania Chamber of Commerce and Industry (Doc. #14401)

12.158 Unless the EPA and the Corps' address uncertainty about how the key terms of this proposal are going to be defined and interpreted, it is apparent that additional waterways, such as those in a ditch, impoundment or stormwater conveyance, would be subject to an impairment designation. Such a designation would not only trigger burdensome permitting and regulatory requirements for nearby point and non-point source discharges, but state and federal regulators would have to devote additional staff time to developing and enforcing a TMDL for the waterway. (p. 3)

Agency Response: See Summary Response. Refer to the rule text and the "Tributary," "Impoundments," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, impoundments, and excluded features such as ditches and stormwater control features. The rule defines and clarifies the scope of waters of the U.S. under CWA regulation, and revised definitions and exclusions in the final rule provide greater certainty to the regulated community and states and tribes implementing CWA regulations. This rule will not affect the current implementation of the various CWA programs such as the TMDL and permitting programs, which is outside the scope of the rule; implementation of CWA programs is outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For instance, many ephemeral and intermittent ditches, and stormwater conveyance features and a number of other waters constructed in dry land, are excluded from waters of the U.S. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.

12.159 This rule could also hamper the development of electric transmission and oil and gas pipeline infrastructure. As the events of the recent polar vortex showed, the regional grid is in need of more natural gas infrastructure and electric transmission lines. EPA's own Clean Power Plan expects that more natural gas will be consumed at power plants for

electric generation – which cannot happen in Pennsylvania and PJM's competitive generation market without additional gas infrastructure to economically deliver gas to market. The regional grid is also in need of upgraded infrastructure to more efficiently deliver power to the market. But this proposal would expand the definition of environmental features subject to various permitting requirements, including Section 404, adding to both time and cost for these vital projects at a time when such infrastructure could not be more needed. (p. 3-4)

Agency Response: **See Summary Response. See the Economic Analysis for additional discussion on changes in jurisdiction. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.**

Georgia Chamber of Commerce (Doc. #14430)

12.160 The WOTUS rules will cause most of the highway stormwater infrastructure of city, county, and state governments in America to be subject to permitting under Section 402 of the CWA. The WOTUS rules will also cause most of the cities, counties, and states to have to acquire Section 404 CWA permits for new highway ditches or expansions of existing ones. The WOTUS rules may cause property owners who want to build a house on an acre of land next to a county highway to have to get a Section 404 permit before installing a 12-inch culvert for a driveway across the county's ditch. (p. 47)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, and excluded features such as certain ditches, and stormwater control features. The excluded ditches include ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary, and excluded ditches cannot become jurisdictional even if they meet one of the categories of jurisdictional waters under paragraph (a) of the final rule. Stormwater control features that are constructed to convey, treat, or store stormwater that are created in dry land are excluded. The final rule includes specific characteristics that a water feature must have in order to**

meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions, including the Clean Water Act 404(f)(1)(C) exemption for maintenance of irrigation and drainage ditches, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

California Building Industry Association et al. (Doc. #14523)

12.161 Despite the assertion in the preamble of the Proposed Rule, its provisions will not increase clarity and efficiency in the regulatory program but simply push disputes, uncertainties, costs, and inevitable litigation into the permit context (p. 4)

Agency Response: See Summary Response. See the Economic Analysis for additional discussion on changes in jurisdiction. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

12.162 Commenters object to the inclusion of "man-altered, or man-made water" in the definition of by-Rule jurisdictional tributaries. Frequently as a means of compliance with the CWA or state water quality laws, regulations, or mandates, development interests or other land use entities will create a feature for water cleansing purposes that would never have existed but for that intervening activity. To render that water-quality-fostering feature now subject to full regulation under the CWA actually sets up a *dis*incentive for natural water quality best management practices in favor of manufactured, artificial means that require increased cost and maintenance and displace "natural" features and processes with artificial ones. (p. 19)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary" and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, and excluded features such as certain ditches, stormwater control features, and other types of man-made features. Stormwater control features that are constructed to convey, treat, or store stormwater that are created in dry land are excluded. The agencies received many helpful comments on the proposed rule

which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to CWA programs were reduced or eliminated. The rule is intended to avoid disincentives to the environmentally beneficial trend in green infrastructure stormwater management practices.

Corporate Environmental Enforcement Council, Inc. (Doc. #14608)

12.163 Many of CEEC's members routinely rely upon CWA 404 permits for construction activities involving impacts to waters of the U.S. and CWA 402 permits for discharges associated with their operations. With the expansion of CWA jurisdiction under this Proposal, many more water features, including impoundments, geographically isolated wetlands and drainage ditches, will now be subject to federal jurisdiction. And as described above, the outer limits of jurisdiction remain poorly defined. As a result, CEEC's members will face new permitting obligations, together with new compliance and enforcement risks associated with unclear regulatory expectations. (p. 10)

Agency Response: See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. See the Economic Analysis for additional discussion on changes in jurisdiction. Refer to the "Tributary," "Adjacent Waters," "Impoundments," "Case-Specific Waters," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries, adjacent waters, impoundments, case-specific waters, and excluded features such as certain ditches. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

12.164 The Proposal cuts across multiple regulatory programs and thus its ambiguities and risks will be compounded.

The CWA's *single definition* of "waters of the United States" applies not only to CWA 402 and 404 permitting, but also a host of other CWA programs (water quality standards, TMDLs, 401 water quality certifications). Beyond the CWA, it also dictates which facilities must develop spill prevention, control and countermeasure plans and/or facility response plans (SPCC/FRP), and whether/when spills and releases must be reported under the Oil Pollution Act, Emergency Planning and Community Right-to-know Act, and the Comprehensive Environmental Response, Compensation and Liability Act. Moreover, due to the expected increase in jurisdiction if the rule is finalized as proposed, there will be a rise in permitting obligations, which will implicate additional consultation requirements under the Endangered Species Act and impact analyses under the National Environmental Policy Act. In short, the risks and uncertainties that we have identified in the Proposal ripple across the CWA and beyond. Thus, it is essential that the Agencies

carefully define the key terms in the rulemaking using rule language that is clear and simple, properly bounded, and suitable for consistent implementation in the field. (p. 11)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.**

New Mexico Association of Commerce and Industry (Doc. #14638)

12.165 In the Proposed Rule, EPA and the Corps propose a new approach to determine what "waters" are subject to jurisdiction under the Clean Water Act. The science underlying this proposal was developed in Eastern states that receive far more precipitation and is not generally applicable to the arid west, where environmental conditions are very different. As a result, the proposed approach defies common sense by regulating vast areas of desert lands and dry features in states like Arizona and New Mexico on the premise that they are actually "waters" or have the required "significant nexus" to a downstream traditional navigable water.

… Reviewed under this standard, the Proposed Rule cannot be legally justified, at least as it would apply to the arid west. The Proposed Rule regulates all "tributaries," defined as features that have a bed, banks, and ordinary high water mark and which contribute flow (however minimal or infrequently) to waters that are traditionally regulated under the Clean Water Act, and deems all features meeting these criteria to have the "significant nexus" required for jurisdiction no matter how minimal the actual chemical, physical, and biological impact. Such a "per se" approach reduces the Supreme Court's requirement of a significant nexus, rather than any minimal nexus, to a nullity, and flies in the face of the

basic tenet of administrative law that agency decision-making must be supported by substantial evidence on a case-by-case basis. (p. 1-2)

Agency Response: **See Summary Response and Technical Support Document for a summary of the legal and scientific basis for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary," "Significant Nexus Conclusions," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries including per se significant nexus for tributaries, and information on excluded features such as certain ditches and erosional features. The final rule includes specific characteristics that a water feature must have in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

12.166 Whatever the merits of the Proposed Rule in other parts of the country, it ignores the unique features of arid landscapes that render this approach scientifically invalid. The Proposed Rule does properly consider the fact that many watersheds in the arid west are characterized by a combination of highly erodible soils and infrequent precipitation events. Under these conditions, what is erroneously treated as the "ordinary" high water mark of a particular feature may, in fact, have been formed by a single event in the distant past and does not bear any relationship to where water may flow in the future. Indeed, the Corps' own research demonstrates that the presence of an "ordinary" high water mark in the west bears no relationship to present or future flows. Thus, rather than being an indicator of equilibrium conditions – as is the case in more humid environments – the "ordinary" high water mark may be produced by extraordinary events. Accordingly, the Agencies' proposed approach, applied on a "per se" basis and never subject to case-specific documentation of the required significant nexus, will result in a broad regulatory overreach when used to define regulated "waters" in the arid west. (p. 2)

Agency Response: **See Summary Response and Technical Support Document for a summary of the legal and scientific basis for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary," "Significant Nexus Conclusions," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries including per se significant nexus for tributaries, and information on excluded features such as certain ditches and erosional features. The final rule includes specific characteristics that a water feature must have in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The ordinary high water mark manuals developed by the Corps provide for the appropriate indicators to consider when determining the ordinary high water mark in the field. Such indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The manual for the arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of such waters in the arid West. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

12.167 In addition, desert features meeting the proposed criteria typically lack regular flow, and as a result do not impact the chemical or biological integrity of receiving waters. In many cases storm water seeps into the dry ground rather than flowing downstream, so these so-called "tributaries" contribute no flow to downstream waters at all – meaning there is no physical connection that would establish jurisdiction under the Clean Water

Act. Finally, the Proposed Rule seeks to regulate "tributaries" while exempting "gullies" and "rills," but the application of the proposed criteria in the arid west provides no way to distinguish between jurisdictional and non-jurisdictional features. (p. 2)

Agency Response: **See Summary Response and Technical Support Document for a summary of the legal and scientific basis for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary," "Significant Nexus Conclusions," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries including per se significant nexus for tributaries, and information on excluded features such as certain ditches and erosional features. The final rule includes specific characteristics that a water feature must have in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The ordinary high water mark manuals developed by the Corps provide for the appropriate indicators to consider when determining the ordinary high water mark in the field. Such indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The manual for the arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of such waters in the arid West. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

12.168 The Proposed Rule attempts to create uniform national standards that do not account for the very significant differences between tributary systems in the arid west and other parts

of the country that receive significantly more precipitation. The Proposed Rule attempts to justify this flawed approach throughout the arid west by relying on a single river system, the San Pedro River in Arizona, which is unrepresentative of arid west water bodies. In fact, the only justification the Agencies offer for relying on the San Pedro is that it is "heavily studied," which cannot be a sensible basis on which to base the regulation of an entire region when nearby watersheds that have demonstrably different geological characteristics and flow regimes. The consequence is that vast areas of dry land in the desert will be regulated as "waters," a substantial overreach by EPA and the Corps and one that will have significant impacts on the regulated community in the arid west, subjecting them to substantial burdens that will far exceed those experienced in other parts of the country. EPA and the Corps can and should do better, and should limit their new regulations to features that are actually documented by substantial evidence to be "waters" in some scientifically meaningful sense. (p. 2-3)

Agency Response: **See Summary Response and Technical Support Document for a summary of the legal and scientific basis for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary," "Significant Nexus Conclusions," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries including per se significant nexus for tributaries, and information on excluded features such as certain ditches and erosional features. The final rule includes specific characteristics that a water feature must have in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters.. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The ordinary high water mark manuals developed by the Corps provide for the appropriate indicators to consider when determining the ordinary high water mark in the field. Such indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The manual for the arid West acknowledges the challenges in identifying the ordinary high water mark in the**

region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of such waters in the arid West. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Arizona Chamber of Commerce and Industry (Doc. #14639)

12.169 The science underlying this proposal was developed in Eastern states that receive far more rain and is simply not applicable to the arid West, where hydrologic drainage conditions are very different. The proposal to extend jurisdiction to all ephemeral tributaries no matter how small or remote from traditional navigable waters would have a disproportionate impact on states such as Arizona that have vast areas of desert lands characterized by sparse vegetation, highly erodible soils, and infrequent, but high intensity, rain events. These conditions result in numerous erosional features, such as small dry desert washes and arroyos that crisscross the desert landscape. Although these erosional features would seldom if ever contribute flow to a traditional navigable water, the proposed rule appears to suggest that the mere presence of bed and banks and ordinary high water mark is sufficient evidence of flow to extend jurisdiction to even ephemeral drainage features in arid landscapes. (p. 2)

Agency Response: **See Summary Response and Technical Support Document for a summary of the legal and scientific basis for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Refer to the "Tributary," "Significant Nexus Conclusions," and "Waters and Features that Are Not Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries including per se significant nexus for tributaries, and information on excluded features such as certain ditches and erosional features. The final rule includes specific characteristics that must have in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. These parameters ensure that only certain water features qualify as a tributary and are jurisdictional by rule. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The science demonstrates that all tributaries have a significant nexus when considered individually or in combination with other tributaries to the (a)(1) to (a)(3) waters. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in**

implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The ordinary high water mark manuals developed by the Corps provide for the appropriate indicators to consider when determining the ordinary high water mark in the field. Such indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The manual for the arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of such waters in the arid West. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Indiana Cast Metals Association (Doc. #14895.1)

12.170 The proposed rule would impose significant negative impacts on metalcasting operations. Those limited areas not included in the definition of "waters of the U.S." (such as the site of metalcasting operations) are likely to conduct routine activities that could affect the surrounding "waters of the U.S." and therefore, be subject to CWA jurisdiction. For example, moving dirt, mowing grass, applying or using chemicals, storing metals, or most any industrial activity could result in a potential discharge of a pollutant into a "water of the U.S." and trigger the need for a federal permit. This could include water quality standards, total maximum daily loads (TMDLs), oil and spill prevention programs, NPDES permits, stormwater discharges, and dredge and fill permits. (p. 3)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, water quality standards or Section 311 requirements which require authorization. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and stormwater control features. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, including certain maintenance activities, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. See 33 CFR 323.2 for further definition on "fill material" and the "discharge of fill material."

Golf Course Superintendents Association of America et al. (Doc. #14902)

12.171 As we note, golf course superintendents are required to manage storm and runoff water in the course of conducting their businesses. The proposed rule will impose federal CWA

regulation to features that are constructed and used pursuant to other federal, state or local restrictions or programs. Golf course superintendents also conduct activities and operations that are likely to cross or impact ephemeral drainages and ditches (i.e., erosion control, drainage maintenance, agronomic practices) that are likely to cross or impact these things. In addition, golf course superintendents implement stormwater best management practices for controlling runoff from adjacent properties or on the golf course itself (i.e., biological BMPs, and channels for storage, filtration and/or irrigation). (p. 13)

Agency Response: **See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches, stormwater control features, and other types of man-made features. Stormwater control features that are constructed to convey, treat, or store stormwater that are created in dry land are excluded. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to CWA programs were reduced or eliminated. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

American Foundry Society (Doc. #15148)

12.172 The proposed rule would impose significant negative impacts on metalcasting operations. Those limited areas not included in the definition of "waters of the U.S." (such as the site of metalcasting operations) are likely to conduct routine activities that could affect the surrounding "waters of the U.S." and therefore, be subject to CWA jurisdiction. For example, moving dirt, mowing grass, applying or using chemicals, storing metals, or most any industrial activity could result in a potential discharge of a pollutant into a "water of the U.S." and trigger the need for a federal permit. This could include water quality standards, total maximum daily loads (TMDLs), oil and spill prevention programs, NPDES permits, stormwater discharges, and dredge and fill permits. (p. 9)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, water quality standards or Section 311 requirements which require authorization. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and stormwater control features. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, including certain maintenance activities, will be modified as a result of this rulemaking; therefore, existing procedures should not be**

further complicated by this rule. See 33 CFR 323.2 for further definition on "fill material" and the "discharge of fill material."

Cooperative Network (Doc. #15184)

12.173 A vast expansion of the Clean Water Act that would result in the additional regulation of countless acres of farm land and right-of-ways where pesticides are used. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is a comprehensive and effective regulatory program that is protective of human health and the environment, including the oversight of pesticide applications in areas today that would become a WOTUS based on the proposed changes to the definition. Expanding the definition of a WOTUS will subject cooperatives to Clean Water Act permitting to use pesticides in these areas that are currently excluded from Clean Water Act regulation in addition to FIFRA oversight. This is an unnecessary and wasteful use of private and government resources. (p. 2)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Many definitions for the first time are clarified. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion regarding changes in jurisdiction. The agencies are not affecting permitting mechanisms under this rule; this rule only defines "waters of the U.S." under the Clean Water Act and does not impact any permitting tools, such as general permits. The agencies disagree that the rule constitutes a vast expansion of the Clean Water Act. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. In addition, the CWA only regulates waters of the U.S., and has no jurisdiction over uplands. With respect the application of pesticides under NPDES and its relationship to FIFRA, please see summary response for Topic 12, section 12.3.

Council of Industrial Boiler Owners (Doc. #15401)

12.174 Around the time of this proposal, the federal government also released proposed rules under the ESA. The ESA prohibits federal government agencies from acting in ways that cause destruction or modification of habitats critical to a listed species. The two proposed rules greatly expand the territories that may be classified as critical habitat and restrict the activities, including permitting of discharges, that the government may undertake that would result in adverse modification of habitats.

The ESA rules and the waters of the US rule, combined, will result in greater jurisdiction over water and increased likelihood of ESA restrictions. With more federal jurisdiction over waters, the Agencies will need to consult with the Fish and Wildlife Services and the National Marine Fisheries Services (FWS and NMFS) when issuing permits. This could create additional delay in the permitting process and could result in permit denials and/or restrictions. At a time when many state and local agencies are facing resource constraints

in the implementation of their environmental and natural resource conservation programs, this proposed rule imposes additional administrative burdens on states. Complicating regulatory implementation at state and local agencies directly affects CIBO members by slowing the deployment of projects at their facilities. Slowing permitting and projects – particularly where the projects will have *de minimis* environmental impact – disserves the public, which benefits from CIBO members' contribution to the local, state, and regional economies. (p. 6)

Agency Response: **See Summary Response. The ESA rulemaking is beyond the scope of this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. See the updated Economic Analysis for additional discussion regarding changes in jurisdiction. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.**

Idaho Association of Commerce & Industry (Doc. #15461)

12.175 With changes in jurisdictional determinations, additional permitting may be required at mine sites relating to Section 311 oil spill prevention and response program; Section 401 state water quality certification process; Section 402 NPDES permit program; Section 404 permit program for the discharge of dredged or fill material into navigable waters and Section 303 requiring the application of water quality standards to these other waters. (p. 8)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The rule only provides a definition for**

"waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, water quality standards or Section 311 requirements which require authorization. None of the existing procedures, permitting mechanisms, efficient Section 404 permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

12.176 Increased permitting includes monitoring, reporting, and mitigation requirements, such as additional water treatment or, as is often the case, avoiding the jurisdictional area (e.g. cancel or move a construction project to avoid CWA issues). (p. 8)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion regarding changes in jurisdiction and potential costs/benefits associated with all CWA programs. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process.

McPherson Law Firm, PC (Doc. #16397)

12.177 (…) different Army Corps of Engineers districts interpret and apply the current rule differently. In my opinion, the proposed rule would not bring consistency to its application among these different corps districts, and in my opinion, it should. (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

12.178 In determining waters of the US in specific instances, I strongly recommend that those processes be the same for both the US COE and the EPA. Deadlines to make determinations should be identical between agencies, as well as safe harbors, so that the

regulated party is not subjected to uncertainty and risk of being penalized. I recommend the agencies revise the Memorandum of Understanding between them regarding CWA determinations, to provide identical protection to regulated parties. (p. 2)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. The tools necessary to assist with the jurisdictional determination process in the implementation of the final rule will be developed in order to make the process predictable, efficient, and effective. Certain Corps guidance documents, memorandums, etc., may require revisions or may be rescinded based on the final rule. Such documents will be identified by the Corps and appropriate action will be taken after the final rule is effective. The Corps will post public notices to ensure widest dissemination possible when changes occur.**

Association of Equipment Manufacturers (Doc. #16901)

12.179 AEM members are required to manage storm and runoff water in the course of conducting their businesses. The proposed rule will impose federal CWA regulation to features that are constructed and used pursuant to other federal and state regulatory programs. AEM members also conduct activities and operations that are likely to cross or impact ephemeral drainages and ditches. The agencies should meet with stakeholders and federal and state regulatory agencies to fully understand the implications on other federal and state regulatory programs and revise the rule to avoid duplication and conflicting requirements. (p. 4)

Agency Response: **See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches, stormwater control features, and other types of man-made features. Stormwater control features that are constructed to convey, treat, or store stormwater that are created in dry land are excluded. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to CWA programs were reduced or eliminated.**

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies recognize the importance of public input on the content of the rule. The agencies adequately allowed for such input through public participation in the notice and comment rulemaking process and the proposed rule was disseminated to the widest audience possible. The public notice comment period was extended twice to ensure sufficient time for comment by all interested parties. Additional outreach efforts were extensive and included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others. The agencies believe the final rule will increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

Water Advocacy Coalition (Doc. #17921.1)

12.180 The proposed rule applies the new definition of waters of the United States throughout *all* CWA programs, and will result in fundamental changes to those programs. The agencies have not considered the implications of this application. (p. 14)

Agency Response: See Summary Response and the Technical Support Document. See the updated Economic Analysis for additional discussion regarding changes in jurisdiction and consideration of the costs/benefits for all Clean Water Act programs. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. However, the rule only provides a definition for "waters of the U.S." and does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, water quality standards, or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies have thoroughly considered the implications of the final rule on all of the CWA programs that rely on this definition, and the agencies, states and tribes responsible for implementing CWA regulations. The agencies disagree that the rule will result in fundamental changes to the CWA programs, and the rule does not change the existing regulatory requirements for the CWA permit programs. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. See the Economic Analysis document for further information about economic considerations for each program.

12.181 The agencies have stated that the proposed rule is necessary because "[t]he lack of clarity in Clean Water Act protection has made enforcement of the law difficult in many cases."[21] Again, this justification for the proposed rule was discussed in the agencies' outreach on the proposed rule, but not in the rule itself. And EPA "has struggled to identify specific examples of waters and wetlands that have not been protected as a result of confusion over the scope of the Clean Water Act . . . ."[22] Indeed, if the agencies are finding it difficult to point to specific factual instances involving specific drainage features, showing that a point source discharge into one feature is actually making it to a down-gradient water of the United States,[23] how can the agencies make a categorical finding of jurisdiction that the same feature has a significant nexus to traditional navigable waters, as they have done in the proposed rule? It is difficult to understand how the proposed rule's categorical assertions that all tributaries and adjacent waters have a significant nexus are anything more than "speculative" findings, when in the enforcement cases the agencies reference, the government could not present empirical evidence that such features have a significant nexus to downstream waters.[24] (p. 21)

Agency Response: **See Summary Response. Refer to Technical Support Document for a summary of the legal and scientific bases for the final rule. See the "Tributary," "Adjacent waters," and "Significant Nexus Conclusions" sections in the final rule and discussions of tributaries, adjacent waters, and per se significant nexus determinations for tributaries and adjacent waters in the preamble. Peer-reviewed scientific literature, case law, regulations, and agency expertise all support per se jurisdiction of all tributaries and adjacent waters. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark which would distinguish them from non-jurisdictional features. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus, individually or in aggregate, to the downstream (a)(1) to (a)(3) waters. The final rule has further refined the "neighboring" definition to provide additional clarity and "bright lines."**

[21] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (then go to "Why do a Rulemaking >Enforcement of the law has been challenging" hyperlink) (last visited Oct. 29, 2014) (citing examples in Lake Blackshear, Georgia, and San Pedro River, Arizona). (Doc. #17921.1, p. 21)

[22] Bridget DiCosmo, *EPA Struggles to Identify Cases to Bolster Rule Defining Water Law's Reach*, InsideEPA (May 22, 2014), *available at* http://insideepa.com/201405222471692/EPA-Daily-News/Daily-News/epastruggles-to-identify-cases-to-bolster-rule-defining-water-laws-reach/menu-id-95.html. (Doc. #17921.1, p. 21)

[23] Although EPA has cited two examples of enforcement actions where EPA found it too costly and time intensive to prove that the water was subject to CWA jurisdiction, *see* Watershed Academy Webcast Transcript, at 4-5, the fact that it was challenging for the agencies to put together the evidence to prove that the features were jurisdictional does not warrant expanding the scope of jurisdiction. Simply because asserting categorical jurisdiction over all wet features would make enforcement easier for the agencies does not mean that it is within the bounds of the agencies' CWA authority.

[24] *See* EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (then go to "Why do a Rulemaking >Enforcement of the law has been challenging" hyperlink) (last visited Oct 29, 2014) (citing examples in Lake Blackshear, Georgia, and San Pedro River, Arizona). (Doc. #17921.1, p. 21)

12.182 It is not surprising that EPA has struggled to find examples of waters and wetlands that have not been protected under the current CWA regulations because the CWA already provides a wide array of protections against the type of "midnight dumping" that the agencies are claiming to address through the proposed rule. The CWA contemplates all waters, including ditches (some as waters of the United States, some as point sources, some as collecting runoff), would be addressed differently by different actors with different tools – e.g., permits for point source discharges, permits for discharge of dredged or fill material, and basic planning by state and local agencies for nonpoint source runoff. The discharge of pollutants, fill, and oil or hazardous substances to waters of the United States, whether direct or *indirect*, is already illegal and enforceable under the CWA.[25] As the plurality noted in *Rapanos*, "the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos*, 547 U.S. at 743 (Scalia, J., plurality). The agencies do not need to call such conveyances waters of the United States to protect these features against such discharges of pollutants. The agencies have other ways to protect remote waters.[26] Indeed, the preamble recognizes the other regulatory mechanisms available under the CWA.[27] Moreover, many States and local governments have robust water quality programs. In addition, discharges to land are already regulated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*., and state hazardous waste laws, such as the California Health and Safety Code § 25100 *et seq*. The agencies do not need to treat all waters and features on a landscape as waters of the United States to protect them, much less to protect the traditional navigable waters ("TNWs") that are the focus of the Act. (p. 22)

Agency Response: **See Summary Response. Refer to Technical Support Document for a summary of the legal and scientific bases for the final rule. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Refer to the final rule language and preamble for categories of jurisdictional waters as well as excluded waters. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as certain ditches and stormwater control features. The agencies believe the exclusions in the rule are comprehensive**

[25] *See* 33 U.S.C. §§ 1311(a), 1321, 1342, 1344.
[26] *See e.g.*, 33 U.S.C. §§ 1342 (National Pollutant Discharge Elimination System); 1321 (Oil and Hazardous Substance Liability).
[27] 79 Fed. Reg. at 22,191 n.5.

and note that the exclusions are applicable to all Clean Water Act programs. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

12.183 States must set WQS for waters of the United States.[28] States typically develop WQS for general categories of waters, which may or may not cover the features and waters that are newly jurisdictional under the proposed rule. As a result of the rule, each State will be required to determine whether features previously not considered waters of the United States are now in fact waters of the United States, and then they must make assessments as to what, if any, existing WQS are applicable. Performing these tasks is very expensive and time-consuming.[29]

If States rely on their existing WQS for the newly jurisdictional features, they will have to employ similar uses and criteria to protect features that were not intended to be protected under those uses or criteria (e.g., a State could have to apply uses and criteria they set for "lakes" to newly jurisdictional ditches or industrial ponds for lack of a more applicable existing category). On the other hand, if States do not want to rely on existing State WQS, then they will have to develop new WQS for these types of features. This process would require baseline data gathering to determine appropriate uses for these newly jurisdictional features. The more waters that potentially are jurisdictional, the greater the costs to the States. For example, the proposed rule's assertion of jurisdiction over all waters within a floodplain or riparian area means that numerous features and waters that were previously considered isolated (and therefore not waters of the United States) would now be waters of the United States. All of these areas would need to be analyzed and addressed by States under the WQS/TMDL program.

A complete analysis of the impact of the proposed rule on the WQS program is even more critical in light of EPA's proposed rule entitled *Water Quality Standards Regulatory Clarifications*,[30] ("WQS Rule"). The WQS Rule (if finalized as proposed)

[28] 40 C.F.R. § 131.3(i).

[29] With respect to the section 303 WQS/TMDL program, after acknowledging that States and tribes incur costs developing, monitoring, and assessing WQS and TMDLs, the agencies state that it is their position that "an expanded assertion of jurisdiction would not have an effect on annual expenditures." Economic Analysis at 6; *see also id.* at 25 (describing the impact to the section 303 program as "cost neutral"). To support that conclusion, the agencies assert that States typically only develop WQS for general categories of waters, which currently cover the types of waters that would be jurisdictional under the proposed rule and which would not change. The agencies go on to concede that what could "change is whether or not those standards apply." *Id*. at 6. This concession undermines the agencies' conclusion that the impact of the proposed rule would be cost neutral.

[30] 78 Fed. Reg. 54,518 (Sept. 4, 2013)

would, among other things, create a rebuttable presumption that the highest uses specified in section 101(a)(2) (i.e., fishable, swimmable) of the CWA are attainable uses for any waters of the United States by default, thereby forcing State and tribal regulators to prove otherwise should they believe it appropriate. To rebut the presumption, a State must perform a burdensome use attainability analysis for waters it does not believe can meet the "fishable, swimmable" goal. Such a showing would create significant additional costs for States and tribes, assuming they would be unwilling to capitulate to the rebuttable presumption.[31] Given that the proposed rule seeks to encompass ephemeral streams and all manner of ditches not subject to the limited exclusions (as discussed above), the proposed rule in concert with the WQS Rule dramatically will increase WQS/TMDL program costs for States and tribes. None of this is discussed or evaluated by the agencies.

By way of example, under Kansas state law, ephemeral streams are not "classified" waters because the State "finds it wholly unnecessary and wasteful of limited state program resources to set WQS, issue wastewater permits, assess impairment, and develop TMDLs for surface drainage features that may have flowing or standing water no more than a few days each year."[32] EPA has approved Kansas's WQS, which do not designate uses or assign water quality criteria for ephemeral streams.[33] If, as proposed, ephemeral drainages are now considered waters of the United States, Kansas estimates an increase from 30,620 stream miles to 134,338 stream miles for which the State must set WQS and comply with other CWA requirements.[34] As the maps in Exhibit 9 demonstrate, that increase is dramatic.[35]

CWA section 305(b) requires States to submit a water quality report biennially that includes a description of the water quality of all waters of the United States in the State and an analysis of the extent to which they meet water quality goals. And under section 303(d), States are required to develop lists of impaired waters (waters that are too degraded to meet the WQS set by the State). For impaired waters, States must develop TMDLs, which are calculations of the maximum amount of a pollutant that a waterbody can receive and still safely meet WQS.[36] Any increase in jurisdictional waters for which WQS are developed necessarily triggers greater costs for States and tribes to monitor and assess whether these newly jurisdictional waters are meeting WQS.[37] Assuming they are not, the TMDL development progress is triggered at even greater costs.

[31] This is to say nothing of the additional costs the WQS Rule's highest attainable use showing will compel.
[32] *See* Comments of the Honorable Sam Brownback, Governor of Kansas, on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act, Docket ID No. EPAHQ-OW-2011-0409 (July 14, 2011) (attached hereto as Exhibit 16).
[33] Letter from Leo J. Alderman, EPA, Director, Waters, Wetlands, and Pesticides Division, to Roderick L. Bremby, Secretary, Kansas Department of Health and Environment (Nov. 3, 2003). (Doc. #17921.1, p. 80)
[34] *See* Exhibit 9.
[35] *See id.* at 11-12.
[36] 40 C.F.R. § 130.7.
[37] The agencies' suggestion that the TMDL process is cost neutral because EPA allows States and tribes to prioritize TMDL development and to develop TMDLs over time is misplaced. *See* Economic Analysis at 6. Prioritization and delay do not neutralize or somehow lessen the impact of additional costs – they only shift those costs to the future, which generally would result in the necessary activities costing more. Similarly unsupportable is the agencies'

As an example, the park ditch in Pinellas County, Florida, discussed and pictured in Exhibit 17, which provides no environmental or human benefits other than flood control, is not now considered to be a water of the United States, but would be under the proposed rule.[38] As noted above, EPA's WQS Rule would establish a presumption that the attainable use for this ditch is "fishable, swimmable" unless the State conducts an expensive and time-consuming scientific analysis to demonstrate that attaining that use is infeasible. Assuming the State did not have the resources to rebut the presumption, it could be forced to develop a TMDL for this ditch. Using current TMDLs for nitrogen and phosphorous as a gauge, the Florida Stormwater Association estimates that the cost to attain hypothetical "fishable, swimmable" uses in the ditch would be $31,351,460. While this example may seem extreme, it unfortunately falls comfortably with the scope of the proposed rule when viewed in light of other CWA program requirements.

In addition to flawed rulemaking, the agencies' casual dismissal of the impacts the proposed rule on States and their WQS/TMDL programs is troubling. The proposed rule's expanded waters of the United States definition would require the States to expend significant resources to satisfy its WQS/TMDL obligations, thereby straining the States' already limited resources. This process would require needless expenditure of large amounts of the public's tax dollars on newly jurisdictional features, such as ditches and ephemeral drainages, with little or no environmental benefit.

In addition to increased costs to comply with WQS and TMDL requirements, States and regulated entities would also be more vulnerable to third party litigation under the proposed rule. For example, in 2007, pursuant to a settlement agreement, the State of Missouri and EPA agreed that Missouri was not required to set WQS for its ephemeral waters. Despite EPA's approval, Missouri later had to defend its WQS against a third party. A group filed a citizen suit challenging Missouri's WQS, arguing that the standards did not meet the requirements of the CWA because they failed to designate uses and set water quality criteria for *all* of Missouri's waters.[39] The agencies and States face similar threats of litigation based on the additional WQS/TMDL obligations that the proposed rule will trigger. (p. 79-81)

<u>Agency Response:</u> See Summary Response. See the updated Economic Analysis for additional discussion. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as ditches, stormwater control features, wastewater recycling features, and water-filled depressions created in dry land. Refer to the "Tributary" section of the proposed

suggestion that in order to comply with the section 305 monitoring and report requirements, States and tribes typically just set a stagnant budget to implement these programs and then make do as best they can by continuing to spread scarce resources even thinner. *Id.* at 6-7. Even if this were true, it does nothing to change the fact that expanding CWA jurisdiction greatly impacts the scope of these programs and the costs of States and tribes meeting their obligations (particularly monitoring and reporting obligations). The agencies have failed to assess the impact of the proposed rule on these programs.

[38] *See* Florida Stormwater Association, Proposed Regulations on Waters of the United States: Preliminary Analysis, (attached hereto as Exhibit 17).

[39] *Missouri Coal. for the Env't v. Jackson*, No. 10-04169 (W.D. Mo. Feb. 16, 2012) (suit was filed against EPA and the State of Missouri intervened to defend its WQS).

rule and preamble for further information and clarification on tributaries. The final rule includes specific characteristics that must be met in order to meet the definition of "tributary," including bed and banks and ordinary high water mark. Refer to the "Adjacent Waters" section of the proposed rule and preamble for further information and clarification on the use of floodplain information in making determinations of jurisdiction based on adjacency. The agencies are not affecting permitting mechanisms under this rule; this rule only defines "waters of the U.S." under the Clean Water Act and does not impact any CWA permitting mechanisms, such as general permits or other applications of waters of the U.S. under the CWA.

American Society of Civil Engineers (Doc. #19572)

12.184 The American Society of Civil Engineers (ASCE) encourages Congress to reauthorize the Clean Water Act to protect our nation's waters and the beneficial use of those waters. The reauthorized Clean Water Act should:

- Aggressively address non-point sources of pollution from watersheds and point-source pollution from sanitary sewer overflows, combined sewer overflows, and storm sewer discharges.
- Address regulatory and best-practices guidelines to ensure a sustainable, comprehensive, cross media, and holistic approach to the protection of the nation's waters.
- Allow sustainable watershed management approaches that integrate water quantity and quality.
- Utilize the latest tools to develop regulations that are scientifically grounded, cost-effective, site appropriate, and flexible in providing for the use of innovative practices in protecting the beneficial uses of the nation's water, and flexible enough to allow innovative practices and means to achieve these goals.
- Provide meaningful information to the public about water quality in their communities.
- Include sunset provisions in regulations to ensure that existing regulations are reviewed and revised periodically. (p. 7)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits, water quality standards, or Section 311 requirements which require authorization. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule; this rule only defines "waters of the U.S." under the Clean Water Act. Congressional reauthorization, best management practices, watershed management approaches, innovative practices, and sunset provisions are outside of the scope of the rulemaking effort.

Minnkota Power Cooperative, Inc. (Doc. #19607)

12.185 As an electric utility, Minnkota can only conclude that this Proposed Rule will provide the Agencies with more options to use in determining whether or not federal jurisdiction and control of a given water body of feature is warranted. The Agencies authority to apply jurisdiction appears to be limitless. As a result of this proposal, most of the Red River Valley in North Dakota and Minnesota could possibly be designated as a wetland subject to the rule. This is of grave concern to us as NWP 12 may not be able to be used due to its size limitations. When emergency restoration of a transmission line is needed as a result of storm damage, the last thing we want to wait for is a permit. As a result, Minnkota could potentially be subject to increased enforcement, over-reaching permitting requirements, and untimely delays, resulting in additional expenditures of time and monetary resources. (p. 2)

Agency Response: See Summary Response. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The definition of wetland and the wetland delineation manuals are also outside the scope of this rulemaking effort and are not affected by the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion on predicted changes in jurisdiction. The Corps regulations define an "emergency" under the nationwide permit program as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(B) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."

Lundell Construction Company, Inc. (Doc. #2627)

12.186 If the NRCS is required to do the engineering and layout for maintenance of the waterways and terraces, there may be more erosion and pollution caused by the backload of work that the agency has already at this time. There is not enough trained and experienced engineers knowledgeable enough to engineer every conservation project or

drainage project which are being done today and every day. The current rules and regulations are sufficient for the soil and water maintenance and improvements. (p. 1)

Agency Response: **See Summary Response. NRCS wetland determinations are completed for a different purpose than the Clean Water Act, but are often reviewed when determining jurisdiction for the Clean Water Act. Only the EPA and the Corps, as well as applicable states and tribes, have authority to determine jurisdiction under the Clean Water Act. See the memorandum dated February 2005 entitled, "Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act," for further information. The agencies will continue to minimize duplication where possible while recognizing the differences in the purpose and statutory language of the laws. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The rule does not address soil and water maintenance and improvements thus this comment is outside of the scope of the rule.**

Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938)

12.187 Impermissibly and Unnecessarily Expands Federal Jurisdiction: Despite the Agencies' claims that this rule is narrower in scope than existing regulations, the proposed rule contains changes that will expand federal jurisdiction, triggering substantial and additional expensive and time-consuming permitting and regulatory requirements while delivering minimal environmental benefit. (p. 2)

Agency Response: **See Summary Response. See the updated Economic Analysis for additional discussion on predicted changes in jurisdiction. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.," consistent with Supreme Court precedent.**

12.188 Creates and Exacerbates Regulatory Confusion: The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer questions. The Agencies' claim that the proposed rule creates clarity and certainty is a fallacy because it only does so by illegally asserting jurisdiction over every possible wet feature. (p. 3)

Agency Response: **See Summary Response and the Technical Support Document. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies disagree that the rule would result in the assertion of jurisdiction over every wet feature. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded waters and features. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe this rule is appropriate in light of regulations, science, and case law. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The definition of wetland and the wetland delineation manuals are also outside the scope of this rulemaking effort and are not affected by the final rule.**

North Houston Association, et al. (Doc. #8537)

12.189 There has been a sea change in the approach to drainage and storm water management in the Houston area over the past several years. Houston is known as the Bayou City. The City, Harris County, and the drainage districts with authority over development in this region have begun to embrace a wide variety of low impact and green infrastructure as the best method to accommodate drainage. Houston has awoken to the fact that being the Bayou City gives it a unique corridor system for a wide range of desirable urban and suburban uses that both relies upon and promotes better water quality. Contemporary land development activities often produce storm water releases from the developed property that are better from a chemical and physical effect on the watershed than the vacant or undeveloped property condition. The goal of the CWA is to protect the chemical, physical, and biological integrity of the navigable waters. We must beware of a situation where by an overbroad assertion of the federal reach actually undermines the goals of the CWA and progress made in active water quality projects in the Houston region.

Certainly, throughout the Houston region this would be the result of the proposed rule. This must not be ignored, the steps – even for the simplest Nationwide Permit – are numerous, and the total time required must be counted in months in the best cases. Much of the drainage system is the responsibility of the public entities that must operate efficiently on the public resources. The continuing move to natural floodplains, with created tributaries utilizing techniques such as bio filter and bioswales, would then create under the proposed rule "navigable waters" for all future purposes, including maintenance or modifications. As a result of this proposed jurisdiction expansion, the green initiatives will come to a screeching halt. This is inherent given the realistic resources available to local governments.

Furthermore, we believe that the resulting land use patterns as affected by the proposed rule will ultimately not create a significant positive result on water quality for two reasons. First, land uses will default to conventional land planning practices (with storm water Best Management Practices), away from green approaches and habitat oriented features. Second, an avoidance scenario causes wetlands to be developed around (avoided) and almost completely isolated and removed from ecosystem. As a result, inclusion of isolated wetlands into the regulatory fold does not provide any appreciable benefit to the ecosystem or the public. So, either way, the functions and values of the wetlands, as theorized by the arguments in the rule making, are lost after a great expense of time and money.

The Environmental Protection Agency (EPA) should demonstrate how expansion of federal jurisdiction will significantly improve water quality when the rule is applied to the typical WGCP setting. The EPA should also demonstrate the real cost of the incremental water quality improvements (if any) from expansion of the jurisdictional reach into the WGCP. As stated above, we believe that the expansion of jurisdiction into the upper reaches of tributaries and into the isolated waters will not appreciably improve water quality of traditional navigable waters (TNW). The EPA should, in concert with the State and Counties, better refine and implement storm water quality processes, practices and procedures that are implemented under Section 402 of the CWA. We feel that the storm water program represents a better and more effective avenue for achieving real and affordable improvements to water quality within the contemplated zone of CWA jurisdiction expansion in the WGCP. (p. 2-3)

Agency Response: See Summary Response and Technical Support Document. See the updated Economic Analysis for additional discussion. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe this rule is appropriate in light of regulations, science, and case law.

Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as ditches, stormwater control features, and wastewater recycling features. The agencies disagree that the rule undermines the goal of the CWA or prevents low-impact or green infrastructure development. Stormwater conveyance features constructed in dry land are excluded from waters of the U.S. With respect to the jurisdictional status of stormwater control features, including green infrastructure, please see summary response at 7.4.4. in Topic 7: Features and waters not jurisdictional. The agencies also disagree that the rule results in jurisdictional expansion. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and includes provisions for a number of

excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.

The final rule will not regulate "isolated" waters and wetlands. Certain wetlands common to the Western Gulf Coastal Plain, Texas coastal prairie wetlands, must be evaluated in combination when making a case-specific significant nexus determination because they are "similarly situated," based on their close proximity and/or hydrologic connections to each other and the tributary network, their interaction and formation as a complex of wetlands, their density on the landscape, and their similar functions.

Land Improvement Contractors of America (Doc. #8541)

12.190 An on-the-ground problem we see with expanded CWA jurisdiction, in addition to exposure of private landowners to the full force of CWA enforcement, is that current, voluntary, incentive based practices could fall off the radar. The § 319 NPS Program is used to increase the utilization of agricultural BMP's such as buffer strips, conservation tillage, and nutrient management, as well as to implement low impact development and stormwater management practices to protect urban water quality. (p. 2)

Agency Response: See Summary Response. The agencies are not affecting permitting mechanisms under this rule; this rule only defines "waters of the U.S." under the Clean Water Act and does not impact any permitting tools, such as general permits. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded features such as ditches, stormwater control features, and water-filled depressions created in dry land. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The rule is consistent with voluntary, incentive-based programs, including the 319 Program, the use of agricultural BMPs, low-impact development, or other stormwater management practices.

The Elm Group, Inc. (Doc. #9688)

12.191 Based on the proposed new definition of "waters of the United States" the number of projects that will require Federal review/permits will increase substantially. The USACE/EPA should recognize and plan on processing these applications in a manner that minimizes the impact on the timelines of projects that the US economy relies on to provide continued growth and employment. (p. 2)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion on predicted changes in jurisdiction. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters.

The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

Shiels Engineering, Inc. (Doc. #13558)

12.192 We suggest that you let the existing definition stand and leave the application of it to Licensed Professional Engineers and Professional Geologists (Licensed Professionals) or those who meet the definition of Environmental Professional in accordance with 40 CFR §312.10 where each site or facility is assessed individually. The way I read your proposed rule change, the burden of assessment would be placed on US Environmental Protection Agency (EPA) or designated/delegated authorities (Agencies) rather than the Owner/Operator. As a former EPA contractor, I know all too well the challenge of enforcement and implementation by the Agencies. We at SE believe that the burden of assessment should remain in the hands of the Property Owner or Operator and not with the Agencies. (p. 1)

Agency Response: **See Summary Response. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. Consistent with the regulations, the agencies have been implementing this mission since the inception of the CWA. Only the EPA and the Corps, as well as applicable states and tribes, have authority to determine jurisdiction under the Clean Water Act. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with science, the existing regulations, and Supreme Court precedent. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.**

Hawaii Reserves, Inc. (Doc. #14732)

12.193 We understand that expansion of the Agencies' federal authority under the CWA would greatly increase the number of construction sites required to obtain building and other permits, which in turn, would delay or impede construction projects, aggravate the current backlog of permits, and further slow the process and increase costs causing project delays. As a proponent of more housing options for Hawaii, including affordable housing, we are concerned about significant negative market impacts that would result given even small cost increases due to additional permit requirements – particularly in the affordable housing sector. Moderate price increases in that sector can have an immediate

and huge effect on lower income home buyers who are already easily susceptible of being priced out of the market.

We are also concerned that currently developable State- and privately-owned land in Hawaii subject to permit requirements may also need to be reclassified as a result of the proposed rule (to conservation or another lower land classification) which would likely preclude the owners' development of such property. (p. 1-2)

Agency Response: **See Summary Response. See the updated Economic Analysis for additional discussion on predicted change in jurisdiction. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies believe this rule is appropriate in light of regulations, science, and case law. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) under the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Additionally, the agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.**

Ames Construction, Inc. (Doc. #17045)

12.194 The EPA and the Corps' proposed rule would overhaul the fundamental term waters of the United States for all sections of the Clean Water Act (CWA). The new definitions would apply to many CWA programs administered by EPA, the Corps and the states, including Section 303 state water quality standards, Section 311 oil spill prevention control and countermeasures, Section 401 state water quality certifications, Section 402 National Pollutant Discharge Elimination System (NPDES) discharge permits, and the Section 404 dredge and fill permit program – as well as various reporting requirements under the National Contingency Plan for CERCLA and the Oil Pollution Act (OPA). These programs regulate many types of construction activities across the nation and will therefore have a direct and significant impact on our operations. The EPA has not provided any meaningful analysis of the potential for impact on CWA programs other than the Section 404 program. (p. 1)

Agency Response: **See Summary Responses. See the updated Economic Analysis for additional discussion. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Many definitions for the first time are clarified. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process.**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe this rule is appropriate in light of regulations, science, and case law. The agencies have thoroughly considered the implications of the final rule on all of the CWA programs that rely on this definition, and the agencies, states and tribes responsible for implementing CWA regulations. See the Economic Analysis document for further information about economic considerations for each program.

Teichert Materials (Doc. #18866)

12.195 Contrary to the claims of the EPA and ACOE, the proposed rule will likely cause more confusion than clarity. The agencies "categorical" inclusion of all tributaries defined by an observed "mark" on the landscape and regulation of wetlands and waters adjacent to tributaries based on "neighboring," "riparian," "floodplain" and "shallow subsurface" connection criteria will make it exceptionally challenging for applicants to know what areas are regulated and what areas are not. This challenge would impact Teichert immediately as we identify and attempt to acquire wetland related permits for new aggregate resources. Without some consistent and fairly certain way of knowing where and to what extent state and federal agencies will and will not take jurisdiction will create uncertainties on what resources Teichert should acquire and bring into the permit process.

This uncertainty creates a very serious issue at the State level where the state agencies attempt to determine what will be covered under a Section 401 Certification and recommend appropriate mitigation for impacts covered under the 401 regulatory processes. Nowhere is this more evident than in California where the California Water Resources Control Board has reacted in recent years to current and past uncertainty over the scope of federal jurisdiction by moving forward with its own wetland regulations that may or may not be parallel with EPA and ACOE. Uncertainty in this regard will add years and extensive costs to the process of authorizing the utilization of new aggregate reserves.

This uncertainty by all affected stakeholders in the aggregate industry could lead to a reduction in permitted reserves and a consequential reduction in the ability to support the infrastructure needs of our communities. This issue cannot be understated for operators in California where permitted reserves are already at critical lows. (p. 2)

Agency Response: See Summary Response. See the updated Economic Analysis for additional discussion. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Many definitions for the first time are clarified. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe this rule is appropriate in light of regulations, science, and case law. Refer to

the "Tributary", "Adjacent Waters," and "Case-Specific Waters of the United States" sections of the proposed rule and preamble for further information and clarification on tributaries and the use of the ordinary high water mark, adjacent waters including neighboring waters and floodplains, and significant nexus determinations for case-specific waters and consideration of shallow subsurface flow. The agencies considered scientific knowledge and literature regarding riparian areas in the formulation of the Adjacent Waters category; however, due to the difficulty in delineating the boundaries of riparian areas, the agencies determined that using riparian areas as a geographic limit of jurisdiction was unnecessarily complicated. Revised definitions and exclusions in the final rule provide greater certainty to the regulated community. The use of ordinary high water mark to identify the lateral extent of tributaries has been in use by the agencies as standard practice. For more information about ordinary high water mark see the summary response in Topic 8, section 8.1.2. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provides distance limits. See preamble Section IV.G and summary response for Topic 3: Adjacent waters for more information. Section 401 certification is based on the state water quality standards which by definition apply to waters identified by the state. For more information, see summary response for Topic 12, Section 12.2 - 401.

CEMEX (Doc. #19470)

12.196 The Agencies should not permanently adopt the case-by case significant nexus test (or any other case-by-case test), as it provides no certainty to the regulated community, requires the unnecessary expenditure of resources (time and money) of both the regulated community and the regulators, and enhances the potential for litigation. (p. 3)

Agency Response: **See Summary Response. Refer to the "Case-Specific Waters of the United States" sections of the rule and preamble for further information and clarification on determinations for case-specific waters. The case specific waters category was determined using available science and the law, and in response to public comments that encouraged the agencies to ensure more consistent determinations. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.**

National Association of Home Builders (Doc. #19540)

12.197 The definition of what constitutes waters of the United States is not mere words on a page. Once an area has been deemed as such, there are regulatory responsibilities, land use implications, and legal liabilities and consequences that apply. As such, developing a new definition that fits within the legal and statutory parameters set by the CWA cannot be done without significant consultation, analysis, and consideration. Indeed, the very fact that the definition of waters of the United States has stood the test of time for 42

years since the CWA's passage should, in and of itself, underscore the magnitude and import of today's undertaking. Clearly, any change to this definition must not be taken lightly as even minor changes will have significant ramifications not only within the Act itself, but under other environmental laws as well.

According to the Agencies, the proposed rule revises the existing administrative definition of waters of the United States consistent with legal rulings and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. But unlike other efforts to define the breadth of federal authority, which were limited to those waters regulated under Section 404 of the Act, today's proposal applies to all CWA programs and to waters not even considered by the Supreme Court in *SWANCC* and *Rapanos*, including all "tributaries" and all "adjacent" waters (not limited to wetlands).

Because the term "navigable waters," defined as "waters of the United States, including the territorial seas,"[40] applies to all sections of the CWA, any change to the definition of waters of the United States will result in significant trickle down effects on a number of substantial CWA programs, including:

- Section 303(a) – requires states to establish Water Quality Standards (WQS; fishable, swimmable) for all waters of the United States
- Section 303(d) – requires states to establish total maximum daily loads (TMDLs) for all waters of the United States that are impaired (i.e., failing to achieve established WQSs)
- Section 311 – prohibits the discharge of oil or hazardous substances into all waters of the United States and requires facilities that handle oil or hazardous substances to develop spill prevention and response programs
- Section 401 – requires states to establish a water quality certification process
- Section 402 – establishes the National Pollutant Discharge Elimination System (NPDES), which regulates the point source discharge of pollutants into all waters of the United States
- Section 404 – establishes the "dredged or fill" permit program, which regulates the discharge of dredged or fill material into all waters of the United States

For each of these programs, EPA has developed subsequent regulations that direct one or more entities to take one or more actions purportedly aimed at restoring or maintaining the chemical, physical, and biological integrity of the Nation's waters. For example, under Section 303 and its subsequent regulations found at 40 CFR 130.4 and 40 CFR 130.7, the CWA directs the states to monitor the quality of all of the waters of the United States within their borders and establish total maximum daily loads (TMDLs) for any waters that are not meeting their water quality standards. For home builders, receiving a jurisdictional determination that one's property contains waters of the United States has an immediate binding and constraining effect on their land-use activities, could adversely impact land values, and may require obtaining and operating pursuant to a Section 404

[40] 33 U.S.C § 1362(7).

wetlands permit. In both of these cases, in addition to new administrative requirements, as more areas are deemed jurisdictional, responsible parties are also immediately subject to the liabilities, red tape, costs, and penalties associated with the Act. (p. 18-19)

Agency Response: **See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process more predictable, efficient, and effective.**

12.198 The Proposed Rule will have Major Impacts on all Clean Water Act Programs.

Throughout the preamble to the proposed rule and in supporting documentation discussing and evaluating the definitional change of waters of the United States, the Agencies focus almost exclusively on the change's impacts on the CWA Section 404 program. But the Agencies propose to substitute their new definition of waters of the United States throughout the CWA's regulations, which will result in broadened scope and additional obligations for *all* CWA programs. The term "navigable waters" is used throughout the CWA and its regulations 135 times. The term waters of the United States is used 98 times. To put it succinctly, the scope of the definition of waters of the United States dictates the scope of the CWA's programs.

Despite this fact, the Agencies have failed to consider the significant implications of this major change on the full suite of the CWA's programs. For example, nowhere in the preamble to the proposed rule are any impacts to Section 303 water quality standards (WQS) and total maximum daily loads (TMDLs), Section 311 oil spill prevention, Section 401 state certification, Section 404 (dredged or fill material permits), or Section 402 (*e.g.*, individual permits, industrial stormwater general permits, construction stormwater general permits, pesticide general permits) programs discussed. Instead, some, though not all, of these programs are discussed only as evidence as to why the Agencies' expanded scope of regulation under the proposed definition is reasonable.[41]

As all industries impacted by the CWA are aware, even with the current jurisdictional reach, the Agencies cannot process permits in a timely fashion. The substantially expanded jurisdiction proposed by the rule will require considerable additional federal and state resources to process permit applications and otherwise implement the affected programs. In addition, considerably increased agency budgets will be required to meet these requirements. Without consideration of these practical impacts, the proposed rule

[41] *See*, e.g., 79 Fed. Reg. at 22,254 – 22,259 (arguing that the history of the water quality standards program demonstrates that the CWA regulates interstate waters without reference to navigability, among other things). Of course, such an ends justify the means argument is unsupportable. *See Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995) (such arguments are the "last redoubt of losing causes"; no law pursues its purpose at all costs; instead, every law "proposes, not only to achieve certain ends, but also to achieve them by particular mean" set out in the text).

essentially sets the Agencies up for failure, and sets home builders and all other regulated entities up for increased delays in project development and increased expenses for navigating any project through requisite CWA permitting. (p. 118)

Agency Response: **The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The final rule does not establish any regulatory requirements or change implementation of CWA programs or processes, which are outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. In addition, the economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Economic Analysis document for further information about economic considerations for each program.**

12.199 The Proposed Rule will Result in Increased Clean Water Act Sections 303, 304, and 305 State Water Quality Standards Requirements.

States must set water quality standards (WQS) for all "waters of the United States."[42] States typically develop WQS for general categories of waters, which may or may not cover the features and waters that are newly jurisdictional under the proposed rule. As a result of the proposed rule, each state will be required to determine whether features previously not considered "waters of the United States" are now in fact "waters of the United States," and make assessments as to what, if any, existing water quality standards are applicable. Performing these tasks is very expensive and time consuming.

With respect to the Section 303 WQS/TMDL program, after acknowledging that states and tribes incur costs developing, monitoring, and assessing WQS and TMDLs, the Agencies state that it is their position that "an expanded assertion of jurisdiction would not have an effect on annual expenditures."[43] To support that conclusion, the Agencies assert that states typically only develop WQS for general categories of waters, which currently cover the types of waters that would be jurisdictional under the proposed rule and which would not change. The Agencies go on to concede that what would change is "whether or not those standards apply."[44] This concession undermines the Agencies' conclusion that the impact of the proposed rule would be cost-neutral. In reality, the more waters that are jurisdictional, the greater the costs to the states.[45]

[42] 40 C.F.R. § 131.3(i).
[43] EPA Economic Analysis at 5; *see also id.* at 25 (describing the impact to the section 303 program as "cost-neutral").
[44] *Id*. at 6.
[45] For example, just under the proposed rule's definition of "neighboring," features within entire riparian areas and floodplains would now be considered adjacent, and thereby jurisdictional. All of these areas would need to be analyzed and addressed by States and tribes under the WQS/TMDL program.

If states rely on their existing water quality standards for the newly jurisdictional features, they will have to employ similar uses and criteria to protect features that were not intended to be protected under those designated uses or criteria (e.g., a state could have to apply uses and criteria they set for lakes to newly jurisdictional ditches or industrial ponds for lack of a more applicable existing category). On the other hand, if states do not want to rely on existing state water quality standards, they will have to develop new water quality standards for these types of features. This process would require baseline data gathering to determine appropriate uses for these newly jurisdictional features. Again, the more waters that are jurisdictional, the greater the cost to the states. For example, the proposed rule's assertion of jurisdiction over all waters within a floodplain or riparian area will now mean that numerous features and waters that were previously considered isolated (and therefore not "waters of the United States"), would now be "waters of the United States." All of these areas would need to be analyzed and addressed by states under the WQS program.

A complete analysis of the impact of the proposed rule on the WQS program is even more critical in light of EPA's proposed rule entitled *Water Quality Standards Regulatory Clarifications* (hereinafter, WQS Rule).[46] The WQS Rule, if finalized as proposed, would create a rebuttable presumption that the highest uses specified in Section 101(a)(2) (*i.e.*, fishable, swimmable) of the CWA are attainable uses for any "waters of the United States" by default, thereby forcing state and tribal regulators to prove otherwise should they believe it appropriate. To rebut the presumption, a state must perform a burdensome use attainability analysis for waters it does not believe can meet the "fishable, swimmable" goal. Such a showing would create significant additional costs for states and tribes, assuming they would be unwilling to capitulate to the rebuttable presumption.[47]

By way of example, under Kansas state law, ephemeral streams are not "classified" waters because the state "finds it wholly unnecessary and wasteful of limited state program resources to set water quality standards, issue wastewater permits, assess impairment, and develop TMDLs for surface drainage features that may have flowing or standing water no more than a few days each year."[48] EPA has approved Kansas's WQS program, which does not designate uses or assign water quality criteria for ephemeral streams.[49] If, as proposed, ephemeral drainages are now considered "waters of the United States," Kansas estimates an increase from 30,620 stream miles to 134,338 stream miles for which the state must set WQS and comply with other CWA requirements.[50] As the maps in Fig. 15[51] demonstrate, this increase is dramatic.

[46] 78 Fed. Reg. 54,518 (Sept. 4, 2013) ("WQS Rule").
[47] This is to say nothing of the additional costs the WQS Rule's highest attainable use showing will compel.
[48] *See* Comments of the Hon. Sam Brownback, Governor of Kansas, on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0409 (July 14, 2011).
[49] Letter from Leo J. Alderman, EPA, Director, Waters, Wetlands, and Pesticides Division, to Roderick L. Bremby, Secretary, Kansas Department of Health and Environment (Nov. 3, 2003). (Doc. #19540, p. 124)
[50] Mike Tate and Tom Stiles, Kansas Department of Health and Environment, Presentation on Waters of the United States (May 2, 2014) at slide 10.
[51] *[Figure omitted here]*

Similarly, CWA Section 305(b)(1)(A) requires states to submit a water quality report biennially that includes a description of the water quality of all "waters of the United States" in the state and an analysis of the extent to which they meet water quality goals.[52] And under Section 303(d), states are required to develop lists of impaired waters (waters that are too degraded to meet the WQS set by the state).[53] For impaired waters, states must develop TMDLs, which are calculations of the maximum amount of a pollutant that a waterbody can receive and still safely meet WQS.[54] Any increase in jurisdictional waters for which WQS are developed necessarily triggers greater costs for states and tribes to monitor and assess whether these newly jurisdictional waters are meeting WQS. Assuming waters are not meeting WQS, the TMDL development process is triggered at even greater costs. And yet, the Agencies suggest that the TMDL process is cost-neutral because EPA allows states and tribes to prioritize TMDL development and to develop TMDLs over time. This assertion is misplaced. Prioritization and delay do not neutralize or somehow lessen the impact of additional costs – they only shift those costs to the future, which generally would result in the necessary activities costing more.

As an example, the park ditch in Pinellas County, Florida, (Fig. 16)[55], which provides no environmental or human benefits other than flood control, is not currently considered to be a "water of the United States", but would be under the proposed rule.[56] As noted above, EPA's WQS Rule would establish a presumption that the attainable use for this ditch is "fishable, swimmable" unless the state conducts an expensive and time-consuming scientific analysis to demonstrate that attaining that use is infeasible. Assuming the state did not have the resources to rebut the presumption, it could be forced to develop a TMDL for this ditch. Using current TMDLs for nitrogen and phosphorous as a gauge, the Florida Stormwater Association estimates that the cost to attain hypothetical "fishable, swimmable" uses in the ditch would be $31,351,460.[57] While this example may seem extreme, it unfortunately falls comfortably within the scope of the proposed rule, when viewed in light of other mandatory CWA program requirements.

In addition to flawed rulemaking, the Agencies' casual dismissal of the impacts the proposed rule will have on states and their WQS/TMDL programs is troubling. The proposed rule's expanded "waters of the United States" definition would require each state to expend significant resources to satisfy its WQS/TMDL obligations, thereby straining its already limited resources. This process would result in the needless expenditure of large amounts of the public's tax dollars on newly jurisdictional features, such as ditches and ephemeral drainages, while providing little or no environmental benefit.

[52] 40 C.F.R. § 130.10(a)(1).
[53] 40 C.F.R. § 130.10(b)(2).
[54] 40 C.F.R. § 130.7.
[55] *[Figure omitted here]*
[56] Florida Stormwater Association, "Proposed Regulations on Waters of the United States: Assessment of Impacts." (July 25, 2014) at 13, *available at:* http://www.florida-stormwater.org/assets/MemberServices/Advocacy/Regulatory/wotus%20-%20fsa%20summary%207-25-14.pdf (Doc. #19540, p. 125)
[57] *Id.* at 14.

In addition to increased costs to comply with WQS/TMDL requirements, states and regulated entities are also more vulnerable to third party litigation. For example, in 2007, pursuant to a settlement agreement, the state of Missouri and EPA agreed that Missouri was not required to set WQS for its ephemeral waters. Despite EPA's approval, Missouri later had to defend its WQS against a third party. A group filed a citizen suit challenging Missouri's WQS, arguing that Missouri's WQS did not meet the requirements of the CWA because they failed to designate uses and set water quality criteria for *all* of Missouri's waters.[58] In October 2014 and arguably in response to EPA pressure and the overbroad proposed definition of "tributary," the Missouri Department of Natural Resources listed previously unclassified waters, including "ephemeral aquatic habitat," in the state's new WQS.[59] EPA Region 7 approved this change, and EPA Regional Administrator Karl Brooks said, "EPA . . . applauds Missouri's decision to protect previously unclassified lakes and streams for uses specified in the Clean Water Act's long-standing requirements to assign designated uses and corresponding criteria to all waters of the United States in Missouri."[60] Did Missouri have any other choice? Did EPA defend its earlier approval or share in litigation costs? What's more, according to the USGS maps recently released by EPA, 94,416 miles of the 169,048 total stream miles (56%) identified across Missouri do not flow year round.[61] Under the proposed "tributary" definition and Missouri's newly approved WQS, Missouri could be required to develop WQS and associated TMDLs for nearly 100,000 miles of newly minted intermittent and ephemeral "waters of the United States." The Agencies and states will face similar threats of litigation and burdensome CWA requirements based on the additional WQS/TMDL obligations that the proposed rule will trigger. Yet the Agencies have not considered these facts. (p. 123-126)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. In addition, see summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated indirect costs and benefits of the rule for each CWA program. Given the reduction in scope of regulatory jurisdiction in the final rule, the waters and/or features the**

[58] *Missouri Coalition for the Environment v. Jackson*, No. 10-04167 (Feb. 16, 2012) (suit was filed against EPA and the State of Missouri intervened to defend its WQS).

[59] EPA Region 7 letter from Karen A. Flournoy (Director, Water, Wetlands and Pesticides Division) to Sara Parker Pauley (Director, Missouri Department of Natural Resources) (Oct. 22, 2014) at 2, *available at* http://www.epa.gov/region7/newsevents/legal/pdf/uw-rule-action-10-22-2014.pdf (Doc. #19540, p. 125)

[60] Chris Whitley, EPA Region 7 News Release, EPA Region 7 Issues Decision Letter on the State of Missouri's Proposed Changes to Water Quality Standards (Oct. 23, 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/names/r07_2014-10-23_epa-r7-decision-ltr-mo-prop-chgs-wqs (Doc. #19540, p. 125)

[61] *See* http://science.house.gov/epa-maps-state-2013#overlay-context (Doc. #19540, p. 126)

commenter is concerned about may no longer be jurisdictional and therefore, concerns over additional burden related to water quality standards application or development and implementation through various CWA programs may no longer be relevant. However, to the degree that any water that was not previously covered by a state's or authorized tribe's water quality standards, EPA offers the following points. In response to the concern regarding the "rebuttable presumption" and EPA's proposed WQS Regulatory Clarifications rule, EPA disagrees with the commenter. First, EPA position on the "rebuttable presumption" is that it is not newly added in the proposed WQS Regulatory Clarifications rulemaking. The rebuttable presumption is the term EPA uses to refer to its interpretation of 40 CFR 131.10(j) and (k), the net effect of which is to require states, when designating uses, to designate CWA section 101(a)(2) uses unless the presumption has been rebutted through a use attainability analyses (UAA). EPA first used the term in federal promulgations in Idaho 1997 and in Kansas in 2003 but the concept originates from the 1983 Water Quality Standards regulations. Additionally, EPA litigated this issue in 2000 – Idaho Mining Association v EPA. The Court upheld EPA's 1983 WQS regulations and the rebuttable presumption as a reasonable construction of the statute. Second, most states established their base water quality standards regulations long before the various changes of jurisdictional interpretation through court decisions, many before the establishment of the CWA. Therefore, it is unlikely that states do not have WQS (including default standards or narrative "free from" standards) applicable to these waters. Third, the rebuttable presumption does not "automatically" designate waters, states and authorized tribes have primacy in WQS and establish uses and criteria to protect such uses. Therefore, if there are any additional jurisdictional waters that were not previously covered by state/tribal WQS, and the CWA section 101(a)(2) uses are not attainable for those waters, states and authorized tribes can control the pace at which UAAs are conducted. Additionally, states and authorized tribes have options in how to streamline the use designation and UAA process. For example, states can do categorical use designations and also categorical UAAs to cover a set of waters that share a similar characteristic and similar justifications for not attaining CWA section 101(a)(2) uses. In regards to the commenter's concern that UAAs are burdensome, EPA emphasizes that a UAA must provide an adequate scientific and technical rationale in the administrative record to support the resulting designated use change. EPA has approved designated use changes supported by UAAs that range from simple to complex. Whether the UAA will be simple or complex will vary on a case-by-case basis based on a number of factors, such as the type of water body involved, the size of the segment(s) or the number of water bodies involved (if doing a categorical UAA), the characteristics of the water body, the designated use being changed and the relative degree of change, the factual showing required to make a demonstration that attaining the designated use is not feasible using one or more of the factors specified in § 131.10(g), the level of public interest/involvement in the designated use decision, etc. A discussion of some examples displaying the varying spectrum of UAAs is available at http://water.epa.gov/scitech/swguidance/standards/uses/uaa/index.cfm. Finally, EPA disagrees with the commenter's articulation of the facts regarding the

Settlement Agreement regarding Missouri's WQS. First, the 2004 Settlement Agreement was between only EPA and Missouri Coalition for the Environment (not the state of Missouri). Furthermore, Missouri was not later sued by Missouri Coalition for the Environment regarding the unclassified waters issue, rather EPA was sued in 2010. Also, as a note, the unclassified waters may have included ephemeral waters but also included other waters such as perennial waters, intermittent waters, lakes, and wetlands. EPA agreed in the Settlement Agreement to proactively work on certain issues, and did not agree to delay or not address any other remaining issues in Missouri and Missouri Coalition for the Environment reserved its right to bring additional lawsuits in the future under the Consent Decree with regard to any such claim addressed. (See http://dnr.mo.gov/env/wpp/wqstandards/docs/2004-12-16_SettlementAgreement_USEPAvsMCE.pdf and http://dnr.mo.gov/env/wpp/wqstandards/docs/2004-12-27_ConsentDecree_USEPAvsMCE.pdf).

American Gas Association (Doc. #4980)

12.200 As we have expressed throughout the stakeholder process, AGA continues to be concerned that the proposed rule would not provide the regulatory certainty natural gas distribution companies need to conduct normal operations in a timely and cost-effective manner. Over the past few 12 months, AGA and other energy industry stakeholders have identified several aspects of the proposed rule that are either overly vague or impracticable to implement in the field, for regulators and regulated entities alike.

As just one example, the proposed rule would subjectively allow "other waters" to be defined based on a best professional judgment standard. The regulatory uncertainty this would introduce could significantly slow timelines for pipeline integrity management and maintenance projects conducted by natural gas utilities. This same aspect of the proposed rule would also create regional inconsistencies in permitting, and necessitate nearly constant jurisdictional reviews in the field to determine whether state or federal jurisdiction applies. In 38 states, natural gas utilities currently perform pipeline integrity management and maintenance across miles of pre-built infrastructure under specific, state-level regulatory authorization subject to those states' water resources jurisdiction. Our members are concerned that as proposed, this rulemaking will create new uncertainties and permitting roadblocks for these priority projects. (p. 1-2)

Agency Response: See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. . The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions are modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Best professional judgment has always been used by the agencies in

making jurisdictional determinations and will continue to be used under the final rule.

RiverStone Group, Inc. (Doc. #10742)

12.201 The proposed rule is so expansive that it will trigger numerous additional environmental reviews to address such issues as endangered species and historic preservation, which will make it even more difficult and costly for our company to ensure timely supply of aggregates for public works projects essential to economic recovery. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404 to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Texas Mining and Reclamation Association (Doc. #10750)

12.202 TMRA is equally concerned with the proposed rule's implications for Section 303 requirements. States, or infrequently EPA, must establish water quality standards for waters within their jurisdiction. For previously non-jurisdictional waters, including on-site industrial waters or other on-site waters previously excluded from jurisdiction that could become jurisdictional under the proposed rule, the state of Texas will have to devote significant resources to designate uses for those waters and to derive criteria to protect those uses. Such standards-setting procedures are ordinarily very costly and time-consuming, and can give rise to contentious litigation.

This is particularly true, for example, in the case of any on-site ditches or water management conveyances deemed jurisdictional under the new rule. There, Texas would be faced with the absurd requirement to establish a "use" designation that must be achieved and protected, while at the same time being confronted with a CWA prohibition on using streams for waste assimilation or transport- exactly what EPA has determined they could be designed to do.[62] Furthermore, state and federal water quality standards also have an antidegradation component requiring that "existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[63] Taken together, these CWA requirements would prohibit use of on-site

[62] 40 C.F.R. 131.10(a)-(b).
[63] 40 C.F.R. 131.10(a).

waters to function as part of an entire treatment system designed to ensure that any discharges from the mine meet the requirements of the CWA. The Agencies have failed to explain how this would – or even could – work.

Section 303 also requires the establishment of total maximum daily loads (TMDLs) for all waters where technology-based effluent limits are not sufficient to implement the applicable water quality standards. Again, states have the primary obligation to establish standards such TMDLs, but EPA must do so in limited circumstances. Like water quality standards, TMDLs are often very time consuming and costly to establish. As the number of jurisdictional waters expands under the proposed rule, the state of Texas (and possibly EPA) will have to expend valuable resources establishing water quality standards and TMDLs under Section 303. Such expenditures simply make no sense in the context of, for example, temporary ditches in construction areas at mine sites.

Also of concern to TMRA, as more mining activities become subject to CWA permitting requirements and as additional waters on mine sites trigger Section 303 requirements, the opportunity for citizen lawsuits will dramatically increase. Specifically, citizen plaintiffs can file suits seeking to enforce effluent limitations against "discharges" internal to a mine site that were formerly not subject to CWA permitting. Citizen plaintiffs could also file suits seeking to compel the promulgation of water quality standards or the establishment of TMDLs for waters on mine sites, and against operators whose discharges violate them even where the agencies assert that the waters in question are excluded from jurisdiction. The number of such suits is certain to increase should the Agencies finalize the proposed rule as drafted, without the necessary clarification. (p. 12-13)

Agency Response: **The rule is a definitional rule that clarifies the scope of "waters of the United States". This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States; implementation of those programs is outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. The final rule includes additional and revised exclusions in paragraph (b) of the rule, which address many of the waters described by the commenter, including many ephemeral and intermittent ditches, and waters constructed in dry land, such as stormwater conveyance features, waste treatment systems including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds including settling basins and cooling ponds. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a**

result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

American Exploration & Mining Association (Doc. #13616)

12.203 We are concerned that under the proposed rule, the agencies' authority to assert jurisdiction is limitless. Where in the past, jurisdiction was based on a site-specific analysis, the proposed rule creates broad categories of waters that would now be considered jurisdictional by rule. For example, under the proposed rule, remote features on the landscape that carry only minor water volumes (e.g. ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches and arroyos), would now automatically be subject to federal CWA jurisdiction.

In addition, under the proposed rule, waters and wetlands are subject to regulation if they are "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." *See* 79 Fed. Reg. at 22,262-63. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. *Id.* at 22,208. The proposal also fails to provide the limits of "shallow subsurface hydrological connections" that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies. *Id.*

Inconsistent with the limits established by Congress and recognized by the Supreme Court, the proposed rule creates sweeping jurisdiction based on connections under newly devised theories such as "any hydrological connection," "significant nexus," "aggregation," and new definitions and key regulatory terms such as "tributary," "adjacent waters," and "other waters." Through use of the broad definition of "tributary" the agencies will extend jurisdiction to any channelized feature, (*e.g.*, ditches, ephemeral drainages, stormwater conveyances), wetland, lake or pond that directly or indirectly contributes flow to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters. *See* 79 Fed. Reg. at 22, 201.

The rule also proposes to expand "adjacent waters," to include any wetland, water, or feature located in an undefined floodplain or riparian area, or that has a sub-surface hydrologic connection to navigable waters. *Id.* at 22,206. A new catch-all "other waters" category would include isolated waters and wetlands that, when aggregated with all other wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters. *Id.* at 22,211. Under the proposed rule, ditches, groundwater and erosional features (*i.e.*, gullies, rills, and swales) can serve as a subsurface hydrological connection that would render a feature a jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water." *Id.* at 22,219. Such far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*,

531 U.S. 159, 172 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006). (p. 2-3)

Agency Response: **See Summary Response The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See the preamble for further discussion on the "Tributary" and "Adjacent Waters" sections. Please see Section I- Water and Features that Are Not "Waters of the United States" for further clarification on excluded water features. In particular, paragraph (b) of the final rule regarding the exclusion for stormwater control features and the exclusion for erosional features and ephemeral features that don't meet the definition of "tributary." To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark which would distinguish them from non-jurisdictional features. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The final rule has further refined the "neighboring" definition to provide additional clarity and "bright lines." The use of shallow sub-surface flow connections has been removed in the final rule from being able to be used as the sole factor in determining adjacency. Best professional judgment has always been used by the agencies in making jurisdictional determinations and will continue to do so under the final rule.**

National Stone, Sand and Gravel Association (Doc. #14412)

12.204 As stated by one company, "As a local aggregate construction and building material supplier, we provide products used by CalTrans, PG&E, and other customers… If the proposed rule is implemented as-is, many of our facilities would have to apply for new CWA permits for being 'neighboring,' 'adjacent,' or containing 'other waters' upstream from a water of the U.S. Each permit will need to be on a watershed basis requiring multiple levels of permit review and corresponding delays. The permit process may tie up new project proposals and on-going material extraction and create a shortage of material that is in high demand. The shortage in aggregate production and supply would cause our customers to purchase their aggregate materials from other mining companies outside of the U.S. that do not have the same environmental standards as the U.S."

Another company stated that "the increase in complexity, cost, and required analysis by ACOE, FWS, and other partners would almost certainly further tax the limited resources of the agencies and increase the time necessary to process and approve projects. The time would be in the order of 6 months to one year. The, further increase in time, cost and

uncertainty raises the likelihood that permits would not come in time to keep an operational supply of aggregate to service the market." (p. 43)

Agency Response: **See Summary Response. See the preamble sections for "Tributary" and "Adjacent Waters" for discussion on this topic. Additionally, the updated Economic Analysis provides information regarding costs associated with implementation of the final rule for applicants and for the agencies. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process for determining jurisdiction. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

Continental Resources, Inc. (Doc. #14655)

12.205 A state's definitions of "waters of the state" must include "waters of the United States." To the extent that the Proposed Rule extends jurisdiction beyond what a state currently defines as "waters of the state", the state must set water quality standards for those newly jurisdictional features. Under Section 303, states must not only develop water quality standards but must also monitor and assess water quality, and develop total maximum daily loads (TMDLs) for impaired waters. As the total number and type of jurisdictional waters increase, so too does the burden on the states for each of these tasks. Under Section 305, states must report and describe their water quality. Sampling, monitoring

and other additional report costs are also likely to increase with the definitions in the Proposed Rule. Given the significant increase in jurisdictional waters, there are many implications for Continental and the states, including unsuitable water quality standards, the development of new (and possibly more stringent) water quality standards, and the requirement that states protect, monitor, and report on literally *all* conveyances even if they have no public or environmental value. (p. 19)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For example, under the final rule many ephemeral and intermittent ditches, and waters constructed in dry land, such as stormwater conveyance features, waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds, including settling basins and cooling ponds, are all excluded from waters of the U.S. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters.**

Washington Forest Protection Association (Doc. #15030)

12.206 The proposal also poses a significant problem for forestry operations subject to state water quality regulation or best management practices. Categorical designation of ditches and ephemeral streams, in particular, will cause considerable confusion as to how forest owners are to implement best management practices like buffers along roadside ditches. Moreover, despite existing exemptions in CWA Sections 404(f) and 402(l) for certain activities in the forest, the proposal's expansion of WOTUS could mean that non-stormwater discharges of pollutants into newly jurisdictional ditches and ephemeral drainages could be considered unlawful discharges without an NPDES permit, thereby potentially triggering daily penalties. (p. 3)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For example, under the final rule many ephemeral and intermittent ditches, and waters constructed in dry land, such as stormwater conveyance features, waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds, including settling basins and cooling ponds, are all excluded from waters of the U.S. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters.**

National Mining Association (Doc. #15059)

12.207 NMA is equally concerned with the proposed rule's implications for Section 303 requirements. States, or infrequently EPA, must establish water quality standards for waters within their jurisdiction. States would have to devote significant resources to designate uses and derive criteria for previously non-jurisdictional waters, including on-site industrial waters or other on-site waters previously excluded from jurisdiction that could become jurisdictional under the proposed rule. Such standards-setting procedures are ordinarily very costly and time-consuming, and can give rise to contentious litigation.

Section 303 also requires the establishment of TMDLs for all waters where technology-based effluent limits are not sufficient to implement the applicable water quality standards. Again, states have the primary obligation to establish such TMDLs, but EPA must do so in limited circumstances. Like water quality standards, TMDLs are often very time consuming and costly to establish. As the number of jurisdictional waters expands under the proposed rule, states (and possibly EPA) will have to expend valuable resources establishing water quality standards and TMDLs under Section 303. Such expenditures simply make no sense in the context of, for example, temporary ditches in construction areas at mine sites.

Perhaps of greatest concern to NMA, as more mining activities become subject to CWA permitting requirements and as additional waters on mine sites trigger Section 303 requirements, the opportunity for citizen suits in federal courts will dramatically increase. Specifically, citizen plaintiffs can file suits seeking to enforce effluent limitations against "discharges" internal to a mine site that were formerly not subject to CWA permitting. Citizen plaintiffs could also file suits seeking to compel the promulgation of water quality standards or the establishment of TMDLs for waters on mine sites, and against operators alleging unlawful discharges even in instances where the agencies assert that the waters in question are excluded from jurisdiction. The mining industry is already a frequent target of citizen suit litigation, and the number of such suits is certain to increase should the Agencies finalize the proposed rule as drafted. (p. 17-18)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation, in part because the final rule includes additional and revised exclusions in paragraph (b) of the rule, which address many waters typically found at mine sites. These excluded waters include many ephemeral and intermittent ditches, and waters constructed in dry land such as stormwater conveyance features, waste treatment systems including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds including settling basins and cooling ponds. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters. Therefore, the EPA does not anticipate an increase in the water bodies on mine sites for which water quality standards and designated uses are developed, and for which TMDLs may be established.**

Independent Oil and Gas Association of West Virginia (Doc. #15406)

12.208 The Proposed Rule affects the fundamental jurisdictional concept that forms the backbone of the federal Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251 et

seq. As set forth in greater detail below, IOGA-WV shares the significant concerns expressed by many other representatives of the regulated community that the Proposed Rule, although ostensibly developed to foster regulatory certainty and predictability by providing "clarity" with regard to the scope of the CWA, in fact introduces considerable confusion into the process of jurisdictional determination, and ultimately would expand significantly the scope of the Agencies' jurisdiction under the Act. This proposed expansion of the critical "waters of the United States" definition would have significant adverse impact on the regulated community across a number of regulatory programs, including NPDES permitting under Section 402 of the CWA, 33 U.S.C. § 1342, "dredge and fill" permitting under Section 404, id. § 1344, and Spill Prevention Control and Countermeasure requirements under Section 311, id. § 1321. With respect to the NPDES program, increasing the number of jurisdictional waters will result in additional discharge points for which NPDES permits will be required, and these newly designated waters will have to meet water quality standards – a significant issue in West Virginia, where the Category A (Public Water Supply) use is applied to all waters in the State, regardless of whether there is any reasonable likelihood of future use of the water as a source of drinking water. Regarding the Section 404 program, not only will the Proposed Rule trigger new permitting obligations for the filling of previously non jurisdictional waters, but the expected increases in the overall impacts for individual projects may render them ineligible for Nationwide Permits. All of these regulatory consequences translate into increased costs and permitting delays for the regulated community. Finally, the Agencies' attempt to bring within the CWA waters previously beyond the scope of federal jurisdiction would erode the authority and discretion of individual states, in contravention of Congress's stated goals when it enacted the Act in 1972.[64] Accordingly, IOGA submits that the Agencies' proposed "clarifications" are unnecessary, and that the Proposed Rule should be withdrawn. (p. 1-2)

Agency Response: **See Summary Response. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary**

[64] See id. § 1251(b) (stating that lilt is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ." (emphasis supplied)).

jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The agencies understand that there is regional variation which can make it appear that there are inconsistencies in the program. However, the rule aims to reduce any inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits or Section 311 requirements which require authorization.

CountryMark Cooperative Holding Corporation, LLC (Doc. #15656)

12.209 As interpreted, the proposed expanded WOTUS jurisdictional changes would significantly lengthen response time for both maintaining and replacing flow lines, regulated DOT pipelines, and gathering lines. It is our opinion that an unintended consequence of this action is a potential increase in environmental incidents due to onerous compliance requirements associated with getting access to maintain lines. Furthermore, this expanded jurisdiction potentially could place CountryMark in a position of determining which Federal or State regulatory agencies' regulations have precedence should an environmental event happen *(i.e.,* comply with expanded WOTUS jurisdiction requiring a lengthy permitting process or take immediate action to abate and repair the problem). (p. 2)

Agency Response: **The Corps regulations define an "emergency" under the nationwide permit program as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."**

12.210 If the Proposed Rule is not withdrawn, CountryMark requests that it should be modified to provide either clearer definitions, or expanded exclusions, or both, in order to create a rule that is consistent with the intent and to be consistent with judicial decisions. If not withdrawn, among other items the Proposed Rule should be modified to: …Make clear that emergency activities and required activities by other regulatory agencies, such as the DOT, are exempt from this jurisdiction. As noted earlier, the current proposal, as interpreted, could generate conflicts between regulatory agencies, such as requirements of the DOT to repair lines within specific timeframes. The rule should clearly exempt activities mandated by other regulatory agencies. (p. 4)

Agency Response: **See Summary Response and answer to question above. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits or Section 311 requirements which require authorization. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act or the Corps nationwide general permit thresholds for impacts in the Section 404 program.**

Coeur Mining, Inc. (Doc. #16162)

12.211 The Agencies have failed to consider the significant implications on these programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, including stormwater and non-stormwater, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 311 oil spill prevention. The expanding Clean Water Act jurisdiction is very broad and the language of the proposed rule is subject to arguable views of interpretation. In particular, our comments address the possibility that historically non-jurisdictional, on-site stormwater and surface water management features will be deemed jurisdictional, and the

complications surrounding distinguishing ephemeral tributaries from non-jurisdictional features, including increased delays, costs, and permitting requirements on mine operations. (p. 2)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The final rule included clarifying language regarding stormwater control features under paragraph (b) for waters and features which are not considered waters of the U.S. Stormwater control features that meet the terms of the exclusion under paragraph (b) are not jurisdictional under the Clean Water Act. With respect to stormwater control features, whether or not subject to an NPDES permit, please see summary response in Compendium 7 at 7.4.4. See essay 12.5 regarding SPCC, essay 12.2 regarding 401 certification, and the Economics Analysis for a discussion of how the final rule accounted for impacts to all CWA programs including water quality standards and TMDLs.**

American Gas Association (Doc. #16173)

12.212 The Proposed Rule is a Significant Obstacle to the Agencies' Implementation of Administration Policy Favoring Expedited Permitting for Energy Infrastructure Projects, and should be Reworked Consistent with the President's Goals to Streamline Infrastructure Permitting.

The Administration has committed to strengthening federal infrastructure permitting processes by reducing red tape, cutting timelines, and promoting early coordination of federal, state and local agencies. AGA strongly supports the Administration's commitment: natural gas pipeline and local distribution companies rely on timely, transparent federal permits and reviews to meet their construction, maintenance, emergency repairs, replacement, and pipeline safety goals. The consequences described above to natural gas utility, pipeline and related infrastructure projects represent just one instance of how a critical infrastructure sector's progress will be impeded and seriously erode the Administration's progress in developing policy favoring modernized, timely and clear federal permitting processes. The Proposed Rule would create setbacks for infrastructure permitting that are contrary to the Administration's comprehensive agenda to modernize federal infrastructure reviews. These setbacks include: increased permitting delays, costly project outlays and timelines, higher environmental service consultant costs, an unprecedented increase in Army Corps resource commitment to project reviews, permit-related litigation costs, and protracted state-federal-tribal jurisdictional reviews and resource consultations. (p. 13)

Agency Response: **See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting**

mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays.

Gas Processors Association (Doc. #16340)

12.213 (…) any unnecessary delay of the permitting process will be detrimental to local, state, and federal economies. (p. 2)

Agency Response: See Summary Response. The updated Economic Analysis provides additional discussion responsive to this comment.

Utah Mining Association (Doc. #16349)

12.214 (…) any change in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our members' ability to finance and develop new projects, or perform maintenance to maintain existing infrastructure and facilities. Our members' construction and operations often require various permits under the CWA and the agencies' proposed expansion of jurisdiction would result in additional permit obligations for all CWA programs. The agencies have failed to consider the significant implications on these programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, including stormwater and non-stormwater, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 311 oil spill prevention. Contrary to the agencies' assertions, the proposed rule will lead to more confusion for regulators and the regulated community, and will by no means establish the certainty or predictability the agencies claim. (p. 2)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing

procedures should not be further complicated by this rule. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

Virginia Coal and Energy Alliance, Inc. (Doc. #18016)

12.215 The net effect of the Proposal in its current form is a substantial broadening of jurisdiction over ditches. Altering the jurisdictional status of the many natural and man-made ditches that dominate the SVC landscape would subject mine operators to duplicative and unnecessary permitting obligations. Construction of surface mine bench ponds and sediment ponds is already generally subject to 404 permitting, and outfalls from the ditches draining them require NPDES permits under CWA section 402. The Proposed Rule would add an absurd and unworkable layer of complexity to this by making the drainage ditches themselves also subject to CWA jurisdiction (both 404 and 402). As noted above, these ditches must be frequently altered for maintenance or operational reasons or to ensure compliance under SMCRA. In fact, the federal SMCRA regulations specifically authorize and direct mine operators to divert flow from mined areas. These regulations require, for instance, that temporary diversions be removed promptly when no longer needed. See 30 C.F.R. s. 81643. (p. 6-7)

Agency Response: See Summary Response. The final rule clarifies the ditch exclusions along with additional excluded waters in paragraph (b). See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. In addition, see the exemptions for certain ditch maintenance activities under section 404(f)(1) of the Clean Water Act and the Corps nationwide general permits which may include some of the activities described above.

Indiana Coal Council (Doc. #18495)

12.216 Indiana coal mine operations are dynamic in that modifications to surface water control plans must be implemented on occasion dependent upon factors such as acquisition of additional properties, market conditions that provide for either mining additional reserves or market conditions that may make mining of all planned reserves unachievable, and a plethora of other factors. Modifications to plans must occur as a result and be approved by the surface mining authority prior to construction. The necessity to obtain jurisdictional determinations and obtain necessary approvals for non-traditionally jurisdictional waters would cause significant delay. In some cases, this could lead to temporarily ceasing operations in order to obtain necessary regulatory permits. This in turn would cause the layoff of miners in the interim putting a strain on their economic wellbeing as well as that of the company. (p. 1)

Agency Response: **See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.**

Coastal Louisiana Levee Consortium (Doc. #19324)

12.217 (…) with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects. (p. 4)

Agency Response: **See Summary Response. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.**

Halliburton Energy Services (Doc. #19458)

12.218 HESI affiliates have several (…) operations in the western United States that would be (…) affected. In some Corps districts, these HESI operations already face 12 to 18 months of delay just for a jurisdictional determination, though one district manages to make determinations based on breaks in the OHWM in approximately two months. With the expansion of jurisdiction that would be triggered by the proposed rule, the work load for the Corps districts would increase significantly and these delays would undoubtedly

get worse, to say nothing of the delays that would be associated with the processing of permit applications. (p. 6)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. See the updated Economic Analysis for additional discussion.**

12.219 (…) what certainty is being provided [in the proposed rule] comes at a high price – most landowners can be almost certain any feature that captures rain during rain events will fall under federal jurisdiction, no matter how fleeting, and they can be certain that the permitting process will be long, expensive and burdensome. If a landowner is fortunate enough to have any remaining doubt about certain features, the jurisdictional determination process to gain the benefit of any of the vague exemptions will be slowed even beyond what is experienced today. There is no indication that the Corps has the resources to handle the fallout from this proposed rule. Moreover, the expansion of jurisdiction under the proposed rule would also impose significant additional burdens on states, which will see their costs associated with implementation of various CWA programs – including programs under Sections 303(d) and 402 – increase even though the states have had limited input regarding the proposed rule. (p. 11)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule clarifies additional waters and features excluded from jurisdiction. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.**

Family Farm Alliance (Doc. #1431)

12.220 The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including section 404 discharges of dredge or fill material, the section 402 NPDES permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load programs. We do not believe the agencies have truly considered the complex implications that this proposed rule will have for the various CWA programs. (p.3)

Agency Response: **See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only**

provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

Montana Wool Growers Association (Doc. #5843)

12.221 The CWA requires states to identify all navigable waters within state boundaries and determine water quality standards for those waters. 33 U.S.C.§§ 1313(d), 1315, 1329. Under 33 U.S.C. § 1315, each State must "prepare and submit a report [containing] ... a description of the water quality of *all* navigable waters in such State " 33 U.S.C. § 1315(b)(l} (emphasis added). If, as suggested in the Proposed Rule, "navigable waters" included ephemeral tributaries, waters connected by subsurface flow, and ditches, states would have the impossible burden of listing every qualifying water with a periodic surface or subsurface hydrologic connection to a Section (a)(I) through (a)(3) water. The CWA and its regulations do not provide framework for such an extensive review of state waters, nor do they describe how states would determine water quality standards for water bodies that contain surface water for only a few months or weeks each year. The lack of framework and the impossibility of the task demonstrate the CWA was not written to encompass such waters. (p. 4)

Agency Response: The rule does not change existing CWA regulatory requirements and processes for the various CWA regulatory and permitting programs, including the development of water quality standards. The final rule includes a revised and expanded exclusion for ditches, which covers most ephemeral and intermittent ditches. See summary response 6.2: Excluded ditches, for more information. States will continue to have discretion to design and implement ambient surface water monitoring strategies.

National Farmers Union (Doc. #6249)

12.222 The agencies should also make clear in the final rule that any wetland determination made by the Department of Agriculture's NRCS will be considered final and ruling. While NRCS wetlands determinations are not jurisdictional determinations, the ability to rely on NRCS' decisions regarding the presence of a wetland would increase clarity for the regulated community, reduce the agencies' administrative burden and prevent inconsistent wetland determination. (p. 8)

Agency Response: NRCS wetland determinations are completed for a different purpose than jurisdictional determinations completed by the Corps of Engineers under section 404 of the Clean Water Act, but are often reviewed when determining jurisdiction for the Clean Water Act. Only the EPA and the Corps, as well as applicable states and tribes, have authority to determine jurisdiction under the Clean Water Act. See the memorandum dated February 2005 entitled, "Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and

Section 404 of the Clean Water Act," for further information. The agencies will continue to minimize duplication where possible while recognizing the differences in the purpose and statutory language of the laws.

San Joaquin Farm Bureau Federation (Doc. #8317)

12.223 The means of enforcement is also a source of significant concern. Delegating enforcement to federal agencies with unilateral authority to issue cease and desist orders without providing adequate due process is unconstitutional. When cease and desist orders are issued, growers are put in the position of being assumed guilty until they prove themselves innocent. Meanwhile, the farmer has to halt operations under the cease and desist, putting them at a financial loss. This unconstitutionally shifts the burden of proof to the farmer when it clearly should lie with the organization that has accused him or her of the violation, and then the farmer should be provided with notice and a hearing. (p. 2)

Agency Response: See Summary Response. The clarity and certainty provided in the final rule will result in better identification of what is/is not waters of the U.S., which may result in reduced enforcement actions for unauthorized activities and reduced opportunity for litigation based on what is/is not a waters of the U.S. The Corps current regulations allow an affected party to appeal an approved jurisdictional determination, permit applications denied with prejudice, and declined permits. Please see 33 CFR Part 331 – Administrative Appeal Process for further information. As of the date of publication of the final rule, approved jurisdictional determinations are not considered "final agency action" and therefore cannot legally be challenged under the Administrative Procedures Act. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Maryland Farm Bureau (Doc. #10755)

12.224 In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. The proposed rule will result in duplicative and incongruent regulatory requirements that are inconsistent with the purpose and structure of the Act and have not been adequately considered by the agencies. (p. 1)

Agency Response: See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The agencies are developing guidance to

facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Hancock County (Indiana) (Doc. #11980)

12.225 The rule also has the potential to add significant delays in permitting. Many of the projects undertaken by farmers and government are to address emergency situations such as when a road washes out or significant erosion threatens to harm private property. Waiting on the permitting process will only add to the potential harm to both people and property. As individuals responsible for the safety of others, local government will be jeopardized in its ability to serve its constituents. (p. 1)

Agency Response: See Summary Response. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions are modified as a result of this rulemaking. The Corps regulations define an "emergency" under the nationwide permit program as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."

United FCS (Doc. #12722)

12.226 Because the proposed rule has broad and poorly defined categories of features that are WOTUS, this will result in large numbers of features on or near farms everywhere in the U.S. potentially coming within the definition of WOTUS. This will leave farmers and ranchers unable to determine with certainty just how much of their farms or ranches are directly subject to the CWA. (p. 3)

Agency Response: See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.

Bayless and Berkalew Co. (Doc. #12967)

12.227 There are example after example of contradictory statements throughout the preamble and proposed rule. This will make defending the exemptions very difficult. The agencies have given no indication to agricultural producers how they plan to defend these exemptions. (p. 4)

Agency Response: See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.

Nebraska Cattlemen (Doc. #13018)

12.228 The §303 program will be impacted by the increased number of water bodies subject to water quality standards. The NDEQ has been monitoring and assessing water bodies for forty years based on its interpretation of the state definition of waters of the state. EPA has approved the state program and, thus, has approved the definition. The addition of more water bodies will add to the state burden without additional resources which will lead to the need for more state resources. In addition, the water bodies that are subject to state assessment will also need to be evaluated to determine if they meet an assigned beneficial use. If the beneficial use is not being met, the water body may be impaired and need to be listed on the §303(d) list of impaired water bodies. That would trigger the requirement that a total maximum daily load (TMDL) be prepared which lays out "reasonable assurances" to bring the water body out of impaired status.

Nebraska Cattlemen comment that additional TMDLs will put additional burdens on producers. If EPA's expanded jurisdictional reach is realized under the propose rule, TMDLs may be written that include reasonable assurances that incorporate regulatory controls over newly defined CWA waters. Under the "other waters" definition, there could be entire watersheds that are subject to TMDLs. Nebraska Cattlemen comments that it is an unwarranted reach of regulatory authority beyond the intent of the CWA or the holdings of the Supreme Court.

The federal encroachment into the §303 process is another illustration of the erosion of cooperative federalism. NDEQ has developed a successful model of a voluntary process

whereby priority watersheds can be protected using state, local, and federal resources to leverage private investment. There have been very successful efforts in Nebraska and around the country that are collaborative watershed projects using state, local, federal, and private (agricultural producers and land owner) resources. If these same efforts had been under a mandatory regulatory program, the results would have been much less successful. In fact, an unintended consequence of this proposed rule would be to create a disincentive for producers to install conservation measures at their operations. Why install conservation terraces if there is a question as to how that land feature will be viewed under the new rule? Why would a producer voluntarily try new conservation practices if they would raise the jurisdictional issue and potentially require a permit? (p. 15)

Agency Response: The final rule does not alter implementation of the Section 303 process. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. Therefore, the EPA does not anticipate a significant increase the water bodies for which water quality standards are developed, and for which TMDLs may be established. For additional information about jurisdiction of "other" waters, see summary response for Topic 4. See the Technical Support Document Section I for a complete discussion of the legal basis for the rule.

The rule is consistent with collaborative watershed prioritization projects and voluntary conservation practices, and the agencies do not anticipate that the rule will discourage or prevent their ongoing implementation.

Milk Producers Council (Doc. #13022)

12.229 As set forth in the previous comments, the rule so broadly encompasses any water feature on a farm that it leaves almost no acreage exempt from the rule. Therefore farmers would have to meet permit requirements for undertaking almost any activity on their farming operation, including the managing of storm water and drainage ditches and other small water impoundments. This would result in extensive costs, delays and interruptions to farmers that would severely affect them economically. (p. 2)

Agency Response: See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not

require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.

Missouri Agribusiness Association (Doc. #13025)

12.230 In March 2014, the Missouri Department of Natural Resources (MDNR) submitted new and revised WQS to EPA. This submittal included state regulations that use the National Hydrography Database (NHD) for classification of enhanced 1:100,000K scale NHD streams. By expanding WOTUS to ephemeral, headwater streams, the proposed rule would expand WOTUS jurisdictional waters beyond 1:100,000K and even beyond the 1:24,000K scale which was rejected by the MDNR. (p. 7)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Monterey County Farm Bureau (Doc. #13045)

12.231 There are existing requirements already in place for Central Coast farming and ranching operations for water quality, both surface and groundwater, administered by our State's regional water quality control board. These are a set of compliance requirements relating to irrigation tailwater discharges, percolation to groundwater basins, sediment constituents in water, and the use of nitrogen in agricultural operations. This layer of regulatory burden is resulting in additional costs for farmers and ranchers as they adopt revised on-farm methods of production and irrigation management controls; the costs of this water quality regulatory process impacts the bottom line of farming economics, particularly in a marketplace where these costs cannot be passed along to consumers. The end result is that small farm operations are struggling with water quality regulations and will ultimately be forced out of production if the economics are not sustainable for compliance. Additional burdens of the proposed rule change will certainly contribute to the downfall of the small farmer and rancher because they just cannot comply at any price. (p. 3)

Agency Response: The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule does not affect any of the exemptions from 404 permitting requirements for normal farming activities under 404(f)(1). To further clarify this, the definition for "adjacent" in the final rule has been expanded to state that waters subject to established, normal farming, silviculture, and ranching activities are not adjacent. A number of revised and expanded exclusions may all apply to waters on farmland, including certain ditches and waters constructed in dry land. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.

North American Meat Association (Doc. #13071)

12.232 The proposed rule is problematic not only because it would change the absence of any Congressional action, but it is littered with vague terms that provide little or no guidance for both regulated entities and regulators. These ambiguities will lead to subjectivity in applying the rule; uncertainty, delay, and significant expense for regulated entities; and ultimately to unnecessary and wasteful litigation. (p. 5-6)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

12.233 Throughout the preamble to the proposed rule and in its supporting documentation, the agencies focus almost exclusively on the change's impacts on the Section 404 program. But the agencies propose to substitute their new definition of "waters of the United States" throughout the CWA regulations, which will cause broadened scope and additional obligations for all CWA programs. The term "navigable waters" is used throughout the CWA and its regulations 135 times. The term "waters of the United States" is used 98 times. The definition of "waters of the United States" dictates the scope of the CWA's programs.

Despite that fact, the agencies have failed to consider the significant implications of this major change on all of the CWA's programs. Nowhere in the preamble to the proposed rule is any discussion of the impacts to the Section 303 water quality standards (WQS) and total maximum daily load (TMDL), Section 311 oil spill prevention, Section 401 certification, Section 404, and Section 402 (*e.g.*, individual permits, industrial stormwater general permits, construction stormwater general permits, pesticide general permits) programs. Instead, some are discussed only as evidence why the agencies' expanded scope of regulation under the proposed definition is reasonable. *See, e.g.*, 79 Fed. Reg. at 22,254-59 (arguing that the history of the WQS program demonstrates that the CWA regulates interstate waters without reference to navigability)[65].

As all industries affected by the CWA are aware, even with the current jurisdictional reach the agencies cannot process permits in a timely fashion. The substantially expanded jurisdiction proposed by the rule will require considerable additional federal and state resources to timely process permit applications and otherwise implement the affected programs. In addition, considerably increased agency budgets will be required to meet these requirements. Without consideration of these practical impacts, the proposed rule sets the agencies up for failure, and sets industry up for increased delays

[65] Of course, such an ends justify the means argument is unsupportable. *See Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995) (such arguments are the "last redoubt of losing causes"; no law pursues its purpose at all costs; instead, every law "proposes, not only to achieve certain ends, but also to achieve them by particular mean" set out in the text).

and expense in project development and increased expenses for navigating any project through requisite CWA permitting. (p. 10-11)

Agency Response: **See Summary Response. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The final rule does not establish any regulatory requirements or change implementation of CWA programs or processes, which are outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. In addition, the economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Economic Analysis document for further information about economic considerations for each program.**

12.234 Increased section 404 permitting requirements will subject project proponents to additional federal and state environmental compliance burdens. A Corps section 404 permit decision triggers the National Environmental Policy Act, Coastal Zone Management Act, National Historic Preservation Act, and Endangered Species Act (ESA).[66] Additional requirements and determinations, including environmental assessments or impact statements, certifications of consistency with the state's Coastal Zone Management Plan, and section 7 ESA consultation, and consultation with State

[66] 33 CFR 325.2.

Historic Preservation Offices, would lengthen delays, increase opportunity costs, increase the burdens on federal and State agencies, and increase the overall cost of permits. (p. 12)

Agency Response: While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Minnesota Agricultural Water Resource Center (Doc. #14284)

12.235 We remind the agencies that the CWA includes distinctly different approaches to point and non-point sources, which is logical given that they are very different. The CWA provides for voluntary, incentive-based programs to address non-point sources, but the proposal does not provide clear continuation of this approach. (p. 2)

Agency Response: See Summary Response. There are no changes in voluntary, incentive-based programs to address non-point sources associated with this rule, or changes to continuation of the CWA section 319 program.

Kentucky Farm Bureau Federation (Doc. #14567)

12.236 (The) rule would not only apply to Section 404, dredge and fill permit requirements, it clearly states "the agencies propose to define the waters of the United States for all sections (including 301, 311, 401, 402, and 404) of the CWA." This is an attempt to significantly expand the jurisdiction scope of the Agencies far beyond the intent of Congress, or within the constraints imposed by the U.S. Supreme Court. (p. 1).

Agency Response: See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

American Farmland Trust (Doc. #14576)

12.237 We also urge EPA and the Corps to develop a section 404 general use permit for agriculture that would facilitate on farm management decisions by removing the need for a lengthy and costly individual permitting process. (p. 2)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The final rule clarifies additional excluded waters and features, including certain ditches. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

California Association of Winegrape Growers (Doc. #14593)

12.238 The Proposed Rule improperly expands the reach of the CWA by broadly interpreting "waters of the United States" in order to inflate the definition to cover waters never previously deemed jurisdictional under existing regulations, previous guidance documents, or federal case law. The Proposed Rule then extends that interpretation to *all programs* authorized under the Act, including the Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program, the Section 311 oil spill program, the water quality standards and total maximum daily load programs under Section 303, and the Section 401 state water quality certification process. The existing 2003 and 2008 guidance documents are *limited* to CWA Section 404 determinations.

Agency Response: See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this

rulemaking; therefore, existing procedures should not be further complicated by this rule.

Wisconsin Pork Association (Doc. #14745)

12.239 There also is the uncertainty and liability from the likelihood that farmers will face citizen suits alleging that drainage features are in fact tributaries. Those suits will be able to claim, following the logic of the proposed rule, that such features not only are directly WOTUS but that the agricultural fields surrounding them have a "significant nexus" to a WOTUS and are, therefore, critical to the "chemical, physical and biological integrity" of the nation's jurisdictional waters. Further following the logic of the proposed rule and the structure of the CWA, these suits also likely will claim that such drainage features require their own CWA "water quality standards," that they must be "assessed" to determine whether they are "attaining" their "designated use" and if "impaired," must have a "TMDL" applied to them. Altogether, of course, this will fundamentally alter the manner in which farmers farm, removing significant tools farmers have used to make America the world's leading agricultural producer. It also will change how lenders assess potential risk, both from direct litigation and potential enforcement actions as well as from crop failures because of the lack of flexibility that farmers will have to address the impacts of constantly changing weather patterns on their crops and animals. (p. 3)

Agency Response: The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule contains revised and expanded exclusions for many ephemeral and intermittent ditches. See summary responses in Topic 6, sections 6.0 and 6.2 for a discussion of the regulation and exclusion of ditches. In addition, the definition for "adjacent" in the final rule has been expanded to state that waters subject to established, normal farming, silviculture, and ranching activities are not adjacent. Drainage features that are not waters of the U.S. do not have water quality standards or designated uses, and are not subject to the Clean Water Act.

Windsong Farm Golf Club (Doc. #14746)

12.240 This rule would make it more difficult to control harmful pests on private and public property if any water is near the area. Professional applicators and homeowners would have to obtain permits to protect properties from pests like ticks, which carry harmful diseases like Lyme disease. (p. 2)

Agency Response: This rule is a definitional rule, intended to clarify the scope of waters subject to the CWA, and does not change existing CWA permitting requirements regarding the application of pesticides, which is beyond the scope of the rule. Only the direct discharge of pesticides into a water of the U.S. requires a CWA permit. The EPA has a pesticides general permit (PGP) for areas in which EPA is the NPDES permitting authority, which covers many discharges. In addition, all states with permitting authority have a PGP. Pesticides and herbicides will continue to be able to be applied consistent with their labeling.

12.241 Under the rule, EPA could compel states to place restrictions on the amount or type of fertilizer that can be used on public and private property including individual home lawns, gardens, parks and golf courses. (p. 2)

Agency Response: **This rule is a definitional rule, intended to clarify the scope of waters subject to the CWA, and does not change existing CWA permitting requirements regarding the application of fertilizer, which is beyond the scope of the rule. The CWA does not regulate lawns, gardens, golf courses, or other features that are not waters of the U.S. Pesticides and herbicides will continue to be able to be applied consistent with their labeling.**

12.242 The expanded scope of the Clean Water Act could leave landowners and professionals applying fertilizers and pesticides vulnerable to nuisance lawsuits. (p. 2)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. See summary responses for Topic 6, section 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional for further discussion of excluded waters. Pesticides and herbicides will continue to be able to be applied consistent with their labeling.**

12.243 Well-maintained lawns are important for the environment and properly-cared for lawns reduce runoff into nearby waters. One of the unintended consequences of EPA's proposed rule could be increased erosion and run-off into many connected water bodies. (p. 2)

Agency Response: **The agencies disagree that the rule will prevent the maintenance of lawns. The CWA does not regulate lawns, gardens, golf courses, or other features that are not waters of the U.S.**

12.244 Uncontrolled growth of poison ivy, poison oak, and poison sumac poses risk to children and adults alike as more than one-half of the U.S. population is allergic to these noxious weeds, which must be controlled with herbicides. (p. 2)

Agency Response: **The rule does not prevent the use of herbicide. Only discharges of herbicide directly into waters of the U.S. require an NPDES permit. The EPA has a pesticides general permit (PGP) for areas in which EPA is the NPDES permitting authority, which covers many discharges. In addition, all states with permitting authority have a PGP. Pesticides and herbicides will continue to be able to be applied consistent with their labeling.**

Missouri Soybean Association (Doc. #14986)

12.245 The rule will expand jurisdiction of federal waters thus expanding the scope, breadth and extent of state agency water programs. In Missouri, the jurisdictional state waters which are defined as "Waters of the State" in Missouri stable and regulation, includes the federal term "Waters of the US". This rule will vastly scope of the Missouri's "Waters of the State" and undoubtedly trigger an increased public and cost of complying with state water quality programs, a cost which was never considered or quantified by EPA. In addition, in 2013, Missouri finalized a quantitative list of water bodies in the state water quality standards that would be subject to Clean Water Act designated uses. We believe this rule will ultimately jeopardize and undermine the painstaking work completed by Missouri stakeholders and the Missouri Department of Natural Resources. (p. 8)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. In addition, see summary response for Topic 11: Costs/Benefits and the Agencies Economic Analysis document for details on the estimated indirect costs and benefits of the rule for each CWA program.**

12.246 But impacts at the state level do not stop there. It is believed that the proposed rule will also impact state water pollution permitting as well as its 401 certification. It also presents the real possibility that states will be left picking up the burden and costs of addressing and assessing the water quality in thousands of addition miles of streams, ditches and water bodies, determining whether they are impaired, listing them on the 3036 list, and writing TMDLs. (p. 8)

Agency Response: **Section 401 certification is based on the state water quality standards which by definition apply to waters identified by the state. For more information, see summary response for Topic 12, Section 12.2 - 401. The rule also identifies waters that are important to regulate due to their collective biological, chemical, and physical connectivity to downstream waters. The CWA requires the protection of waters of the U.S., which includes development of water quality standards and TMDLs where appropriate. States and tribes continue to have the authority to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.**

Jackson Family Wines (Doc. #15019)

12.247 The Burden of Inconsistency/Duplication of Process and Regulation. Farmers currently have to deal with multiple regulations that address the same issue. As an example the Endangered Species Act is regulated both by Federal and State agencies. These agencies (the US Fish & Wildlife Service and the California Department of Fish & Wildlife) have inconsistent processes for compliance. Similarly, regulations around Federal and State Waters usually require consultation with multiple agencies necessitating numerous and expensive permits to carry out an activity. In the case of jurisdictional waters, the Army Corps of Engineers, the Regional Water Quality Control Boards, and the California Department of Fish & Wildlife all have regulatory authority. Each agency has different and expensive processes to achieve common goals resulting in no benefit to resources merely increasing burdens upon landowners. This challenge will only be exacerbated by adoption of the Rule as the vagueness in definition of terms such as "uplands," "floodplain," "waters," etc., could easily be interpreted differently by different agencies, leading to confusion and additional burdens upon farmers, including an increased risk of liability. (p. 1-2)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. The Corps will continue to work with stakeholders, including partner agencies, to identify efficient and effective tools to aid in making jurisdictional determinations. See the definitions in paragraph (c) of the final rule for further clarifications. See the preamble for additional discussion about the terms used in the final rule. The final rule has been revised to reflect concerns received about the proposed rule, including the use of terms such as "upland," and has provided additional clarity as to the "floodplain."**

National Alliance of Forest Owners (Doc. #15247)

12.248 The categorical assertion of jurisdiction over all tributaries and adjacent waters, particularly ditches and ephemeral streams, poses a significant problem for forestry operations subject to best management practices. Designation of all of those features as jurisdictional waters will cause considerable confusion as to how forest owners will implement best management practices such as buffers along roadside ditches. Furthermore, the more waters that are defined as jurisdictional, the more opportunities there will be for allegations that certain activities involve point source discharges that are not exempted under CWA Sections 404(f) and 402(l). (p. 25)

Agency Response: **See Summary Response. In addition, the final rule is not changing any of the existing statutory activity-based exemptions under the Section 404(f)(1) of the Clean Water Act, including those related to normal silviculture activities and forest roads. See the Corps nationwide general permits for existing general permits related to forestry activities. The final rule clarifies the additional excluded waters and features, including certain ditches. See the preamble section on**

"Waters and Features That Are Not Waters of the U.S." for further discussion. The agencies believe the clarity and certainty provided in the rule will result in better identification of what is/is not waters of the U.S. which may result in reduced enforcement actions for unauthorized activities and reduced opportunity for litigation based on what is/is not a water of the U.S.

12.249 The expansion of jurisdiction under the proposed rule could also trigger the duty under Section 303 to establish water quality standards, and possibly total maximum daily loads ("TMDLs"), to all newly jurisdictional waters. States (and potentially EPA) would have to undertake the burdensome exercise of designating uses for jurisdictional waters and then deriving scientifically defensible criteria to protect those uses. Such rulemaking proceedings can be time consuming, costly, and generate extensive litigation. The same is true with respect to impaired waters listings and the establishment of TMDLs for any newly jurisdictional waters that cannot attain applicable water quality standards through technology-based effluent limits in NPDES permits. TMDL establishment often requires complicated modeling and also often results in protracted litigation. Moreover, an impaired waters listing and the regulatory restrictions resulting from the TMDL process could adversely impact private forest owners, who must comply with any resulting land use restrictions and may see a reduction in their property values.[67] (p. 25-26)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. This rule will not affect the current implementation of the various CWA programs such as WQS, TMDL and permitting programs. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.**

US Dry Bean Council (Doc. #15256)

12.250 The ambiguity of the Proposed Rule put forth by the EPA and the Corps that defines the Waters of the U.S. that are protected under the Clean Water Act is concerning to dry bean producers because they believe the Corps will use this definition to over-ride state and local control of the aforementioned water management activities and subject these activities, many of which are occurring on an ongoing basis, to a National Pollutant

[67] Cf. Barnum Timber Co. v. EPA, 633 F.3d 894 (9th Cir. 2011).

Discharge Elimination System (NPDES) and/or a Section 404 permitting process. Based on past experience with the Corps, dry bean producers believe that if such control is gained over routine farming activities by the Corps, many acres of farmland across the country will become un-farmable due to the lack of timely water management activities. This would occur by rule, without regard to current conditions or science as applied to local areas. We ask that the rule stipulate that state and local governmental water resource regulatory agencies will continue to be in control of local water resource issues pertaining farm land. (p. 1-2)

Agency Response: **See Summary Response. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation including existing statutory activity-based exemptions under the Section 404(f)(1) of the Clean Water Act. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. See the Corps nationwide general permits for existing general permits related to agricultural activities. The final rule clarifies the additional excluded waters and features, including certain ditches. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.**

Weyerhaeuser Company (Doc. #15392)

12.251 The expansion of jurisdiction under the proposed rule could also trigger the duty under Section 303 to establish water quality standards, and possibly total maximum daily loads ("TMDLs"), to all newly jurisdictional waters. States (and potentially EPA) would have to undertake the burdensome exercise of designating uses for jurisdictional waters and then deriving scientifically defensible criteria to protect those uses. Such rulemaking proceedings can be time consuming, costly, and generate extensive litigation. The same is true with respect to impaired waters listing and the establishment of TMDLs for any newly jurisdictional waters that cannot attain applicable water quality standards through technology-based effluent limits in NPDES permits. TMDL establishment often requires complicated modeling and also often results in protracted litigation. Moreover, an impaired waters listing and the regulatory restrictions resulting from the TMDL process

could adversely impact private forest owners, who must comply with any resulting land use restrictions and may see a reduction in their property values.[68] (p. 14)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. This rule will not affect the current implementation of the various CWA programs such as WQS, TMDL and permitting programs. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.**

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

12.252 The expansion of jurisdiction under the Proposal could also trigger new obligations under CWA Section 303 relating to water quality standards and TMDLs. For example, an impaired waters listing and the regulatory restrictions resulting from the TMDL process could negatively impact private forest owners, who must comply with any resulting land use restrictions and may see a reduction in their property values.[69] (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. This rule will not affect the current implementation of the various CWA programs such as WQS, TMDL and permitting programs. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the**

[68] Cf. Barnum Timber Co. v. EPA, 633 F.3d 894 (9th Cir. 2011).
[69] *Cf. Barnum Timber Co. v. EPA*, 633 F.3d 894 (9th Cir. 2011).

covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

New York Farm Bureau (Doc. #15616)

12.253 The definition changes in this rule would increase the difficulty for livestock farms, operating under a state or federal CAFO permit, to spread organic fertilizer (manure) onto farm fields. This is a sound agricultural practice when applied at an agronomic rate and frequency under appropriate field and weather conditions that limits the possibility of any runoff. This practice is a key part of New York's certified CAFO plans and has the added benefit of decreasing the use of synthetic fertilizers. However, this practice could become too impractical to continue if this rule moves forward, due to a maze of buffer zones crisscrossing small farm fields so as to avoid even a drop of manure (considered a pollutant) landing in a low-spot or ephemeral drainage now considered a "water of the U.S." – even if that feature is dry at the time. In this case, how does EPA propose addressing the nutrient management needs of farms and disposing of this previously valuable resource? (p. 4)

Agency Response: See summary response for Topic 12: Section 12.3, for a discussion of the issues relating to permitting requirements for the application of fertilizer (including manure). In addition, many waters on farm fields qualify for exclusions found in paragraph (b) of the final rule. Discharges to waters which are excluded from waters of the U.S. would not require a permit. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters.

Oklahoma Grain and Feed Association (Doc. #16067)

12.254 We believe the proposed rule broadens the scope of the CWA jurisdiction well beyond constitutional and statutory limits established by Congress and recognized by the U.S. Supreme Court. The rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. The agencies have failed to consider the significant adverse implications on several CWA programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 311 oil spill prevention. (p. 1)

Agency Response: See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of

"waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

American Horticultural Industry Association (Doc. #16359)

12.255 Under the proposed rule, Clean Water Act Section 404 permits could be required to install trees, plants, and other landscape features on private property that includes "Waters of the United States" or is deemed to be in a floodplain. The installation of trees and plants protects water quality and provides other environmental benefits. The EPA and the Corps should encourage these activities, rather than subject them to permits. (p.3)

Agency Response: See Summary Response. A Section 404 permit is only required if there is a discharge of dredged and/or fill material into a jurisdictional water of the U.S. Please see the definition of discharge of fill material at 33 CFR 323.2 for additional information. Many minimally impacting activities involving the discharge of dredged and/or fill material are authorized by the Corps via nationwide permits, which are efficient permitting tools. The rule does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S.

United States Canola Association (Doc. #16361)

12.256 The ambiguity of the Proposed Rule put forth by the EPA and the Corps that defines the Waters of the U.S. that are protected under the Clean Water Act is concerning to canola producers because they believe the Corps will use this definition to over-ride state and local control of the aforementioned water management activities and subject these activities, many of which are occurring on an ongoing basis, to a National Pollutant Discharge Elimination System (NPDES) and/or a Section 404 permitting process. Based on past experience with the Corps, canola producers believe that if such control is gained over routine farming activities by the Corps, much of the farmland in the Great Plains will become highly unproductive due to the lack of timely water management activities. (p. 2)

Agency Response: See Summary Response. The final rule does not change existing regulatory programs that rely on the definition of WUS or affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

Kansas Corn Growers Association (Doc. #16398)

12.257 The Proposed Rule would make at least five million miles of remote waters and drainage in farm country jurisdictional or likely jurisdictional. Not only is this unlawful in light of the Supreme Court's decisions, it will work directly against farmers efforts to prevent nutrients and sediments from reaching the system of navigable waters while they also work to produce abundant, affordable high quality food, feed, fuel and other products. The WOTUS Proposed Rule, if enacted as it is currently written would create an immense regulatory framework that would make it immensely more difficult and more expensive for farmers to grow their crops. If features on their farms are made jurisdictional or could be considered possibly jurisdictional farmers could be subject to new and unprecedented regulatory requirements or obligations under the CWA's Section 404 and Section 402, spurious legal actions by citizen activists involving both these programs, and a host of uncertainties and liabilities that come with such consequences. All of these will have direct financial, practical and serious consequences for farmers and they must not happen. (p. 1)

Agency Response: **See Summary Response. The final rule does not change existing regulatory programs that rely on the definition of WUS or affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.**

Riceland Foods (Doc. #16530)

12.258 The proposed rule would impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields. It also would require additional permitting regulations for the application of crop protectants to combat insects, disease and weeds. (p. 2)

Agency Response: **See summary response for Topic 12: Section 12.3, for a discussion of the issues relating to permitting requirements for the application of fertilizer, pesticides and herbicides. In addition, many waters on farm fields qualify for exclusions found in paragraph (b) of the final rule. Discharges to waters which are excluded from waters of the U.S. would not require a permit. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters.**

Agency Response:

Western Landowners Alliance (Doc. #16553)

12.259 Relationship to Other Programs and Factors – The agencies should investigate the effects and potential of other programs and factors to be more protective or destructive of wetland resources than can be effected by a regulatory program. For example, ethanol mandates have driven up prices of commodities such that producers are being driven out

of programs that protect wetlands and other habitat, as well as being incentivized to break into ground that previously produced other habitat, soil, and water benefits. (p. 2)

Agency Response: See Summary Response. This comment is beyond the scope of this rulemaking. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

12.260 Regulatory Burden and Agency Resources – There is an important prohibition in the CWA against discharging pollutants into our waters and destroying valuable wetlands. It is appropriate for that to be illegal. Where it can't be avoided however, the permitting process should not be onerous, and staff should be sufficiently available and knowledgeable so as to not create an undue burden on permittees. (p. 2)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

12.261 Opportunities for Incentives – The Agencies should evaluate where incentive programs, rather than regulatory programs can be effective in conserving habitats sought to be conserved through this proposal, including whether Sodbuster and Swampbuster programs are effective and could be enlisted (if not already) to protect "other" waters, including isolated wetlands. These are valuable resources, but may be more effectively managed through USDA programs. (p. 2)

Agency Response: This comment is beyond the scope of this rulemaking. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

12.262 Interpretive Rule Elements Possibly as Nationwide Permits – The agencies should consider whether converting the Interpretive Rule practices to practices approved under a nationwide 404 permit. This would, unfortunately, eliminate the 'no-nexus' benefit noted above, but could clear up some jurisdictional confusion created by the IR. Converting only those directly water-related or wetland-related could also reduce confusion. (p. 3)

Agency Response: See Summary Response. The Clean Water Act Section 404(f)(1) exemptions are self-implementing. The agencies note that the Interpretive Rule for conservation practices under 404(f)(1)(A) has been withdrawn as directed in the Consolidated and Further Continuing Appropriations Act, 2015. This comment is outside the scope of this rulemaking. The Corps Nationwide permits will be reauthorized in 2017 via the public notice and comment rulemaking process and comments regarding appropriate activities for inclusion are welcomed during that process.

Missouri Corn Growers Association (Doc. #16569)

12.263 The rule will expand jurisdiction of federal waters thus expanding the scope, breadth and extent of state agency water programs. In Missouri, the jurisdictional state waters are defined as "Waters of the State" in Missouri statute and regulation, includes the federal

term "Waters of the US". This rule will vastly expand the scope of the Missouri's "Waters of the State" and undoubtedly trigger an increased public and private cost of complying with state water quality programs - a cost never considered or quantified by EPA. In addition, in 2013, Missouri finalized a quantitative list of water bodies in the state water quality standards that would be subject to Clean Water Act designated uses. We believe this rule will ultimately jeopardize and undermine the painstaking work completed by Missouri stakeholders and the Missouri Department of Natural Resources. (p. 7)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. In addition, see summary response for Topic 11: Costs/Benefits and the Agencies Economic Analysis document for details on the estimated indirect costs and benefits of the rule for each CWA program.**

Michigan Blueberry Growers Association (Doc. #16587)

12.264 If the rule is finalized, it will burden our growers by creating new permitting requirements and unprecedented levels of uncertainty. Our growers are committed to maintaining compliance with environmental regulations, while remaining competitive with their growing operations; the proposed impedes their ability to carry out this commitment and subsequently, will result in a significant cost increase for our growers and may drive some out of business.

Coupled with the aforementioned issues above, the proposed rule also interferes with states' efforts to develop successful water quality protection programs that do not depend on burdensome regulation. For example, the proposed rule may contradict Michigan's Wetlands Law and cause the EPA to consider Michigan's assumption of delegated authority over Section 404 of the CWA to be out of compliance. If Michigan loses this delegated authority, the state loses the ability to manage a program that Michigan has used for 30 years to provide valuable protection of wetlands through agencies that have local contact with growers. (p. 1)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the General Comment Compendium for discussion of 404 Assumption. The rule does not affect the scope of waters subject to assumption under section 404(g) of the CWA. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects**

on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Florida Crystals Corporation (Doc. #16652)

12.265 The Army Corps commonly tries to shift the costs of procedural compliance onto private applicants. It is typical that private permit applicants have to pay consultants to prepare Environmental Assessments, Biological Assessments, and other permit-related documents. When the Army Corps decides to prepare an Environmental Impact Statement, it asks the applicant to pay for a third-party consultant to prepare the document, at a typical cost of millions of dollars. These costs far exceed the cost of water permitting with state agencies in Florida. Given that Florida law already regulates the exact same waters, expanding the scope of federal CWA jurisdiction simply expands the number of projects for which landowners will have to pay exorbitant federal permitting costs. (p. 11)

Agency Response: See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Corps does not require an applicant to obtain third party consultants to prepare materials to support an application. District engineers are authorized to require that permit applicants or permittees provide essential information necessary for compliance with Corps regulations; the Corps recognizes that an applicant may choose to use third-party contracting to obtain the information. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

Greene County Farm Bureau (Doc. #17007)

12.266 This rule also has the potential to add significant delay in permitting. Many of the projects undertaken by farmers and government are to address emergency situations such as when a road washes out or significant erosion threatens to harm private property. Waiting on the permitting process will only add to the potential harm to both people and property. As individuals responsible for the safety of others, local government will be jeopardized in its ability to serve its constituents. Farmers will be impacted by the

potential restrictions on their ability to properly manage their farmland and produce the crop and livestock upon which much of the economy is built and people rely. (p. 1)

Agency Response: **See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The Corps regulations define an "emergency" under the nationwide permit program as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."**

Westlands Water Districts (Doc. #14414)

12.267 Treatment wetlands, as the name implies, are designed to treat wastewater or stormwater before it is discharged into waters of the United States. These facilities are often constructed in close proximity to traditional navigable waters and with direct outlets to such waters. As a result, they would be considered adjacent to either traditional navigable waters or their tributaries under the Proposed Rule. Such regulation of these constructed wetlands as waters of the United States would impose a significant burden on both the wetland owner, the Army Corps of Engineers, and the EPA. Every time significant maintenance is required or there is a discharge into the wetlands, a federal permit would be required. Nothing in the text of the Clean Water Act suggests that such a regulatory burden should be imposed on the wetland owner or the regulatory agency. (p. 24)

Agency Response: **See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.**

The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. Also, see essay 7.1 regarding the waste treatment system exclusion.

Maryland Farm Bureau (Doc. #10755)

12.268 In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. The proposed rule will result in duplicative and incongruent regulatory requirements that are inconsistent with the purpose and structure of the Act and have not been adequately considered by the agencies. (p. 1)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

North Platte Valley Irrigators Association (Doc. #18963)

12.269 We believe the rule creates more confusion about what will or will not constitute a "normal" farming practice with respect to §404 permitting. The proposed rule causes more confusion than clarity with respect to our normal farming and irrigating practices and whether or not we need §404 permits. Over the years, our membership has dealt

primarily with the NRCS and the Nebraska state agencies which regulate water usage and water quality. We believe that the proposed rule seems to give the EPA free reign to interpret the CWA rules as well as veto power over determinations made by other agencies and remove the ability of the NRCS and state agencies to help us make the appropriate decisions at the local level. (p. 2)

Agency Response: See Summary Response. Only the EPA and the Corps, and applicable states and tribes, have authority to determine jurisdiction under the Clean Water Act. The final rule clarifies the additional excluded waters and features, including stormwater control features. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

Wilkin County Farm Bureau (Doc. #19489)

12.270 The agencies' proposed expansion of jurisdiction will result in additional permit obligations for the daily tasks of farmers, ranchers, and landowners, especially for Section 404 dredge and fill permitting, Section 402 NPDES permitting, Section 401 water quality certification, and Section 311 oil spill prevention. (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

New Mexico Cattle Growers Association et al. (Doc. #19595)

12.271 Implications regarding the Endangered Species Act (ESA): The Parties express grave concern regarding the additional regulatory and economic burden that will be placed on our membership in complying with ESA Section 7 consultation requirements as a result of the Proposed Rule. When the Proposed Rule as written is broadly enforced by the EPA and USACE regarding permitting requirements, the ensuing federal nexus will require ESA Section 7 consultation across New Mexico for normal and customary agricultural and ranching practices that is not required today, as there are no agricultural or ranching exemptions contained within the ESA. The additional burden and potential ESA take findings will undoubtedly cause irreparable economic harm to our membership and threaten to undermine and potentially eliminate the customs and culture of their rural communities. (p. 14)

Agency Response: While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Iowa Poultry Association (Doc. #19589)

12.272 The Corps Lacks the Staff and Resources Necessary to Adequately Address the Increase of Permit Application that Will Result because of the Lack of Clarity in the Proposed Rule.

Due to the Jack of clarity in the new rule regarding which waters are jurisdictional and which farming activities are exempt from the proposed regulations, the likely result will be either an influx of permit applications to ensure compliance with the rule and/or a stifling of conservation practices which may involve a jurisdictional water due to the now mandatory permitting requirements for those practices. The permitting process under the CWA either for an NPDES permit or a Section 404 permit is an expensive and timely process. It is doubtful that the Corps has the staff or the resources to timely process permit application. The unfortunate effect of the proposed rule will be to limit or impede conservation, business, farming, and industrial practices that may in fact benefit both the environment and the water because of the overarching and limitless jurisdiction afforded to the Corp through the proposed rule. (p. 3)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and

certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

North Carolina Aggregates Association (Doc. #6938)

12.273 The proposed rule leaves many key concepts unclear, undefined, and subject to the agency's discretion. This vagueness will not provide the intended regulatory certainty that the agency is professing and will require the regulated community to unnecessarily spend resources in the courts to clarify the vagueness of the rule. (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

12.274 The proposed rule will subject more activities to CWA permitting requirements, NEPA analysis, mitigation requirements, and citizen lawsuits challenging local actions based on the expanded jurisdiction by EPA and the Corps. (p. 2)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The CWA citizen suit provision is also unaffected by this final rule. The Technical Support Document provides additional responsive information.

New York State Association of Town Superintendents of Highways, Inc. (Doc. #7641)

12.275 We support efforts to help preserve our environment and understand the purpose of the proposed redefinition as an attempt to better ensure a more secure, clean water supply for our citizenry. However, we cannot support such a broad-stroke, imprecise approach that will only create further cause for public concern. These regulations fly in the face of

common-sense and work to prevent the timely maintenance of local infrastructures. Critical repairs could be unduly delayed as proposals and permits are waited on for approval by the correct federal agencies. (p. 2)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. Certain nationwide permits do not require pre-construction notification, including certain ones for maintenance activities, and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."**

New Salem Township, Office of the Road Commissioner (Doc. #8365)

12.276 Ditches are pervasive across the nation and were never considered to be jurisdictional by the Corps. Whether or not a ditch is regulated under Section 404 has significant financial implications for our township the Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. This could put our township in a precarious position as we often balance a small budget against public health and safety needs. Delays of a year at a cost of hundreds of thousands of dollars would make our position untenable. (p. 2)

Agency Response: **See Summary Response. The agencies disagree that ditches have never been regulated under the Clean Water Act. While it is true that certain types of ditches have generally been excluded from jurisdiction, other types of ditches such as those constructed in tributaries have generally been considered to be jurisdictional. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.**

Lake Charles Harbor and Terminal District (Doc. #14448)

12.277 Most port construction activities come under the CWA jurisdictional definition of traditional navigable waters. The proposed rule makes additional lands subject to CWA jurisdiction and the District is very concerned about the impacts on the timely processing of critical port actions, such as construction and dredging permits by the Corps. (p. 1)

Agency Response: See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

Airlines For America (Doc. #15439)

12.278 Overall, it is reasonable to assume that the Proposed Rule would result in the incidental characterization of individual drainage ditches or detention/retention ponds as WOTUS within airport sites. Such characterizations would vastly and unpredictably reshuffle the systems that airports, airlines, and their permitting authorities have put in place to meet the requirements of the Act. By potentially requiring outfalls within the aircraft operations area to be permitted the Proposed Rule would – inadvertently, we assume – render many choices of treatment technology unavailable. On the other hand, by requiring permits at on-airfield sites where no treatment can feasibly be placed, the Proposed Rule would make it impossible to meet water quality-based effluent limitations and, thereby, threaten the sustainability of air service (a result that clearly is impermissible under the Federal Aviation Act). (p. 6)

Agency Response: See Summary Response. The rule limits CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It improves efficiency, clarity, and predictability for all landowners as well as permit applicants. The final rule does not modify existing regulatory programs and clarifies the additional excluded waters and features, including certain ditches and stormwater control features. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, the summary responses at 7.4.4.

Airports Council International – North America (Doc. #16370)

12.279 In an effort to further understand the jurisdictional reach and related impacts of the Proposed Rule the following general questions need to be answered:

In the case of costal airports the Proposed Rule paints a limitless regulatory reach to upstream natural and/or manmade water features. Further clarification on the delineation of jurisdiction in this case is needed.

Agency Response: **See Summary Response The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The final rule also clarifies the additional excluded waters and features, including certain ditches and stormwater control features. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.**

12.280 How would this ruling cascade into the National Water Program (NWP)? (p. 6)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction.**

WateReuse Association (Doc. #1349)

12.281 The proposed rule's impacts and implications across the many CWA programs has not been adequately analyzed or clearly communicated, and more time is needed to identify and comment upon these impacts. The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load (TMDL) programs. We do not believe the agencies have truly considered or analyzed the complex implications that this proposed rule will have for the various CWA programs. Because the agencies have not fully considered the implications across all CWA programs, the public could not possibly address and comment on these implications within the time allowed for public comment. We believe these issues must be fully addressed by the agencies during the rule making process. Analyzing these implications is complicated, will require additional time, warranting an extension of the comment period. (p. 2)

Agency Response: **See Summary Response. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the**

U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

Department of Public Works, City of Harrisville (Doc. #4038.2)

12.282 We do not believe that either agency seriously intends that this new 'clarification' of EPA and USACOE view of waters of the United States intended to regulate routine activities (…) since the projected cost increases associated with this rule change to local entities was effectively non-existent. That analysis makes no operational sense either for cities or to the USACOE if we have to apply to the Corps for a vegetation removal permit every time we need to mow a dry section of right of way just because it carries rainwater after a storm and eventually drains into jurisdictional waters. We do not believe either the Corps of the EPA have appropriately factored the cost for anyone. (p. 2)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. See the updated Economic Analysis for additional discussion. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4

Red River Joint Water Resource District (Doc. #4227)

12.283 The proposed rules clearly identify navigable waters, interstate waters, and territorial seas as jurisdictional. The District does not dispute EPA's and the Corps' jurisdiction over these waters under the CWA. However, the proposed rules effectively extend jurisdiction over virtually any and all waters and activities and this dramatic expansion will have a chilling effect on all construction activity in the entire country, certainly including any and all efforts of the District to manage water in accordance with our statutory charge. (p. 2)

Agency Response: See Summary Response. The rule limits CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It improves efficiency, clarity, and predictability for all landowners as well as permit applicants.

Nye County Water District Governing Board (Doc. #5486)

12.284 The proposed definition change could place additional restrictions on development or use of multiple-use lands currently managed by the Federal government by requiring additional permits. Again, these restrictions and permit requirements place additional financial burden on the County or other prospective users. (p. 2)

Agency Response: **See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The agencies do not have authority to regulate a landowner's property or land use. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. See the Economic Analysis for additional information on costs/benefits of the final rule.**

JEA (Doc. #10747)

12.285 In the preamble of the draft rule revisions, the Agencies assert that a central purpose of this rule proposal is to clarify the boundaries of federal jurisdiction. 79 Fed. Reg. at 22,218. In endeavoring to achieve this goal, the Agencies attempt to interpret and apply Justice Kennedy's concurring opinion in *Rapanos*, which stated that wetlands should be regulated under the Clean Water Act if they have a "significant nexus" to waters that are or were "navigable in fact" (i.e., obviously jurisdictional waters). *Rapanos v. United States*, 547 U.S. 715, 779 (2006). Based on this seemingly narrow opinion on wetland jurisdiction, the Agencies assert jurisdiction over a broad array of ditches and surface water features that have a seemingly tacit connection to traditionally navigable waters.

JEA is concerned that instead of increasing clarity regarding the scope of the Agencies jurisdictional authority, the proposed rule instead creates uncertainty. The proposal will place JEA and other members of the regulated community in the untenable position of applying new, undefined terms and amorphous standards when evaluating whether particular surface areas constitute waters of the U.S. In particular, the proposed rule's handling of stormwater ditches, "other" adjacent and neighboring waters, and the waste treatment exclusion raises significant concerns to JEA. (p. 2-3)

Agency Response: **See Summary Response. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. In addition, see**

the exemptions for certain ditch maintenance activities under section 404(f)(1) of the Clean Water Act. The rule limits CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It improves efficiency, clarity, and predictability for all landowners as well as permit applicants. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. With respect to the waste treatment system exclusion, please see essay 7.1.

County of San Diego (Doc. #14782)

12.286 A broader definition of Waters of the U.S. will make it more difficult for jurisdictions to maintain compliance with Total Maximum Daily Load (TMDL) limits and identify stormwater treatment options.

In response to the Municipal Separate Storm Sewer System (MS4) Permit adopted by the San Diego Regional Water Quality Control Board in May of 2013 (NPDES Order No. R9- 2013-0001), Water Quality Improvement Plans (WQIPs) are being prepared for several watersheds in San Diego County. MS4s are regulated under the Clean Water Act's Section 402 National Pollutant Discharge Elimination System (NPDES) permitting structure, the State of California's Porter-Cologne Act, and the MS4 Permit.

During the WQIP development process, bacteria have been identified as the highest priority water quality condition in several County watersheds. Bacteria have been a focus since adoption of the Bacteria TMDL (San Diego Regional Water Quality Control Board Resolution No. R9-2010-0001). TMDLs emanate from Section 303(d) of the Clean Water Act (CWA), which requires states to identify waters that are impaired by pollution, establish priorities for development of TMDLs based on the severity of the impairment, and determine the sensitivity of beneficial uses associated with the waters. Thus, the TMDL program has become a core element of the MS4 permit requirements imposed by the San Diego Regional Water Quality Control Board.

The purpose of the Bacteria TMDL is to protect the health of those who recreate at beaches and streams. The TMDL requires responsible agencies to attain required load reductions during both dry and wet weather conditions within a 10- and 20-year compliance timeline, respectively. The County is in the process of identifying potential bacteria load reduction strategies, including treatment options, in order to achieve compliance. Because the Clean Water Act prohibits placement of best management practices (BMPs) in Waters of the U.S., expanding the definition of Waters of the U.S. can significantly limit future options for compliance.

Example: The MS4 Permit identifies points of compliance for the Bacteria TMDL. For the San Diego River, a compliance point occurs in the lower portion of Forrester Creek. Measurements in Forrester Creek will determine if jurisdictions are meeting the required bacteria limits. Expanding the definition of Waters of the U.S. to include ditches and other "offline" MS4 conveyances with connectivity to the Creek would significantly limit opportunities to treat stormwater before it reaches the receiving water. (p. 1-2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. TMDLs are not self-implementing and do not impose regulatory requirements on discharges. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. As a general matter, the agencies do not encourage placement of BMPs in waters of the U.S., but where appropriate such placement could be evaluated in the context of 404 permit coverage.

SD1 (Doc. #15140)

12.287 By failing to account for the strength and degree of connection between water bodies, the proposed definition of WOTUS struggles to establish a scientifically defensible, independently verifiable test of what constitutes a "*significant nexus*". This phrase, which is used multiple times in the Federal Register publication, is key to determining whether or not "*other waters*" that are neighboring and adjacent to currently regulated water bodies are included in the definition of WOTUS under the proposed rule. Without considering and incorporating the degree of connection and establishing an independently verifiable test for significant nexus based on the strength and degree of the connection, all water bodies with any demonstrable connection, regardless of how large or small, through any hydrologic, biological, or chemical linkage, either surface or subsurface, are by definition WOTUS. This is particularly relevant in considering the regional variability in the factors, such as climate, soils, and topography, contributing to connectivity. Addressing regional variability in the tests of "significant nexus" will appropriately incorporate the complete range of available science in support of the regulatory process. Equally important, addressing regional variability provides an opportunity for state water and natural resource agencies to participate in the development and determination of what constitutes a "significant nexus" for waters of each state.

A consequence of not addressing variability is that the regulated community faces the burden of proving the complete negative (no hydrologic, biological, or chemical connection at all) in any effort to have a water body not identified as WOTUS and falling under the jurisdictional authority of the EPA. The USACE and EPA themselves suggest a level of uncertainty with this approach when they state on page 22214 of the proposed rule:

"In particular the agencies solicit information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of particular types of "other waters," either alone or in combination with similarly situated waters that can appropriately be identified as always lacking or always having a significant nexus."

The failure by the agencies to establish a test or guidance for determining what constituents "significant nexus" that includes treatment of the degree of connectivity (e.g., frequency, duration, predictability, and magnitude) at the regional level, indicates that the proposed rule is not ready for implementation and does not adequately or completely resolve the original issues raised in the United States Supreme Court cases of Rapanos and SWANCC (Solid Waste Agency of Northern Cook County). (p. 3-4)

Agency Response: **See Summary Response. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination. See the preamble section on "Case-Specific Waters of the United States" for further discussion. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

12.288 (…) we propose that the agencies:

- Withdraw the proposed rule at this time;
- Finalize the connectivity report by incorporating the Science Advisory Board's recommendations;
- Conduct additional outreach to obtain well-informed input on the issues raised during this public comment period and develop alternatives;
- Establish a definitive approach to establishing significant nexus that takes into account regional variability in hydrologic regimes of the United States;
- Develop a companion guidance document to determine significant nexus to accompany the proposed definition when reissued;
- Redo the economic analysis and solicit input from states and regulated entities in that process;
- Develop specific exclusion language into the rule for storm water control measures and BMPs; and,
- Reopen the comment period for ninety days after the above actions are completed. (p. 8)

Agency Response: **See Summary Response. The Connectivity Report has been finalized. See the Technical Support Document for a scientific summary to support the final rule. The agencies conducted extensive outreach and stakeholder meetings during the public comment period. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination. See the preamble section on "Case-Specific Waters of the United States" for further discussion. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure**

appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. The comment period was extended twice to close on November 14, 2014. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. The Agencies withdrew the Interpretive Rule January 29, 2015.

County of San Diego (Doc. #15172)

12.289 Impact on TMDL Compliance Requirements. A broader definition of Waters of the U.S. will make it more difficult for jurisdictions to maintain compliance with Total Maximum Daily Load (TMDL) limits and identify stormwater treatment options. In response to the Municipal Separate Storm Sewer System (MS4) Permit adopted by the San Diego Regional Water Quality Control Board in May of 2013 (NPDES Order No, R92013-0001), Water Quality Improvement Plans (WQIPs) are being prepared for several watersheds in San Diego County. MS4s are regulated under the Clean Water Act's Section 402 National Pollutant Discharge Elimination System (NPDES) permitting structure, the State of California's Porter-Cologne Act, and the MS4 Permit.

During the WQIP development process, bacteria have been identified as the highest priority water quality condition in several County watersheds. Bacteria have been a focus since adoption of the Bacteria TMDL (San Diego Regional Water Quality Control Board Resolution No, R9-2010-0001), TMDLs emanate from Section 303(d) of the Clean Water Act (CWA), which requires states to identify waters that are impaired by pollution, establish priorities for development of TMDLs based on the severity of the impairment, and determine the sensitivity of beneficial uses associated with the waters. Thus, the TMDL program has become a core element of the MS4 permit requirements imposed by the San Diego Regional Water Quality Control Board.

The purpose of the Bacteria TMDL is to protect the health of those who recreate at beaches and streams. The TMDL requires responsible agencies to attain required load reductions during both dry and wet weather conditions within a 10- and 20-year compliance timeline, respectively. The County is in the process of identifying potential bacteria load reduction strategies, including treatment options, in order to achieve compliance. Because the Clean Water Act prohibits placement of best management practices (BMPs) in Waters of the U.S., expanding the definition of Waters of the U.S. can significantly limit future options for compliance.

EXAMPLE: The MS4 Permit identifies points of compliance for the Bacteria TMDL. For the San Diego River, a compliance point occurs in the lower portion of Forrester

Creek. Measurements in Forrester Creek will determine if jurisdictions are meeting the required bacteria limits. Expanding the definition of Waters of the U.S. to include ditches and other "offline" MS4 conveyances with connectivity to the Creek would significantly limit opportunities to treat stormwater before it reaches the receiving water. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. TMDLs are not self-implementing and do not impose regulatory requirements on discharges. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. As a general matter, the agencies do not encourage placement of BMPs in waters of the U.S., but where appropriate such placement could be evaluated in the context of 404 permit coverage.**

Utility Water Act Group (Doc. #0852)

12.290 The terms "navigable waters" and "waters of the United States" appear over 200 times in the CWA and its accompanying regulations. The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including the §402 National Pollutant Discharge Elimination System program, the §404 dredge and fill permitting program, the §311 spill prevention program, and the § 401 certification process. The agencies have not truly considered the complicated implications that this proposed rule will have for the various CWA programs. Additional time is needed for UWAG and its members to assess how the application of the proposed rule's new definition will affect electric utilities with respect to each of the CWA regulatory programs. (p. 3)

Agency Response: **See summary response 12.3 regarding NPDES; summary response 12.2 regarding 401 certifications; summary response 12.4 regarding the 404 program; and summary response 12.5 regarding SPCC. See also compendium 11 and the Economics Analysis for an explanation of how the agencies considered costs and benefits for all CWA programs.**

Clearwater Watershed District, et al (Doc. #9560.1)

12.291 We are concerned that the proposed rule seeks to achieve this goal by over-simplifying the connections of tributaries, adjacent waters, and other waters to include virtually all types of water resources, unlimited by the language of the Clean Water Act, Congress's power under the Commerce Clause, and existing case law. The general tone of the proposed rule is to achieve clarity through over-inclusiveness based on categorical determinations. We caution the agencies' approach in the proposed rule as it exacerbates an already existing problem: over regulation of non-navigable waters under the Clean Water Act and costly and time consuming over exertion of jurisdiction.

Prefatory comments to the rule state, "The agencies are providing clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting, and whether individual water bodies are not jurisdictional and discharges

are not subject to permitting." The rule sets out only to define "waters of the United States." It does not, as the prefatory comments suggest, discuss types of "discharges" that are exempt or not exempt. We encourage the agencies, through further rulemaking and analysis, to evaluate the significance of the impact different types of discharges have on the chemical, physical, and biological integrity of waters of the United States. (p. 3-4)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The comment is outside the scope of this rulemaking effort.**

Duke Energy (Doc. #13029)

12.292 (Specify) the types of maps that can be used for jurisdictional determinations, how they will be specifically used in the determination and how the maps will be maintained should be clarified. (p. 13)

Agency Response: **See Summary Response. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. Determinations will be made on a case-by-case basis utilizing all relevant resources (aerial photos, USGS topo map, NHD, Soil Surveys, stream gauge data, etc.) along with data collected in the field, when applicable.**

12.293 Clarify that review of SPCC Plans will continue on current 5-year cycle and will not need to be expedited for any newly jurisdictional waters identified following a final rule. (p. 13)

Agency Response: **This action would not necessarily require facilities that have prepared SPCC plans to update these plans outside of the normal 5-year review cycle or complete a technical amendment to the plan unless there is a change in facility configuration, etc. that affects its potential for an oil discharge to waters to the U.S. or adjoining shorelines. See 40 CFR part 112.5 in the SPCC rule.**

12.294 For the recently finalized 316(b) Cooling Water Intake Structure Rule, there could be some incremental affects from the proposed rule if a facility needs to install or upgrade their cooling water intake screens and adds a fish return system, or decides to reconstruct their intake to meet the 0.5 fps flow intake limit. The majority of the waters encountered during a modification or replacement of an intake structure would have already been accounted for under the current "waters of the United States" definition, but incremental increases to the number of these waters is possible. The installation of a fish return system, on the other hand, could run into unique challenges under the proposed rule. This conveyance is essentially a man-made trough or pipe that transports fish that are captured on modified intake traveling screens from one water (the intake river or bay) to another location (the return). Most likely, both the intake and the return location would already be considered "waters of the United States". Under the proposed rule, however, the actual fish return could potentially be deemed a jurisdictional tributary since, even though it's man-made, it could have a bed, banks, and discernible OHWM along with flow to a TNW. The broad definition for tributary makes this plausible and there is nothing in the proposed rule to exclude this type of conveyance. In addition, with the expanded jurisdiction for adjacent waters, there is a greater potential for more jurisdictional waters to be encountered while constructing the fish return structures which could be, in some cases, as long as a mile in length. (p. 66)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. In addition, see summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated indirect costs and benefits of the rule for each CWA program. EPA disagrees with the comments concerning perceived impacts of the final 316(b) Cooling Water Intake Structure Rule. EPA notes the comments provide no data or examples to support the assertions, nor do the comments interpret the 316(b) Cooling Water Intake Structure Rule requirements correctly. In developing the 316(b) rule, EPA conducted a census of all power plants and a survey of manufacturing facilities designed to withdraw at least 2 million gallons of water per day for cooling from a waters of the U.S as defined in 40 CFR 122 in the year 1999. Because fewer waters will be defined as "waters of the United States" under the rule than under the**

existing regulations, EPA disagrees with the underlying premise that more facilities would meet the applicability at 122.125. The comments assume any facility newly affected by the rule would need to "install or upgrade their cooling water intake screens and adds a fish return system, or decides to reconstruct their intake to meet the 0.5 fps flow intake limit." This is incorrect. The final 316(b) rule provides for seven different compliance alternatives, not just the two alternatives identified in the comments. If a facility chooses to comply by the intake velocity alternative, it can do so by demonstrating under 40 CFR 125.94(c)(3) that the measured velocity is less than 0.5 feet per second; there is no requirement to reconstruct the intake, nor is intake reconstruction necessary to reduce velocity (for example see 79 FR 48345 discussing variable speed pumps). EPA notes additional flexibility under the 316(b) rule includes: compliance can be on an intake-by-intake basis or for the facility as a whole; a provision for de minimis impacts; and a provision for low capacity utilization power generating units. See 40 CFR Part 125. With respect to construction of a fish return, according to the comments the most likely scenario is where the intake location and the return location are on the same waterbody. This is not just the most likely, it is the only permissible scenario. Under 40 CFR 125.92(s) the fish must be returned to the source water body, thus the hypothetical scenario for constructing the fish return with a location different from the intake location as described by the commenter is inconsequential.

WaterLaw (Doc. #13053)

12.295 Congress has historically recognized federal deference to state laws to allocate and administer water use. If virtually all water supply and irrigation ditches are now subject to wetlands permitting, it will unnecessarily burden, render cost prohibitive, or frustrate water allocation, use and administration. If a water user cannot comply or secure the necessary permitting, either practically or economically, the water user may be prevented from exercising a valid water right. This would upset the comprehensive legal scheme for efficient water use each western state relies on The Clean Water Act lacks a clear and manifest intent expressed from Congress to authorize this abrogation and intrusion into traditional state regulation of water use. *See, e.g., Rapanos*, 547 U.S. at 737-738. (p. 8)

Agency Response: See Summary Response. The final rule clarifies the additional excluded waters and features, including certain ditches, stormwater control features, wastewater recycling features, and other water features. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

San Juan Water Commission (Doc. #13057)

12.296 The WOTUS Rule would extend federal jurisdiction to ornamental ponds, flood retention ponds, municipal storm drains, stock watering ponds, irrigation canals and puddles at construction sites. By elevating such waters to federal waters, many land uses will become subject to complex permitting requirements, including potential application of the National Environmental Policy Act and the Endangered Species Act. (p. 3)

Agency Response: **The final rule clarifies the additional excluded waters and features, including certain ditches, stormwater control features, wastewater recycling features, and other water features. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. The agencies do not have authority to regulate a landowner's property or land use. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. See also responses to comments on non-jurisdictional ponds at 7.3.2, 7.3.3, 7.3.4 and 7.3.5.**

12.297 Adoption of the WOTUS Rule will dramatically limit the ability of SJWC's member entities to continue necessary maintenance and other activities related to the operation of water diversion and distribution facilities. Under the proposed legislation, such activities will arguably require National Pollutant Discharge Elimination System ("NPDES") and/or Section 404 Wetlands permits, which may or may not be obtainable in a timely manner, if at all. The economic and time costs of compliance, and resulting service disruptions, will be unprecedented and, in many instances, may make it impossible for SJWC's member entities to perform their essential functions. Population growth in New Mexico is straining existing water supplies and infrastructure, and the additional restrictions, prohibitions and limitations that will result from adoption of the WOTUS Rule will do much more harm than good (p. 4)

Agency Response: **See Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs. See Summary Response. The final rule clarifies the additional excluded waters and features, including certain ditches, stormwater control features, wastewater recycling features, and other water features. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. See the revised Economic Analysis for the final rule.**

Ameren Corporation (Doc. #13608)

12.298 These proposed broader definitions will trigger more Section 404 permits, Section 401 state water quality certifications, additional individual site permits, changes to NPDES Section 402 and storm water permits, case-specific evaluations, create added costs, resources, and result in significant delays. States will be required to set water quality

standards (Sections 303, 304, 305 and 311) for all features and waters that meet the newly proposed WOTUS definition. (p. 1)

Agency Response: **See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. With respect to discussion on the effect of the final rule on NPDES permits, please see Compendium 7. With respect to the effect of the final rule on NPDES permits, please see essay 12.3. See essay 7.4.4 with respect to stormwater features. See also essay 12.2 (401 certifications), 12.4 (404 permit program), 12.5 (SPCC), and the Economics Analysis for a discussion of how EPA analyzed costs and benefits for all CWA programs, including water quality standards and TMDLs.**

NRG Energy, Inc. (Doc. #13995)

12.299 The expanded Definition, if adopted, would also impact other permitting requirements under the CWA, in addition to permits issued by the ACE under section 404 of the Clean Water Act ("CWA") (33 CFR Part 328 and 40 CFR Part 230, 40 CFR Part 232), including: discharges of oil under section 311 of the CWA (40 CFR Part 110), the Spill Prevention, Control and Countermeasure ("SPCC") program under section 311 of the CWA (40 CFR Part 112), the designation of hazardous substances under section 311 of the CWA (40 CFR Part 116), reportable quantities of hazardous substances under section 311 of the CWA (40 CFR Part 117), discharge permits under section 402 of the CWA (40 CFR Part 122), the National Contingency Plan for Superfund and the Oil Pollution Act ("OPA") (40 CFR Part 300), reportable quantities of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and section 311 of the CWA (40 CFR Part 302), and CWA effluent limitations and standards (40 CFR Part 401). (p. 7)

Agency Response: **See summary responses in Topic 12, including sections 12.2, regarding 401 certifications, 12.3 regarding NPDES; 12.4 regarding the 404 program; and 12.5 regarding SPCC. See also summary responses in Topic 11: Costs/benefits and the Agencies Economics Analysis for an explanation of how the agencies considered costs and benefits for all CWA programs.**

Southern Company (Doc. #14134)

12.300 Expanded CWA jurisdiction would necessarily lead to a corresponding increase in National Environmental Policy Act (NEPA), cultural resources, and endangered species

reviews/consultations, among other regulatory program implications. It would also lead to more CWA citizen suit challenges to project proponents where more jurisdictional waters are at issue. Put simply, expanding the definition of waters of the U.S. in the manner as proposed would require more, not less, regulatory action, leading to added costs and delays in implementing the numerous regulatory programs tied to this key term.

These implications and impacts would be felt to an equal or even greater degree at the state level, where state agencies with delegated authority generally assume the bulk of the regulatory load in implementing CWA Section 402 and other affected regulatory programs. Many states are unable to keep pace with NPDES permitting schedules and other CWA-mandated regulatory obligations as it is. Southern Company is concerned that the agencies have not taken these and other less direct and unintended consequences into full consideration (p. 18-19)

Agency Response: **The agencies have thoroughly considered the implications of the final rule on all of the CWA programs that rely on this definition, and the agencies, states and tribes responsible for implementing CWA regulations. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. See summary response for section 12.3: 402-NPDES for more discussion of the rule and implementation of this program. See also summary responses in Topic 11: Costs/benefits and the Agencies Economics Analysis for an explanation of how the agencies considered costs and benefits for all CWA programs.**

12.301 The agencies do not explain whether the additional three percent is tied to categorically jurisdictional waters (e.g., the expanded definitions for "adjacent" and "tributary") or to case-specific determinations with respect to newly defined "other waters" and the broad new definition for "significant nexus." Moreover, the agencies simply fail to provide any supporting documentation and reasoned explanation regarding how this estimate was derived, which is a flawed comparison and significantly underestimates the likely increase.

Introducing the new aggregate approach to establish significant nexus, the proposal would significantly increase the scope of CWA jurisdiction. Yet the agencies have absolutely no idea how many more waters would be jurisdictional based on aggregation – nor could they – and thus the issue could not have been properly considered under the three-percent estimate. As well, under recent Corps field practices, potential permittees would not have sought a jurisdictional determination (JD) for non-jurisdictional isolated features that would now be covered by this rule – further undermining the agencies' estimation. Additionally, it is unclear whether the comparison is based solely on final or preliminary JDs (where applicants will frequently concede jurisdiction for permitting efficiency or for project cost/timeline reasons). Moreover, the comparison is not even relevant because the issue of whether the subject field practices are consistent with the CWA has not even been established. For these reasons, the agencies must provide a more

transparent, reasoned, and defensible estimate of the jurisdictional expansion under this proposal. (p. 20)

Agency Response: **See Summary Response. See Technical Support Document for additional information on the scientific basis for the rule. See the Economic Analysis for additional information on predicted change in jurisdiction. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations in particular for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

Spectra Energy Corp (Doc. #14273)

12.302 Spectra recommends that the agencies take steps to alleviate agency workload concerns, including maintaining key nationwide permits and fully implementing their authority under the Water Resources Reform & Development Act of 2014 ("WRRDA") which allows pipeline companies like Spectra to fund designated positions at the Corps to assist with permitting workloads.[70] (p. 2)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays.**

[70] Water Resources Reform & Development Act of 2014, Pub. L. No. 113-121, § 1006, 128 Stat. 1193, 1212-14 (2014).

The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations in particular for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.303 We recommend that the rule acknowledge the increased need for permits under the proposed definition, commit to maintaining NWP 3 and NWP 12, and commit to adopting additional nationwide permits for newly jurisdictional waters.

Spectra also recommends that the proposed rule commit to full implementation of section 1006 of the WRRDA. This authority allows the Corps to expedite the evaluation of permit applications by accepting and expending funds contributed by natural gas companies and public utilities.[71] Spectra recommends that the rule commit to employing this process. This would allow pipeline companies like Spectra to fund designated positions at the Corps to assist in dealing with the increased workload from the proposed definitional change. Such funding would ensure that delays are lessened and the Corps is able to employ the necessary qualified personnel to deal with the influx of permit applications. (p. 5)

Agency Response: **See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations in particular for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The Corps Nationwide permits will be**

[71] Analysts estimate that North America will need over 338,000 miles of new natural gas pipeline from 2014-2035. INGAA Report at 19.

reauthorized in 2017 via the public notice and comment rulemaking process and comments regarding appropriate activities for inclusion are welcomed during that process. Implementation of WRRDA 1006 is beyond the scope of this rulemaking.

National Lime Association (Doc. #14428)

12.304 Unless the Agencies reissue a clearer and more precise proposal for the public to consider, the rule as currently written will compel sources to interpret the regulations in the most conservative way and thereby conclude that a water is jurisdictional (even when it is not) in order to avoid the potential for later being accused of being in non-compliance. Thus, either by the rule's intent or merely by happenstance, it is quite foreseeable that the current proposal will contribute to a potential expansion of jurisdiction, not the narrowing which the Agencies predict. (p. 17)

Agency Response: See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies believe the clarity and certainty provided in the rule will result in better identification of what is/is not a water of the U.S. which may result in reduced enforcement actions associated with unauthorized activities and reduced opportunity for litigation based on what is/is not a water of the U.S. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Responsible Industry for a Sound Environment (Doc. #14431)

12.305 Due to the broad definitions outlined in the proposed rule, there are no metrics to guide pesticide applicators and landowners in determining which "other waters" establish a significant nexus to a jurisdictional water. The proposed rule will create regulatory uncertainty between the Federal Insecticide, Fungicide, Rodenticide Act and CWA jurisdiction, specifically as it relates to NPDES permits being required for applications of pesticides in, over or near waters. (p. 2)

Agency Response: For clarification regarding "other waters" and their significant nexus see the summary response for Topic 4: Other waters. With respect the application of pesticides under NPDES and its relationship to FIFRA, please see summary response for section 12.3.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

12.306 To the extent additional waters, such as all intermittent or ephemeral streams are now jurisdictional, the ability to utilize nationwide 404 permit provisions is placed at risk. As the scope and length of jurisdictional waters expands, the ability to meet the limitations governing qualification for nationwide status contracts. (p. 4)

Agency Response: **See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. See the Nationwide Permit program for further discussion of impact thresholds which may/may not require pre-construction notification. The Corps Nationwide permits will be reauthorized in 2017 via the public notice and comment rulemaking process and comments regarding appropriate activities for inclusion are welcomed during that process.**

12.307 As more so-called jurisdictional waterbodies or waterbody reaches of the type noted above are considered jurisdictional, additional point and nonpoint sources will need to be included in TMDL calculations. It may also be necessary to reopen existing TMDL allocations for purposes of including within the calculations the new point and nonpoint sources. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For example, under the final rule many ephemeral and intermittent ditches, and waters constructed in dry land, such as stormwater conveyance features, waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds, including settling basins and cooling ponds, are all excluded from waters of the U.S. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters. Additionally, this rule will not affect the current implementation of the various CWA program, such as the development of water quality standards or implementation of sections 303, 402 and 404.**

Metropolitan Water District of Southern California (Doc. #14637)

12.308 The Agencies do not discuss how they will establish consistency in making significant nexus determinations across the country. For instance, how does the seasonality of precipitation and periodic lengthy drought in the arid west affect the connectivity of upstream features to downstream waters? If an "other" water is isolated from downstream features for 10 years or more due to lack of precipitation, does that still mean there is a significant nexus between that isolated upstream feature and the downstream water? In other words, is there a certain frequency of storm event that would trigger a finding of significant nexus in the arid west? Metropolitan is concerned that the standards proposed for the final rule will unnecessarily increase permitting requirements in the arid southwest, without a measured benefit to water quality. Metropolitan requests

that the Agencies explicitly consider the special circumstances in the arid west in significant nexus determinations to take into account the fact that isolated or "other" waters may not in fact be connected to downstream waters except during infrequent exceptional storm events, and that this situation does not constitute a significant nexus. (p. 7)

Agency Response: **See Summary Response. See Technical report and the Connectivity Report for additional information. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule includes a definition of "significant nexus" which includes a list of factors to be considered when making such a determination. The definition provides additional clarity and predictability in making significant nexus determinations. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the OHWM regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

12.309 Groundwater should not be used to determine the jurisdictional scope of surface features. The term "adjacent" is defined in the proposed rule to mean bordering, contiguous or neighboring. The term "neighboring," for purposes of the term "adjacent," includes waters with a shallow subsurface hydrologic connection to (a)(l) through (a)(5) waters. Metropolitan is concerned about this regulatory provision for a number of reasons. As discussed in our comment letter on the Draft Connectivity Report, in the arid west, directional movement of subsurface water can be very complicated (see Enclosure 2). Therefore, studies to understand subsurface connections may not be definitive, and the determination of subsurface connection can be very costly and time-consuming. The burden of these studies, in terms of cost, effort and time involved, would fall to the regulated community. This one requirement alone could greatly increase the cost and schedule of projects and activities. Such studies could require costly installation of wells and piezometers to characterize subsurface groundwater conditions. These studies could require many months to complete. This delay would be in addition to the delay caused by limited staff resources at the Corps available to review project applications (p. 10)

Agency Response: **See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. See the preamble for further discussion on the "Adjacent Waters" sections. The final rule has further refined the "neighboring" definition to provide additional clarity and predictability. The use of shallow sub-surface flow connections has been removed from the definition of neighboring in the final rule.**

Utility Water Act Group (Doc. #15016)

12.310 With respect to TMDLs, the Agencies make the wholly unfounded assumption that the only segments likely to be affected are those already classified as jurisdictional, and any water features newly captured by the Proposed Rule will lie upstream of segments already listed as impaired and thus will be covered by, or at least benefit from, TMDLs already required. *Id.* at 7 [Economic Analysis at 7]. No data or analysis are provided to support this proposition, which is at best unexplained and, UWAG believes, wrong. Given the costs and other burdens imposed by TMDLs, which are expensive and time-consuming to prepare[72] and can impose enormous costs on point and nonpoint sources if prepared incorrectly, UWAG urges the Agencies to re-evaluate this assumption in the analysis that would support a new WOTUS proposal after the Proposed Rule is withdrawn. (p. 27)

Agency Response: The final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs. States conduct assessments based on all existing and readily-available monitoring data. States are required to list waters that are impaired, but have discretion to prioritize this list for TMDL development, which may proceed over a period of several years under EPA policy. Monitoring, assessment, and TMDL development tend to occur in water segments where the agencies assertion of jurisdiction is unlikely to change. Therefore, additional cost burdens for TMDL development are not anticipated from this action.

Steptoe & Johnson LLP (Doc. #15242)

12.311 This Proposal is excessively broad and ambiguous, and in practice will undermine EPA's efforts to encourage fuel retailers to invest in equipment that is compatible with higher ethanol blends. Under the Proposed Rule, there will be an additional layer of regulatory complexity and cost associated with every investment and expansion decision that retailers make. These will work against EPA's regulations under the Renewable Fuel Standard program ("RFS"), which relies on retailers investing in new equipment that can store and dispense gasoline-ethanol blends greater than ten percent ethanol. If finalized as proposed, retailers would be less inclined to undertake these investments. (p. 1)

Agency Response: The renewable fuel standards are outside the scope of this rulemaking. The EPA does not agree that the Clean Water Rule will discourage fuel retailers from investing in new equipment.

Upper Trinity Regional Water District (Doc. #15728)

12.312 The draft rule does not address the issue of recycled water projects, in particular those that may involve natural process using wetlands to treat millions of gallons of water a

[72] According to a 2001 EPA estimate, preparing a single pollutant-specific TMDL costs an average of about $52,000, with actual costs ranging from $26,000 to $500,000 in 2001 dollars. See EPA, EPA 841-F-01-004, Fact Sheet on the National Costs of the Total Maximum Daily Load Program (Draft Report) (Aug. 1, 2001), available at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/costfact.cfm.

day. Additional clarification is needed to avoid adverse impact on such wetland projects, especially man-made or enhanced wetlands. (p. 3)

Agency Response: **See Summary Response. See the preamble section "Water and Features that Are Not Waters of the United States" for further clarification on excluded water features. In particular, paragraph (b) of the final rule regarding the exclusion for certain stormwater control features and wastewater recycling structures provides clarification of this issue. With respect to constructed treatment wetlands, please see essay 7.1.**

Lower Colorado River Authority (Doc. #16332)

12.313 LCRA requests that USAGE confirm that all existing USAGE Regulatory Guidance Letters will remain valid after the adoption of a final rule. (p. 3)

Agency Response: **See Summary Response. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. However, certain guidance documents, memorandums, etc., may require revisions or may be rescinded based on the final rule. Those documents will be identified by the Corps and appropriate action will be taken after the final rule is effective. The Corps will post public notices to ensure the widest dissemination possible of the information when any change occurs.**

Anthracite Region Independent Power Producers Association (Doc. #16545)

12.314 (…) the definitional changes (of waters of the United States) provides a more comprehensive means to become more deeply involved with veto power over many other state and/or federal programs including but not limited to the Federal Office of Surface Mining, Reclamation and Enforcement (which also provides a similar veto power over their programs (both the Title IV and Title V Programs under the Federal Surface Mining Conservation and Reclamation Act of 1977 (PL 95-97). This expansion can also have an impact on re-mining programs that include aspects of 40CFR Part 434 related to coal mining. (p. 3)

Agency Response: **See summary response. The final rule at paragraph (b) and the preamble section "Water and Features that Are Not Waters of the United States" provide further clarification on excluded water features, in particular, regarding the exclusion for water-filled depressions created in dry land incidental to mining. EPA and the Corps jurisdictional authority under the final rule is limited to the Clean Water Act. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The**

rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

League of Oregon Cities (Doc. #16546)

12.315 (…) broadening of jurisdictional regulation is likely to increase permitting and mitigation requirements which can result in additional time, complexities and cost to projects including roadway construction, utility facility expansions, and installation of water lines, intakes and outfalls. These additional requirements could come in the form of compliance considerations under the Endangered Species Act as well as the National Historic Preservation Act. With mounting infrastructure needs and facilities on the verge of Non-compliance, we have significant concerns that the proposed rule will result in further litigation, increased costs or permitting delays. (p. 2)

Agency Response: See summary response. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations in particular for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

Xcel Energy, Inc. (Doc. #18023)

12.316 Utilities should not lose the important benefits of the nationwide permit program under existing permits for separate and complete pipeline projects and underground utility installations. (p. 8)

Agency Response: See summary response. The comment is outside the scope of this rulemaking effort. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be

modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The Corps Nationwide permits will be reauthorized in 2017 via the public notice and comment rulemaking process and comments regarding appropriate activities for inclusion are welcomed during that process.

Coalition of Renewable Energy Landowner Associations (Doc. #14626)

12.317 (…) if "case by case" of significant nexus standards are applied in making a waters of the United States determination, then we would ask what the conventions and standards currently are (and should be) that need be applied to a jurisdictional review of a waterway to determine if a significant nexus exists and most importantly if a significant nexus can be maintained in perpetuity on any particular river, tributary or playa lake/prairie pothole. (p. 3)

Agency Response: See summary response. The preamble sections for "Significant Nexus" and "Adjacent Waters" provide additional clarification. An approved jurisdictional determination would be required to make a case-specific determination that a significant nexus exists on a potential waters of the U.S. under the (a)(7) and (a)(8) categories of the final rule. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule includes a definition of "significant nexus" which includes a list of factors to be considered when making such a determination. The definition provides additional clarity and predictability in making significant nexus determinations. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Ducks Unlimited (Doc. #11014)

12.318 *Balancing Science and Pragmatism in Fulfilling the Purposes of the Act.* In our previous discussion of the fundamental criteria for a final rule, we encouraged the agencies to craft a rule that is scientifically and administratively efficient and pragmatic in fulfilling the purposes of the Act. An underlying assumption, of course, is that in seeking to apply the significant nexus test, there is an obligation to ensure that the scientific processes used produce valid results with which to make sound decisions. Unfortunately, these two objectives can be somewhat in opposition to one another. Good, valid science requires time and money, not only to gather the relevant facts but to do so over a spatial scale and time period sufficient to adequately account for the inherent temporal and spatial

variability that exists within aquatic systems. However, an administratively efficient system seeks certainty and predictability, as well as timeliness, in the decision-making process. A final rule must balance these issues, but must do so in a way that is most likely to fulfill the purposes of the Act and be consistent with the weight of the scientific evidence.

The growing post-*Rapanos* case law is making it increasingly clear that a dependence upon case-by-case analyses of significant nexus is creating a growing expectation and burden to collect as complete a record of the science-based facts as possible (Kerns 2014). These analyses can be very costly and time-consuming, but as complete and sound as they might seek to be in documenting the facts within a short (at least one annual cycle) time frame, from a scientific standpoint their validity is nevertheless compromised by not assessing the inter-annual variation that can lead to significantly different results and determinations. Thus, the extent to which a regulatory path emphasizes the use of case-by-case analyses, it will be more impractical and costly for all entities, and perhaps open the door to increased litigation to dispute science-based facts drawn and interpreted from various perspectives (e.g., short-term vs. long-term, small versus large spatial scale, variable interpretations of scientific and legal "significance"). In addition, there is inherently less clarity, certainty, and predictability associated with a broader emphasis on case-by-case analyses.

Also, as is seen in and exhaustive review of the literature such as the Connectivity Report, wetlands and other aquatic features exist along a continuum of multiple variables. Disputes between regulators over "facts," and even the variability with respect to perspectives on significant nexus among the perspectives of regulators, create additional uncertainty for all concerned, as well. The complexity of case-by-case analyses could be overwhelming in many respects and lead to "paralysis by analysis," or alternatively, to making decisions through a process that is neither scientifically valid nor as accurate as possible or necessary in a given situation.

Therefore, a reductionist approach to applying case-by-case analyses within the rule will not lead to a rule that accomplishes the agencies' stated objectives, such as maximizing clarity, while at the same time fulfilling the purposes of the Act to the maximum extent supported by the weight of the available and emerging science. These overall circumstances should lead the agencies to seek the more "simple truths," i.e., the generalizations that are valid in light of the overall weight of the scientific evidence, and that are as broadly applicable as possible. The science should be viewed broadly, focusing on scientifically valid commonalities and reasonable generalizations, and should not give undue weight to the exceptions and outliers. In light of the massive amount of science that demonstrates significant nexus of many classes of "other waters" within their regional contexts, designation as jurisdictional by rule will most often be more scientifically accurate than a designation as non-jurisdictional until determined to be so via a case-specific significant nexus assessment that would suffer from the inherent shortcomings addressed above.

In considering the scope and direction of the reasonable generalizations that can be made regarding the significant nexus between many "other waters" and navigable waters, the agencies should also consider the trends in the recent, emerging science and what the application of new technologies tells us about the inter-relationships of these classes of

waters. Consideration of these issues has important ramifications for appropriate and scientifically justifiable application of jurisdiction in fulfillment of the Act's purposes.

For example, even the incremental advances in the remote sensing analysis that took place between each update of the national wetland status and trends by the U.S. Fish and Wildlife Service has led to the detection of more wetland acres than had been observed in the previous analysis. These changes simply reflected improvements in the accuracy and precision of the technology. Frohn et al. (2009) used remote sensing to identify and map geographically isolated wetlands, and offer a number of recommendations to achieve high accuracy. However, their work highlights weaknesses associated with many existing datasets, indicating that underestimation of wetland acreage on the landscape and their level of connectivity is more the norm than not. Their recommendations also provide additional emphasis on the concerns regarding the time, cost, and considerations of scientific validity that are involved in conducting case-by-case significant nexus analyses. Based on an analysis of a Georgia landscape in which geographically isolated wetlands are common, Martin et al. (2012) demonstrated that improvements in techniques and technology can lead to improved accuracy and showed an increased detection of wetlands. However, it seems evident that application of these technologies at large spatial scales would be extremely costly, particularly at a time when the National Wetlands Inventory is being phased out due to fiscal constraints and federal agency budgets, in general, are under great pressure.

Further, the increasing use of LiDAR technology (e.g., Lane and D'Amico 2010; Lang et al. 2013) is dramatically affecting the detection of wetlands on the landscape and analyses of their connectivity. Lang et al. (2012) looked at Delmarva bays among the forested wetlands in the Choptank River watershed in Maryland and Delaware, and found that LiDAR was considerably more accurate than was the NHD high resolution data which underestimated wetland area by 15% and wetland number by 13%. This kind of difference could have an important and meaningful impact upon the outcome of any significant nexus analyses of watersheds such as this.

Overall, the trends in the wetland science being generated as a result of emerging technology, as well as the trends in the rapidly growing science related to the connectivity between wetlands and navigable waters, supports the general view that the emerging science far more often supports connectivity (in the aggregate) between "other waters" and downstream waters than it demonstrates a lack of connectivity. Regardless of the generalizations that the agencies use in the course of finalizing the rule and its determination of the classes of wetlands that will be jurisdictional by rule and those that will be subject to case-by-case significant nexus analyses, in light of the rate and importance of the emerging science relevant to science-based determinations of significant nexus, the final rule must incorporate a process whereby jurisdiction and related processes can be updated based on new science and data related to the actual observation of downstream impacts of wetland degradation and loss. (p. 71-73)

Agency Response: **See Summary Response. The Technical Support Document provides a summary of the legal and scientific bases for the final rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The Corps will develop the tools necessary to assist its staff with the**

jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. The agencies use the best available science and information gathered from field visits and/or desktop resources in each case-by-case jurisdictional determination.

12.319 A final rule must balance science and pragmatism, but in a way that is most likely to fulfill the purposes of the Act and be consistent with the weight of the scientific evidence. The extent to which the final rule relies upon case-by-case analyses will be more impractical and costly for all entities, and perhaps open the door to increased litigation to dispute facts drawn and interpreted from various perspectives (e.g., short-term vs. long-term, small versus large spatial scales, variable interpretations of scientific and legal "significance"). In light of the massive amount of science that demonstrates significant nexus for many classes of "other waters" within their regional contexts, designation as "jurisdictional by rule" will most often be more scientifically accurate than a designation as "non-jurisdictional until determined to be so" via a case-specific significant nexus assessment that would suffer from the inherent shortcomings imposed by scientific and administrative realities. (p. 80)

Agency Response: **See summary response. The preamble section on "Case Specific Waters of the U.S." provides further discussion on the types of waters under the (a)(7) and (a)(8) categories which require case-specific significant nexus determinations. The final rule was developed to increase CWA program**

predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. Additionally, the agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination.

Professional Landcare Network (Doc. #11831)

12.320 The lack of clear definitions will make it more difficult for lawn care and landscape professionals to determine if Clean Water Act (CWA) permits will be needed to install landscapes or to apply fertilizer or pesticides. The vague definitions and concepts will likely result in litigation over their proper meaning. (p. 2)

Agency Response: See summary response 12.3. The proposed rule neither changes nor imposes new requirements for complying with the pesticides general permit (PGP). See also compendium 14.3 for responses to comments on definitions.

Chesapeake Bay Foundation (Doc. #14620)

12.321 Recognizing the *Rapanos* decision's importance to the health of the Chesapeake Bay and its tributaries, CBF submitted an *amicus curiae* brief in the *Rapanos* case supporting the U.S. Army Corps of Engineers' (Corps) jurisdiction over non-tidal wetlands and headwater streams. CBF explained that without CWA jurisdiction over non-navigable tributaries and adjacent wetlands, the Bay states could not achieve the stricter water quality standards and waste load allocations necessary to restore the water quality of the Chesapeake Bay. This remains true today and is even more pressing in light of the upcoming 2017 and 2025 benchmark deadlines for the Chesapeake Bay TMDL for sediment, nitrogen, and phosphorous. In 2007 CBF submitted comments in response to the EPA and Corps' Rapanos Guidance urging that the CWA definition of "waters of the United States" be amended to resolve the confusion caused by the Rapanos decision. CBF is encouraged by EPA's current rulemaking process and initiative to bring much needed clarification to the definition. The proposed definition of "waters of the United States" explicitly includes waters with a documented[73] hydrologic connection to navigable waters and reduces the number of cases in which a water is subject to the case-by-case analysis of the significant nexus test.

[73] See Review of Connectivity Report, supra note 1.

Post-Rapanos regulatory confusion leads to a lack of enforcement of the CWA except in clear cases of jurisdiction; these clear cases constitute a minority of the total number of instances of illegal water pollution. Under the current rule, discharges of pollutants continue not because the CWA permits pollution of waterways, but because of the prohibitive cost of litigating the issue of jurisdiction. The resource-constrained Department of Justice (DOJ), EPA, and Corps – the federal agencies jointly responsible for identifying and bringing CWA enforcement cases – are deterred from pursuing cases in which the facts are not entirely clear. Indeed, a 2009 Report from the EPA Inspector General found that overall CWA enforcement "ha[d] decreased since the Rapanos ruling. An estimated total of 489 enforcement cases…ha[d] been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action."[74] Non-navigable tributaries, non-tidal wetlands, and ephemeral and intermittent streams are often subject to the "significant nexus" test and its high burden of scientific evidence, and are often avoided by enforcement agencies. Non-profit organizations like CBF attempt to fill these large and harmful gaps in enforcement by bringing citizen suit actions to protect valuable tributaries and wetlands. CBF has experienced first-hand the financial and environmental cost of proving the hydrologic importance of these waterbodies on an individual basis. (p. 2-3)

Agency Response: **The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. This rule replaces existing procedures that often depend on individual, time-consuming, and often inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream navigable waters. The agencies have greatly scoped the extent of waters subject to this individual review by carefully incorporating the scientific literature characterizing the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters. The result of applying this scientific analysis is that the agencies can more effectively focus the rule on identifying waters that are clearly covered by the CWA and those that are clearly not covered, making the rule easier to understand, consistent, and environmentally more protective.**

Environmental Defense Fund (Doc. #14946)

12.322 In light of the need for clarity on the scope of the waters of the U.S., we urge the agencies to finalize the rule as expeditiously as possible: EDF and a broad array of other stakeholders and stakeholder groups, including developers, energy companies, water utilities, agriculture, manufacturing and extraction industries, conservationists and environmentalists, state, local and tribal government officials, and members of Congress, urged the agencies to conduct a rulemaking to provide greater clarity on the scope of waters of the U.S. in the wake of confusion caused by the Supreme Court decisions in *SWANCC* and *Rapanos*.

[74] U.S. EPA Office of Inspector General, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149, at 1 (2009), available at http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf.

The threat posed by the current uncertainty is that it leaves many headwater and seasonal streams and wetlands unprotected, thereby crippling efforts to achieve the Clean Water Act goal to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Like the capillaries in the human body's circulatory system, the vast networks of headwater and seasonal streams comprise the majority of stream miles in this country and play a critical role in maintaining the chemical, physical and biological integrity of downstream navigable waters. (p. 2)

Agency Response: **See Summary Response. The agencies acknowledge the commenter's support of the final rule. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S."The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies agree that headwater streams that meet the definition of tributary are important resources and do have a significant nexus to the downstream (a)(1) to (a)(3) waters such that they are jurisdictional by rule.**

12.323 In the wake of SWANCC and Rapanos, the CWA permitting programs have become more complicated, resource-intensive, uncertain and slow. Making case-by-case determinations of whether individual waters have a significant nexus to downstream navigable waters is 8 to 10 times more resource intensive than the permitting process was pre-SWANCC and Rapanos.[75] This also has had a significant chilling effect on CWA enforcement. EPA has declined to pursue hundreds of enforcement actions due to "jurisdictional uncertainty."[76] (p. 2)

Agency Response: **See summary response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The agencies believe the clarity and certainty provided in the rule will result in better identification of what is/is not a water of the U.S. which may result in reduced enforcement actions for unauthorized activities and reduced opportunity for litigation based on what is/is not a water of the U.S. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.**

[75] R. Meltz, C. Copeland, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond", at 11 (Congressional Research Service, September 2014) http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf

[76] Id.

National Wildlife Federation (Doc. #15020)

12.324 The Overall Approach to the Proposed Rule Increases Clarity and Consistency with the Clean Water Act, the science, and the legal precedent. First, we support the agencies' application of the jurisdictional definition of "waters of the United States" to all of the Clean Water Act programs, just as Congress did when it passed the 1972 Clean Water Act. There is no jurisdictional distinction between different programs of the Act.[77] The Act simply does not allow a water body to be jurisdictional if one type of activity is at issue, but not jurisdictional if another type of activity is at issue.[78] Thus, if a water body is not jurisdictional for purposes of the section 404 permit program, it is not jurisdictional for the Section 301 prohibition on the discharges of pollutants, the Section 402 NPDES program, Section 303 water quality standards, Section 311 oil spill regulations, or any other Clean Water Act program that limits its jurisdiction to "navigable waters." The scope of jurisdiction also affects when states are able to certify whether federal permits are in compliance with state water quality standards under Section 401 of the Act. Consequently, we strongly support the agencies decision to apply the Proposed Rule to all of these CWA programs. (p. 23)

Agency Response: **See Summary Response. The rule will significantly improve the consistency and predictability for all CWA programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. such as NPDES permits Section 401 certification, water quality standards or Section 311 requirements which require authorization. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated.**

[77] Id. § 1362(7): [supra at 23: EPA SAB letter to Administrator McCarthy, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (October 17, 2014) (SAB Connectivity Peer Review Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

[78] While the 2008 Guidance purported to be limited to CWA § 404, even then the Corps acknowledged this in a Questions & Answers posting related to the Rapanos decision and the 2007-08 Guidance, stating, "While the Rapanos case involved the CWA § 404 permitting program for discharged of dredged or fill material, the decision has implications for all CWA programs, such as § 402 National Pollutant Discharge Elimination System (NPDES) permits, § 311 oil spill prevention and cleanup, and § 303 water quality standards." Questions & Answers for the Rapanos and Carabell Decision at 67.

Environmental Council of the States (Doc. #15543)

12.325 If and when the proposed rule is finalized, it may set new standards in some regions for defining jurisdiction under the CWA Section 404 and 402 permitting programs. To the extent that an area previously found to be non-jurisdictional has the potential to be found jurisdictional under a new rule, a final rule must be clear regarding how such situations will be handled. A smooth transition between regulatory approaches is critical. In order to reduce litigation and uncertainty, the final rule should describe under what circumstances it will apply to previously made jurisdictional determinations, and also to what universe of currently pending jurisdictional determinations, if any, it will apply. (p. 3)

Agency Response: The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.Already issued permits are not affected by this rule.

American Association of Port Authorities (Doc. #13559)

12.326 Most port construction activities come under the CWA jurisdictional definition of traditional navigable waters. The proposed rule makes additional lands subject to CWA jurisdiction and AAPA is very concerned about the impacts on the timely processing of critical port actions, such as dredge and fill permits by the Corps. (p. 1)

Agency Response: See Summary Response. The Economic Analysis provides additional information on costs/benefits and predicted change in jurisdiction. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

12.327 The cumulative effect of these changes is an increase in the amount of land where activities will come under the jurisdiction of the CWA. AAPA is concerned that this increased coverage will result in larger numbers of jurisdictional determinations and permits to be evaluated. We are concerned that unless the Corps receives additional resources, in terms of funding and staff, that implementing this proposed rule will extend the permit evaluation and processing times. (p. 2)

Agency Response: See Summary Response. The Economic Analysis provides additional information on costs/benefits and predicted change in jurisdiction. The agencies only have authority to regulate "waters of the U.S." under the Clean Water Act, and not all lands. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional

determinations for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Center for Regulatory Reasonableness (Doc. #14416)

12.328 Regulatory Presumptions. As discussed above, several regulatory presumptions accompany the "waters of the U.S." designation and EPA has not yet informed the public how the various regulatory presumptions contained within existing rules will apply to the new waters. Because these regulatory presumptions were developed for primarily perennial waters and there is a strong likelihood that they do not apply to these new "waters of the United States" that are primarily dry for most of the year and/or do not provide the necessary habitat to allow for the propagation of sensitive aquatic life forms, the proposed rule needs to account for and appropriately address this situation. The rule should explicitly indicate that these presumptions do not apply to these new waters unless a site-specific analysis has been conducted to demonstrate that such protection is necessary. If EPA does not undertake these changes, EPA should specifically respond to the following questions so the public may be fully informed regarding the impact of any new designation:

- Do the presumptions contained in 40 CFR 131.6 and 131.10 (waters presumed fishable/swimmable) apply to the newly designated intermittent waters?
- Do the use attainability study requirements of 40 CFR 131.10 apply to such waters to avoid application of Section 304(a) criteria and fishable/swimmable uses?
- Will antidegradation requirements that require full protection of existing aquatic life and uses apply to the newly designated waters? (p. 3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. The regulations at 40 CFR 131 implement the Water Quality Standards program (CWA section 303(c)) and apply to waters of the United States. Therefore, for waters that are jurisdictional under the final rule, state's and authorized tribe's WQS must be consistent with 40 CFR 131. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.**

12.329 Connectivity of Waters. The proposed rule relies principally upon a 2013 draft EPA report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. This report and the proposed rule discuss the need to identify a physical, chemical, or biological connection with downstream navigable waters

to demonstrate a "significant nexus" in order to qualify as a water of the U.S. During major rainfall events as well floods, an otherwise isolated upstream water or ditch may become briefly hydrologically connected to downstream navigable waters. This same area will "dry up" after the major rainfall event or flood.

- In such examples, are the upstream waters always waters of the US?
- Under which return period storm/flow does this connectivity apply?
- How will the Agency's rules with respect to setting standards to protect downstream waters apply in this instance?
- What water quality criteria are presumed applicable to such waters?
- Will EPA presume that the *Goldbook* criteria for phosphorus, ammonia and bacteria are the "applicable standards" for such waters when conducting compliance evaluations under Sections 303 and 402 of the Act as discussed in EPA's published guidance? (p. 4)

Agency Response: **The final rule includes revised definitions for several terms, including "tributaries" and "adjacent" which bring clarity to which upstream waters are jurisdictional. The rule does not rely on a particular flow regime or return period, but on the physical features of tributaries and other waters. The final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs. With regard to which criteria apply to a state's or authorized tribe's jurisdictional waters, EPA does not apply CWA section 304(a) national ambient water quality criteria recommendations for the purposes of CWA sections 303(d) or 402. EPA, states, and authorized tribes use the applicable EPA-approved state/tribal water quality standards regulations (including downstream protection provisions) for implementing water quality management programs under the CWA (e.g., assessment, listing, permitting, TMDL development). Where EPA has promulgated federal WQS for a particular state, those WQS serve as the applicable standard for CWA purposes. See the preamble for further discussion on the "Tributary" and "Adjacent Waters" sections. Please see Section I- Water and Features that Are Not "Waters of the United States" for further clarification on excluded water features. To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark which would distinguish them from non-jurisdictional features. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to the downstream (a)(1) to (a)(3) waters. The final rule has further refined the "neighboring" definition to provide additional clarity and "bright lines." Best professional judgment has always been used by the agencies in making jurisdictional determinations and will continue to do so under the final rule.**

Protect Americans Now (Doc. #12726)

12.330 Section (a)(5) and definition of "tributary": For legal and scientific clarity, the agencies should withdraw the Proposed Rule and replace it with a rule that defines tributaries as

only those waters that maintain a permanent, surface water connection to an (a)(1) or (a)(3) water.

The proposed definition of "tributary" will substantially increase the burdens on our nation's agricultural producers. As currently drafted, the definition includes "ditches" that contribute water directly or through another water (even if only intermittently or ephemerally) to an (a)(1) through (a)(4) water. This will almost certainly work its way backward to include most on-the-farm ditches. Notably, the CWA states that "normal farming" activities are exempt from regulation. See 33 U.S.C. § 1344(f)(1). However, the exemption only applies to the dredge and fill permitting that is required by the Corps under § 1344. Therefore, the ditches will remain subject to regulation under other sections of the CWA, notably "point source" regulation under § 1342. This is particularly problematic given court decisions regarding the application of pesticides, herbicides and fertilizers. See National Cotton Council of America v. U.S. EPA, 553 F.3d 927 (invalidating EPA's exemption and holding that "dischargers of pesticide pollutants are subject to the NPDES permitting program in the CWA."). For row-crop producers, the expansion of the jurisdictional definition of tributary could carry heavy costs and restrictions. The economic and compliance impacts of this potential have not been adequately analyzed. (p. 13-14)

Agency Response: **The definition of "tributaries" has been revised in the final rule, but continues to include non-perennial waters. The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See summary responses for Topic 8: Tributaries and Topic 6: Ditches for discussion about the jurisdiction of these waters.**

12.331 Even if farming and ranching activities are exempted (which will only apply is few cases) the Corp and EPA (as well as the ranchers and farmers who are subject to their jurisdiction) will additionally have to comply with the Section 7 requirements of the Endangered Species Act ("ESA"). 16 U.S.C. § 1536(a)(2). ESA Section 7 consultation requirements must be completed between the federal action agency (either EPA or the Corp) for all permits, plans, or decisions of the federal agency AND for all federal permits or authorizations necessary for private action. Even Federal Emergency Management Agency flood insurance determinations and payments under the 1996 Federal Agriculture Improvement and Reform Act to private landowners must comply with ESA Section 7. See Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency, 345 F. Supp. 2d 1151 (W.D. Wash. 2004); Sierra Club v. Glickman, 156 F.3d 606, 619 (5th Cir. 1998) respectively. Given the broad reach of the ESA, new water courses designated by the Corp or EPA will be subject to ESA Section 7.

Agency Response: **See Summary Response. The final rule does not change any of the existing statutory activity-based exemptions under the Section 404(f)(1) of the Clean Water Act, including those related to agricultural activities. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger**

Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

Black Hills Regional Multiple Use Coalition (Doc. #14920)

12.332 Moreover, the proposed rule redefines the fundamental term "Waters of the United States" (WOTUS) for all sections of the CWA: Sections 303, 304, 305 (state water quality standards), 311 (oil spill prevention), 401 (state water quality certification), 402 (effluent/stormwater discharge permits) and 404 (dredge and fill permits). At a minimum, this is likely to require substantial state resources to administer and issue additional permits, and to develop and/or revise water quality standards and total maximum daily loads (TMDLs), as third parties are likely to argue that they are required for all waters subject to the CWA. (p. 2)

Agency Response: See summary responses in this Topic, including sections 12.2, regarding 401 certifications, 12.3 regarding NPDES; 12.4 regarding the 404 program; and 12.5 regarding SPCC. See also summary responses in Topic 11: Costs/benefits and the Agencies Economics Analysis for an explanation of how the agencies considered costs and benefits for all CWA programs.

The final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

12.333 The proposed rule could potentially add a significant number of "other waters" in Lake County, including "geographically isolated wetlands," to WOUS status (44% of wetlands in Lake County are isolated per Lake County GIS estimate). Even in light of permitting efficiencies currently in place (e.g., the Chicago USACE District's Regional Permit Program), this would place an additional workload on the already over-burdened USACE-Chicago District to process more permit actions, with the result being even longer permit turnaround times and potentially severing economic development programs and opportunities. This is not the simplified, efficient regulatory system the regulated public desires, especially during this post-recessional period. (p. 2)

Agency Response: See Summary Response. The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations for certain categories of waters jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The rule also

does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will provide needed clarity regarding jurisdictional determinations, thus reducing uncertainties and delays.

Red River Waterway Commission (Doc. #15445)

12.334 Our prime concern is that under the proposed rule, more waters would become WOTUS, and as a result, more applicants will need to obtain an individual permit from the Corps. The increased utilization of individual permits will trigger more companion federal permitting processes; during these costly review procedures, consulting federal agencies are not bound by a specific time limit. Over $1.7 billion is spent each year by the private and public sectors on administrative costs to obtain wetlands permits, without taking into account the cost of required mitigation, and it is our fear that this proposed rule will increase both this dollar amount and the time required to obtain these permits. (p. 2)

Agency Response: See summary response. The updated Economic Analysis provides additional discussion on costs/benefits under the final rule. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

Michigan United Conservation Clubs (Doc. #16395)

12.335 We are seeking confirmation from the US EPA that the proposed rule will not impact Michigan's program, which allows for a streamlined regulatory process while still protecting Michigan's water resource. We urge the USACE and EPA to continue to work cooperatively with the state**.** (p. 2)

Agency Response: See Summary Response. Nothing in this rule limits or impedes any existing state or tribal effort to protect their waters. The Agencies feel the proposed rule will provide greater clarity regarding what waters are subject to CWA jurisdiction which will reduce the need for permitting authorities and to make jurisdictional determinations on a case specific basis. Additionally, nothing in the CWA or the proposed rule precludes a state or tribe from establishing more protective standards or limits than the Federal CWA. See the General Comment Compendium for a discussion of state 404 Assumption. The rule does not affect the scope of waters subject to assumption under section 404(g) of the CWA.

University of Missouri College of Agriculture, Food, and Natural Resources (Doc. #7942)

12.336 The University of Missouri and the College of Agriculture, Food and Natural Resources has a great deal of investment and interest in this issue as evidenced by a long history of research and extension specialists assisting farmers and landowners to address soil and water quality concerns. Currently, a great deal of that effort has been directed at our engagement with our state and federal partners in developing Missouri nutrient reduction criteria. A number of MU scientists and extension specialists have been engaged in the development of a comprehensive, integrated state level nutrient reduction strategy that is science-based, effective, achievable and economically sustainable. The tentative date for completing the Missouri Nutrient Reduction Strategy is December 31, 2014. We are greatly concerned that the new WOTUS ruling will confound what has to date been an extremely productive process in the State of Missouri. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. We do not agree that the rule would have negative impacts on nutrient reduction efforts in Missouri.

Mercatus Center at George Mason University (Doc. #12754)

12.337 Under this rule, the agencies would bring clarity to this process by expanding definitions. While the expansion clarifies some areas, it produces new areas of ambiguity. The proposed definition of "tributary," for example, is so broad that a home's rain gutter could very well qualify and be deemed jurisdictional by the agencies. Rain gutters are manmade and have a bed, a high water mark, and intermittent flows that may provide a significant nexus to other water bodies during rainstorms. As leaves and detritus decompose in rain gutters, riparian vegetation has even been known to germinate. According to the new rule, the Corps of Engineers could potentially regulate these rain gutters. (p. 2)

Agency Response: See Summary Response. See the "Tributary" section in the preamble for further discussion. Also, see the preamble section "Water and Features that Are Not Waters of the United States" for further clarification on excluded water features. In particular, paragraph (b) of the final rule regarding the exclusion for stormwater control features and the exclusion for erosional features and ephemeral features that don't meet the definition of "tributary" is informative on the points raised in this comment. To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark, which distinguish tributaries from non-jurisdictional features. The agencies believe such characteristics indicate sufficient volume and frequency of flow for a tributary to have a significant nexus to downstream (a)(1) to (a)(3) waters. The agencies have never considered a home's rain gutters to be jurisdictional waters. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4.

Florida Stormwater Association (Doc. #14613)

12.338 If finalized as currently worded, the proposed regulations would have very significant and profound impacts on local governments and other entities subject to or administering the NPDES and MS4 permit programs, and to the workload of EPA and Corps Regional offices. Waterbodies that are "jurisdictional" are subject to the following:

Water Quality Criteria – Water quality criteria for the appropriate classification of the waterbody must be attained. In Florida, the overwhelming numbers of waterbodies are classified as "Class 3 – Recreational" waters. Class 3 recreational waters are subject to the "swimmable, fishable" narrative or numeric nutrient water quality criteria.

> The Class 3 designation is the default classification for waterbodies in Florida. Waterbodies that are not presently considered to be jurisdictional (but would become such per the proposed regulations) would become subject to the Class 3 classification unless an administratively complicated, arduous and expensive process is successfully undertaken to move (for example) a ditch out of a Class 3 classification into another classification category.

TMDLs and Basin Management Action Plans – Florida's landmark programs for implementing Total Maximum Daily Loads and water quality improvement measures – the listing process for impaired waters and Basin Management Action Plans (BMAPs) – would be applied to newly jurisdictional waters, significantly increasing the workload of not only the MS4 permittees but also that of Florida's Water Management Districts and the Florida Department of Environmental Protection.

MS4 Permit Program – Attainment of water quality criteria and water quality improvement programs (i.e. implementation of TMDLs and BMAPs) are implemented by the regulated community. In the case of city and county governments, that is through the MS4 permit program, as administered by the Florida Department of Environmental Protection. (p. 4-5)

> **Agency Response:** **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. The rule will not affect the current implementation of the various CWA programs. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time, including many ditches and certain stormwater conveyance features. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations, and the agencies believe that revisions in the final rule respond to a number of concerns expressed by states and other stakeholders. In addition, the economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Agencies Economic Analysis document for details on the estimated costs and benefits of the rule. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4.**

12.339 The State of Florida and its MS4 permit holders have worked cooperatively for the past 25 years to develop and refine water quality improvement programs that implement the goals and provisions of the Clean Water Act and other state-based initiatives. Florida's TMDL and BMAP programs implement these provisions on a systematic basis, establishing priorities for directing scarce fiscal resources to those waters most in need of improvement and where there is a realistic possibility of seeing improvements that will benefit environmental systems and human uses. It is a methodical, focused approach, with the costs of implementing water quality improvements as required by the TMDL and BMAP programs primarily borne by the MS4 permit holders.

If finalized, the proposed regulations would throw Florida's programs into a state of chaos, increasing the number of waters determined to be jurisdictional to such a degree that it will force local governments to divert scare resources from water quality improvement projects benefiting streams, lakes and rivers, to ditches and other stormwater conveyances that serve no useful purpose other than to move floodwaters from one point to another. (p. 5)

Agency Response: **Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. The rule will not affect the current implementation of the various CWA programs. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time, including many ditches and certain stormwater conveyance features. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional. The agencies have thoroughly considered the implications of the final rule on the CWA programs and the agencies, states and tribes responsible for implementing CWA regulations, and the agencies believe that revisions in the final rule respond to a number of concerns expressed by states and other stakeholders. In addition, the economic analysis has been updated for the final rule. See summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated costs and benefits of the rule. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. States conduct assessments of waters based on all existing and readily-available monitoring data. Under section 303(d) states are required to list waters that are impaired, but have discretion to prioritize this list for TMDL development, which may proceed over a period of several years under EPA policy. Monitoring, assessment, and TMDL development tend to occur in water segments where the agencies assertion of jurisdiction is unlikely to change. Therefore, the agencies do not anticipate additional cost burdens associated with this rule for TMDL development and implementation.**

12.340 The universe of waterbodies to which the MS4 permit program might apply would be so large and local fiscal resources so dispersed, and the discretion of EPA and the Corps so limited by the provisions of the proposed regulations, that it is quite possible that the regulations would have the paradoxical effect of reducing (not improving) water quality. This would be an absurd result if ever there were one.

Furthermore, to attempt to successfully implement the proposed regulations, local governments subject to the MS4 permit program would be forced to implement revisions to zoning and other land use regulations, in addition to the permit conditions. We believe that this necessity far exceeds any consideration ever made by the framers of the Clean Water Act and far exceeds the authority granted by Congress to EPA and the Corps. (p. 6)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. The final rule does not address local land use and zoning regulations or decisions, or processes for how these decisions are made, and comments about them are beyond the scope of the rule.**

Water Environment Federation (Doc. #16584)

12.341 If these "adjacent" wastewater and recycled water facilities, including spreading grounds, are defined to be within the jurisdiction of the CWA, it would adversely impact WEF's member agencies' ability to augment groundwater supplies and to effectively provide wastewater treatment services. The plethora of additional and unnecessary requirements, regulations, and permitting associated with making these areas into jurisdictional waters, including but not limited to the procurement of an NPDES permit, assigning designated uses, exposure to penalties and potential third party liability for effluent violations, and impairment of the ability to operate and maintain these areas, would erect new mandates with no benefit to the surrounding ecosystems and waterbodies. Such a result represents an extreme disincentive to sustainable water supply development and a significant impairment of wastewater agencies' ability to protect public health and safety through innovative and effective wastewater treatment. (p. 4)

Agency Response: **The agencies are supportive of water reuse and recycling and have added an exclusion specifically for wastewater recycling structures constructed in dry land, detention and retention basins for wastewater recycling, groundwater recharge basins and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling. See the summary response in Topic 7: Features and waters not jurisdictional for further discussion of this exclusion.**

12.342 WEF recommends that EPA stipulate the basic technical and administrative approaches that are intended to be used at the source in order to define frequency, duration, and water quality-based risk factors that are directly associated with wet weather events that reportedly transport pollutants of concern to downstream designated beneficial use areas. In other words, how does EPA intend to establish applicable, defensible water quality standards and monitoring requirements at the claimed pollutant sources, such as ephemeral stream areas under short-term wet weather conveyance conditions? (p. 6)

Agency Response: **The final rule does not address how WQBELs are derived, and comments about them are beyond the scope of the rule.**

American Legislative Exchange Council (Doc. #19468)

12.343 (…) the proposed rule will apply to all programs of the CWA and therefore subject more activities to CWA permitting requirements, National Environmental Policy Act (NEPA)

analyses, mitigation requirements, and citizen suits challenging local actions based on the applicability and interpretation of new-found authorities. (p. 4)

Agency Response: **See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a section 404 permit is a federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. This rule does not impact the citizen suit provisions under the Clean Water Act**

Illinois State Senate (Doc. #11995)

12.344 The process of obtaining permits and approvals under the Clean Water Act is very costly and time-consuming. Obtaining a permit to develop in jurisdictional area can take longer than a year and cost hundreds of thousands of dollars. This would place a further burden on municipal entities in my district, which includes our state capitol and many small, rural jurisdictions. (p. 2)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.**

12.345 How will water recycling and reuse programs be addressed in the proposed rule? Will they be subject to permitting requirements? If so, what level or detail? Of particular interest are water recycling programs that result in water that is directed to groundwater recharge areas. (p. 4)

Agency Response: **See Summary Response. The preamble section "Water and Features that Are Not Waters of the United States" provides further clarification on excluded water features. In particular, paragraph (b) of the final rule includes the revised exclusion for stormwater control features and wastewater recycling structures, including groundwater recharge basins.**

12.346 In the West we [are] taking every opportunity to collect rainwater, slow runoff, or direct runoff into groundwater retention basins or groundwater recharge areas. Often these may

be flood control reservoirs that are retrofitted or operated to slow down or redirect the flow of runoff. Will these efforts to collect, capture and reuse runoff be subject to the requirements of the proposed rule? (p. 4)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. The Agencies specifically excluded constructed detention and retention basins created in dry land that are used for wastewater recycling, including groundwater recharge basins and percolation ponds built for wastewater recycling. The new exclusion also covers water distributary structures that are built in dry land for water recycling. The Agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." The exclusion in paragraph (b)(7) codifies the long-standing agency practice that water reuse and recycling structures are important and beneficial in protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Committee on Transportation and Infrastructure, U.S. House of Representatives (Doc. #18018)

12.347 How is the proposed rule helpful to American farmers –will the rule reduce regulatory burdens on the nation's agriculture producers? (p. 2)

Agency Response: **The rule will not have an effect on farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the proposed rule. The final rule is not changing any of the existing statutory activity-based exemptions under the Section 404(f)(1) of the Clean Water Act, including those related to agricultural activities**

Mary Landrieu, Chair, Committee on Energy and Natural Resources, U. S. Senate (Doc. #19301)

12.348 The negative impact on real estate development is a glaring example of the disruptive practical effects of the proposed rule. Increased permitting requirements will cause delay for site modifications, and landlords, who often have specific time incentives built into lease agreements, may be unable to fulfill time obligations or predict certainty in those lease agreements. This would jeopardize their ability to retain and attract future tenants. In addition, tenant companies seeking to expand or relocate their operations will be impacted by project scheduling uncertainty and increased time and cost. This would change the cost calculations and potentially put at risk the capital investment necessary to support such projects. Perhaps most troubling is that these property owners could now have to meet water quality standards for ditches, ephemeral streams, or other features on their property that were not previously considered WOTUS. (p. 1)

Agency Response: **See summary response. The Economic Analysis provides information on costs/benefits for all CWA programs. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies also note that the final rule provides for certain categories of waters that are**

jurisdictional by rule, which will result in a more efficient process. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs, such as the NPDES program, were reduced or eliminated. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

The Property Which Water Occupies (Doc. #8610)

12.349 The CWA defines inert materials like sand, rock and soil as a 'pollutants', without defining the quantity that represents a threat to the public water supply. Natural run-off drains sediment into rivers, which over time define the contours of our country (see the Mississippi Delta, or the Chesapeake Bay); therefore Rules which prevent sediment flowing into waters defy the law of nature as well as interfering with the property right. Chemical toxin and containment are prevented from entering public waters under the Toxic Substances Control Act15 U.S. §§ 2601-2629, and therefore the CWA is only the Floor and not the Ceiling of Federal regulatory control. Conversely, installing riprap on a non-navigable stream, or grading of lands near a drainage wash should not invoke CWA jurisdiction, because they create no real threat to the downstream water supply. Yet, because the term pollutant remains so broadly defined under the CWA, simply grading a lawn near a drainage ditch could invokes CWA jurisdiction.[79] The CWA and these Rules do not distinguish between deadly toxins which could destroy the public water supply, and a grain of sand which could wash from privately owned land during a rainstorm. As currently written the Rules make grading land, mowing a lawn on private lands, or doing nothing at all a potential violation under the CWA. Leaving enforcement of the broadly claimed Act an arbitrary and capricious action up to the discretion of the party invoking CWA jurisdiction. Extending such broad jurisdiction authority over private lands and all potential uses of these lands, goes too far by clouding title, invoking uncertainty of the property right and even a property taking. Although a Federal Agency has authority to make such Rules respecting public property (navigable = public water) within the confines of the CWA, extending such Rules over private lands represent an abuse of power and exceeds the limits of agency discretion. (p. 13-14)

Agency Response: The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The comment regarding what is/is not a pollutant is beyond the scope of this rulemaking. Refer to the definition of "fill material" and the definition of "discharge of fill material" under 33 CFR 323.2.

[79] The exemptions arbitrarily allow some forms of grading and land uses while grading for another purpose would require a permit. This based solely on the end-purpose for which the grading is performed, despite having the identical impact on water quality. The rules and exempting arbitrarily select when and if inert material would invoke jurisdiction. Such inconsistent and arbitrary Rule making is exploitative and allows for an abuse of agency discretion

12.350 The Private Right of Action Under the CWA Necessitates Greater Clarity. Any ambiguity as to jurisdiction becomes untenable as the CWA allows for a private right of action -any private citizen can file a lawsuit invoking a purported CWA violation. Therefore, ambiguity in the Rules which broadens the CWA jurisdictional scope beyond public waters, allows any citizen to claim harm under the CWA based on the use of private property. As written the proposed Rules expansive claim of jurisdiction under the CWA allow for legal action from any citizen against another for almost any use of private land over which water may be present in the form of rain run-off or soggy ground. Flipping a penny into a fountain, building a shed on private property, using Round-up on a sidewalk, or even tiling a backyard tomato garden, are potential violations that could invoke legal action under the proposed Rules. The Rules continued ambiguity over the scope of jurisdiction encourages frivolous legal actions brought under the auspice f clean water. Including claims against the validity of the Rules proposed 'exemptions'. Any proposal to expand the CWA jurisdiction beyond protecting navigable waters, should also require the moving party in the lawsuit to prove not only that a 'significant nexus' exists, but that a pollutant creating a significant enough threat to a public water supply to warrant judicial action. The ambiguity and arbitrary elements defining CWA jurisdiction under the Rules must be clarified to prevent abuses of discretion not only by federal agencies, but also those misguided citizens. The Rules should include a reimbursement clause of any and all legal fees expended by a property owner when successfully defending his property rights against an asserted CWA violation. (p. 14-15)

Agency Response: **See summary response. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. This rule does not impact the citizen suit provisions under the Clean Water Act. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

12.1. REGIONAL QUESTIONS/CONCERNS

Summary Response

The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures will not be further complicated by this rule. Furthermore, the final rule will not

directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the Clean Water Act definition of waters of the U.S.

The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public.

The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule would limit CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. It is expected to improve efficiency, clarity, and predictability for landowners as well as permit applicants.

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

The rule will not affect a farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that private property will be negatively impacted by the Federal Government as a result of the proposed rule. Consistent with current practice, the final rule does not obviate the requirement for landowners to operate in accordance Clean Water Act mandates which require landowners to be cognizant of potential waters of the U.S. within their property boundaries. Under the CWA, the agencies only have authority over jurisdictional activities which occur in waters of the U.S.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Tribes and states play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources. Tribes and states, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Section 510 of the CWA indicates that, unless expressly stated, nothing in the CWA precludes or denies the right of any tribe or state to establish more protective standards or limits than the Federal CWA. Many tribes and states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future tribal or state efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the tribes and states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The agencies understand that the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The Economic Analysis provides costs/benefits and predicted change in jurisdiction for all CWA programs.

The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies understand that there is regional variation which can make it appear that there are inconsistencies in the program. However, the rule aims to reduce any inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public.

The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies believe the clarity and certainty provided in the rule

will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant or unless site-specific facts/information necessitate the reopening of an approved JD. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. Already issued permits are not affected by this rule.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The exemptions under Section 404(f)(1) of the Clean Water Act, as well as nationwide general permit thresholds for impacts, are outside the scope of this rulemaking.

While it is the responsibility of the Corps as the agency evaluating permit applications under section 404, to determine if Endangered Species Act and the National Historic Preservation Act requirements are being met, there are cases where these laws or other federal, state or local laws may still require review absent a CWA action. The 404 permit action does not remove the requirement to get other permits, if required by law. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, such as a section 404 permit decision. However, private landowners are also required to comply with Section 10 of the Endangered Species Act absent a federal action. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process.

This rule does not impact the citizen suit provisions under the Clean Water Act.

Although the agencies believe that additional efficiencies will be gained through implementation of the rule, all jurisdictional determinations are site-specific, using available information for that review area. Site-specific conditions are considered when determining whether a water meets the (a)(7) or (a)(8) category requiring a case-specific significant nexus determination. Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is only specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters.

Although the agencies believe that additional efficiencies will be gained through implementation of the rule, all jurisdictional determinations are site-specific, using available information for that review area. Site-specific conditions are still considered when determining whether a water feature meets the definition of "waters of the U.S."

Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics of waters are absent in the field, often due to unpermitted alteration of waters.

The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

Specific Comments

Area II Minnesota River Basin Projects, Inc. (Doc. #7185)

12.351 Knowing how southwestern Minnesota floods frequently due to the Buffalo Ridge, concern is great that overflowing wetlands, due to excessive snowmelt or rainfall, would be considered jurisdictional under the proposed rule. The overflowing wetland or basin does not establish a hydrologic connection which would justify jurisdiction. Jurisdiction can only be determined under normal hydrologic conditions. (p. 2)

Agency Response: **The relevant science on the relationship and downstream effects of waters has advanced considerably in recent years. A comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science. The Science Report found that wetlands and open waters in floodplains and riparian areas are chemically, physically and biologically connected with downstream rivers and influence the ecological integrity of such rivers. The rule establishes jurisdiction in three basic categories: waters that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, and a narrowed category of waters subject to case-specific analysis. "Adjacent" waters include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. The agencies have determined that "adjacent" waters, as defined in the rule, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. The final rule establishes a definition of "neighboring" for purposes of determining adjacency. In the rule, the agencies identify three circumstances under which waters would be "neighboring" and therefore "waters of the United States." Waters that meet the definition of "adjacent" would be jurisdictional by rule. Wetlands that are not jurisdictional by rule are subject to case-by-case determination. Jurisdictional determinations can be requested from the local Corps District Office.**

Pennsylvania Department of Environmental Protection Water Management Office (Doc. #7985)

12.352 EPA asserts that protection of the 60 percent of nation's stream miles that flow only seasonally[80] is an important objective of the rule. However, Pennsylvania is not a state for which the majority of stream miles only flow seasonally. Further, to the extent Pennsylvania streams have seasonal flow, they are protected under State law. Administering a detailed and specific hut 'one-size-fits-all' definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule may in fact undermine existing state law protections.

[80] Pennsylvania uses the terminology "intermittent stream" and "perennial stream" rather than seasonal. 25 Pa. Code §102.1

Agency Response: **The agencies disagree that the rule will undermine existing state law protections. EPA and the Corps recognize that the establishment of "bright line" thresholds in the rule does not in any way restrict states from considering state specific information and concerns, as well as emerging science to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states' specific-circumstances are properly considered to complement and reinforce actions taken at the national level. The agencies are committed to working with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.**

California State Association of Counties (Doc. #9692)

12.353 Starting almost 100 years ago, counties in southern California have constructed artificial basins for the purpose of replenishing local area aquifers. Today, the counties in southern California are home to over 20 million people, and the population is expected to increase. Groundwater serves a significant portion of the water supply for the inhabitants of these counties. In many communities, groundwater actually makes up the majority of their water supply. Counties in southern California are under pressure from the federal and State governments to lessen their dependence on water imported from the Sacramento / San Joaquin Delta and the Colorado River for the sake of environmental concerns at these source areas. The State of California declared a drought emergency in early 2014 that is still in effect; there are projections that drought conditions may continue for a very long period of time, even decades. It is therefore vital that groundwater recharge in these counties is not only maintained but enhanced. (p. 8)

Agency Response: **The agencies are supportive of groundwater recharge and have added exclusions from the definition of "waters of the United States" for "groundwater, including groundwater drained through subsurface drainage systems" and "wastewater recycling structures constructed in dry land," which include "groundwater recharge basins." Please also see summary responses 7.3.1.6 and 7.4.2.**

State of Idaho (Doc. #9834)

12.354 The Proposed Rule makes no attempt to recognize regional differences in the terms it defines. Failing to recognize the distinct differences between water conveyances in the arid West will result in confusion and the overbroad application of CWA jurisdiction. This will result in regulatory uncertainty rather than clarity and consistency.

Agency Response: **The agencies disagree that the rule will result in regulatory uncertainty. The agencies have concluded that the rule will clarify the scope of "waters of the United States" that are protected under the Clean Water Act (CWA). The rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting streams and wetlands. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be**

defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Washington State Association of Counties (Doc. #9976)

12.355 Due to federal designation of several species of salmon to be either listed as threatened or endangered, Washington's counties have over several years developed best management practices (BMPs) which have been reviewed by federal resource agencies through consultation and have been determined to be protective of salmon. These BMPs, together with Ecology's stormwater regulations provide strong protection for state and U.S. waters. We are concerned that the new regulatory definition together with federal jurisdictional interpretations will undermine and undo the significant efforts by counties to develop these road maintenance BMPs. (p. 2)

Agency Response: Please see the summary responses at 12.3 and 7.4.4. The agencies support Washington's counties efforts to develop best management practices (BMPs) for road maintenance and stormwater management facilities to protect salmonid species.

Interstate Mining Compact Commission (Doc. #14114)

12.356 IMCC asserts that proposed national rules should not utilize a one-size-fits-all approach and assume that a rule that works well in one part of the country will work just as well elsewhere. Given the significant differences in geography, soils, hydrogeology, rainfall, and other unique conditions throughout the country, the states urge EPA and the Corps to thoroughly consider whether there might be better approaches to the rulemaking that would recognize these regional differences. For example, the state of Alaska contains 63% of the country's wetlands and the majority of them are dependent on continuous or discontinuous permafrost. Due to a very short growing season (that may be interrupted with frosts) and hydric soils that generally hover around a "biological zero" temperature, it can be difficult to demonstrate a significant nexus to downstream waters for wetlands within permafrost areas. Other unique features that must be considered in Alaska which are uncommon or entirely absent in the rest of the country include tundra, muskegs, boreal forest spruce bogs, glaciers, and massive snowfields. Despite these unique circumstances, EPA and the Corps did not include a review of scientific studies based on work in Alaska as part of the Draft "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report), which was used as the basis for conclusions in the proposed rule. The state has provided examples of such studies in testimony and comments they provided to the Science Advisory Board's (SAB) Peer Review Panel. We urge EPA and the Corps to take these studies into consideration.

EPA states that an important objective of the rule is to protect the 60 percent of the Nation's stream miles that flow only seasonally. However, the Commonwealth of Pennsylvania is not a state in which the majority of stream miles only flow seasonally. To the extent that Pennsylvania streams have seasonal flow, they are protected under state law. Administering a detailed and specific "one-size-fits-all" definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely

divergent average annual rainfall and snow melt characteristics, will be difficult. Such a rule may in fact undermine existing state law protections. (p. 3)

Agency Response: See summary response. The agencies recognize the unique aquatic habitats present in Alaska and the challenges in determining jurisdiction when it may be different from the other States. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies believe the clarity and certainty provided in the rule will result in increased consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

Wyoming House of Representatives (Doc. #14308)

12.357 As numerous state and local regulatory officials and public and private-sector stakeholders have pointed out in their comments and letters, Congress never intended for the CWA process to apply to the management of groundwater in states. Such an expansive regulatory reach described above would encompass most of the arid Western U.S. and the proposed rule also expands the definition of "Waters of the U.S." to include "permafrost" – a move that would potentially put 85 percent of the entire landmass of Alaska under a CWA permitting regime. (p. 1)

Agency Response: See summary response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories. See paragraph (b) of the final rule and the preamble section "Waters and Features That Are Not Waters of the U.S." for further discussion on the exclusions provided under the final rule, including groundwater.

Commonwealth Pennsylvania Department of Agriculture (Doc. #14465)

12.358 One size does not fit all. EPA asserts that protection of the 60 percent of nation's stream miles that flow only seasonally[81] is an important objective of the rule. However, Pennsylvania is not a state for which the majority of stream miles only flow seasonally. Further, to the extent Pennsylvania streams have seasonal flow, they are protected under State law. Administering a detailed and specific but "one-size-fits-all' definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections. (p. 3)

Agency Response: See summary response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national

[81] Pennsylvania uses the terminology "intermittent stream" and "perennial stream" rather than seasonal. 25 Pa. Code §102.1

consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The final rule provides a bright line of clarity for the agencies, state partners, and the regulated public.

Tribes and states play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources. Tribes and states, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Section 510 of the CWA indicates that, unless expressly stated, nothing in the CWA precludes or denies the right of any tribe or state to establish more protective standards or limits than the Federal CWA. Many tribes and states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA.

State of Oklahoma (Doc. #14625)

12.359 Critical portions of the proposed rule include key concepts that are newly created, yet are left unclear, undefined or subject to agency discretion. In other words, the rule fosters continued and additional subjectivity – a result diametrically opposed to the authoring agencies' intent. While the proposed rule does not change the primary categories of water that historically have been regulated as "navigable waters" (e.g., tidal water bodies, interstate waters, territorial seas, and impoundments of these waters), the proposal seemingly expands the CWA's regulatory coverage of tributaries and includes broad new categories of waters, such as ditches, adjacent waters, riparian areas and floodplains. (p. 10)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule limits CWA jurisdiction only to those types of waters that have a significant nexus to downstream (a)(1)-(a)(3) waters, not just any hydrologic connection. For this reason it is expected to improve efficiency, clarity, and predictability for landowners as well as permit applicants. The agencies received many helpful comments on the proposed rule which resulted in the refinements seen in the final rule to provide further clarity and certainty.**

Additionally, definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

Western Governors Association (Doc. #14645)

12.360 CWA Reauthorization: The Western Governors support reauthorization of the CWA, provided that it recognizes the unique hydrology and legal framework in Western states. Further, any CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources. (p. 8)

Agency Response: See Summary Response. The agencies acknowledge the support of the Western Governors Association for promulgation of this rule, which is a different action than reauthorization of the Clean Water Act. The agencies are supportive of water reuse and recycling and have added exclusions specifically for wastewater recycling structures created in dry land, including groundwater recharge basins and percolation ponds, and water distributary structures built for wastewater recycling. The agencies appreciate your support in clarifying the definition of waters of the U.S.; the rule will continue to allow for regional variation in implementation which may be necessary based on regional differences in aquatic resources.

South Carolina Forestry Commission (Doc. #14750)

12.361 The South Carolina Forestry Commission would prefer to see a regionalized approach to "waters of the US" rulemaking. The "significant nexus" determination of all "similarly situated waters" within an ecoregion if applied to "Other Waters" at a national level would appear to also greatly expand the reach of "waters of the US". The SCFC recognizes that waters are different in the various regions across the South and across the US, and would prefer to see a more site by site approach to determinations of "waters of the US" status, rather than a "one size fits all" national rule or standard. (p. 1-2)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Arizona Game and Fish Department (Doc. #14789)

12.362 The predominant channel types in Arizona are ephemeral and intermittent waters, such as desert washes. According to the proposed Rule, these types of waters may be determined to be "tributaries" if the waterway has a defined bed, bank or high water mark. However, as noted in *Survey of* OHWM *Indicator Distribution Patterns across Arid West Landscapes* (U.S. Army Corps of Engineers, January 2013), flows in intermittent and ephemeral channels are unstable and migrate within the boundaries of the active channel. The *Survey* identified six "flow indicators" across mountain, foothill and basin landscapes: change in vegetation cover, bed and hank, change in vegetation species, drift, slope and change in texture. The *Survey* concludes these flow indicators are randomly distributed in all locations across a channel and cannot be used to delineate the lateral extent of the OHWM. The *Survey* concludes that a geomorphic approach that identifies the hydrogeomorphic floodplain units of the channel, linking vegetation and sediment texture patters to changes in channel morphology, and identifying the break in slope associated with the geomorphically effective event is necessary. *Survey* at 17. For this reason, intermittent and ephemeral channels in Arizona do not readily fit into the jurisdictional category of a "tributary" and may require case-specific evaluations of significant nexus. This regulatory uncertainty will create burdens for the Department in the management of its properties. The Department supports the development of an eco-regional approach to determine which ephemeral channels might be better defined as tributaries with a significant nexus to waters of the U.S. (p. 1-2)

Agency Response: **See Summary Response. The agencies disagree that the rule's definition of "tributary" will result in regulatory uncertainty. The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice.**

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

Office of the Governor, State of Kansas (Doc. #14794)

12.363 It is clear to Kansas that the Federal agencies intend the proposed rule to facilitate the issuance of Section 404 permits while reducing staff workloads by eliminating the need for site-specific determinations on jurisdiction. By claiming broad categories such as

tributaries are jurisdictional; all determinations may be made from the desktop of Federal staff through maps and aerial photography. With the inclusion of adjacent waters to the coverage provided by tributaries, positive jurisdiction determinations will become automatic, without consideration of site-specific conditions. The Federal agencies believe all tributaries contain a bed, a bank and an ordinary high water mark and channels with those three characteristics are jurisdictional, regardless of flow conditions. Kansas refutes that, noting especially in the case of western Kansas streams, that the location of the channel above the regional water table, the frequency of flow occurring in the channel and the longitudinal distance between the channel site and actual downstream perennial or seasonal water warrant equal consideration. The latter factors play to the concept of "significant nexus" and connectivity among streams, and more closely embrace Justice Kennedy's insistence that mere hydrologic connection does not bestow ecological significance to certain waters. (p. 4)

Agency Response: **See Summary Response. Although the agencies believe that additional efficiencies will be gained through implementation of the rule, all jurisdictional determinations are site-specific, using available information for a specific review area associated with a landowner's request for a determination. Site-specific conditions are considered when determining whether a water feature meets the definition of "tributary" or "adjacent" due to the inclusion of specific characteristics within those definitions. In other words, in order for a water feature to be a "tributary" or to be "adjacent" it must have the characteristics included in the definition.**

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. Erosional features that do not meet the definition of tributary excluded under paragraph (b) of the final rule. See the Technical Support Document for a summary of the applicable scientific and legal basis for the final rule. Furthermore, if a water feature is not explicitly included within paragraph (a), including being subject to case-specific significant nexus determinations, it is excluded from coverage under the CWA even if it is not specifically excluded in paragraph (b). The preamble contains important discussion on this point in the "Case-Specific Significant Nexus Determinations" sections.

Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on

desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

Arizona Department of Environmental Quality, et al. (Doc. #15096)

12.364 We agree with the Agencies that there are geographic differences around the country, but giving federal officials authority to change the scope of federal jurisdiction based on location provides for inconsistency, obscurity, and uncertainty. To avoid this outcome, federal jurisdiction should be limited to water that is clearly subject to Clean Water Act authority based on navigability or a demonstrated ability to impact the quality of navigable water. Regulation of other water may be appropriate depending on location and function, but decisions based on such geographic differences are best left to the discretion of State officials. Federal jurisdiction must be consistent, clear, and certain. (p. 7)

Agency Response: The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

Arizona Department of Transportation (Doc. #15215)

12.365 Overall, our concern is that this Proposed Rule will impose substantial and unjustified new costs and delays. ADOT urges EPA and the Corps to revise the definition of "tributary" to clarify the upper extent of a tributary with a definition that can be applied to the arid landscape and ephemeral drainages in the arid southwest. (p. 3)

Agency Response: See Summary Response. See the Economic Analysis for additional information on costs/benefits of the final rule.

The preamble section on "Tributaries" provides additional discussion on the definition of tributary and how to identify the upper limit of the tributary. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. Erosional features that do not meet the definition of tributary excluded under paragraph (b) of the final rule. See the Technical Support Document for a summary of the applicable scientific and legal basis for the final rule. Furthermore, if a water feature is not explicitly included within paragraph (a), including being subject to case-specific significant nexus determinations, it is excluded from coverage under the CWA even if it is not specifically excluded in paragraph (b). The preamble contains important discussion on this point in the "Case-Specific Significant Nexus Determinations" sections.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Delaware Department of Natural Resources and the Environment (Doc. #16558)

12.366 As in other states, Delaware has unique conditions due to legal, political, geomorphologic, hydrologic, resource management, and other forces with bearing on achieving clean water. Delaware recognizes the difficulty in developing a rule to clarify and make consistent the scope of the CWA for the entire nation. It will be extremely important for EPA and the Corps to work closely with states to establish a rule that will be productive in regard to state's unique conditions and emphasizes the need for regional guidance on many of these issues. The proposed rule affects the implementation of CWA Sections 303(d), 319, 402 and 404, and states need direction, clarification and consistency within the proposed rule to administer these water authorities. (p. 2)

Agency Response: **See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

State of Idaho (Doc. #16597)

12.367 The Proposed Rule makes no attempt to recognize regional differences in the terms it defines. Failing to recognize the distinct differences between water conveyances in the arid West will result in confusion and the overbroad application of CWA jurisdiction. This will result in regulatory uncertainty rather than clarity and consistency. (p. 5)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section "Waters and Features That Are Not Waters of the U.S."**

which includes erosional features that do not meet the definition of "tributary." The characteristics required for a water feature to meet the definition of "tributary" provides for a clear distinction between jurisdictional by rule waters and excluded erosional features.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

New York State Department of Environmental Conservation (Doc. #18895)

12.368 (…) there is little to no regional flexibility in the proposed rule. The geography of the northeast is different than that of the southwest, for example, New York State, with its rocky terrain and multitude of glacial lakes, is a complicated environment that requires a tailored permitting process. New York State already has some of the strongest water quality programs in place and could work with EPA/USACE to craft New York-specific guidance, which would clearly apply to New York's waters. This approach is consistent with the way in which EPA has handled other water quality issues under the CWA. (p. 2)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to the 404 program during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The

initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

State of Alaska (Doc. #19465)

12.369 As a consequence of failing to consult with co-regulator states, EPA and the Corps promulgated a proposed rule that fails to account for the regional differences existing among the states.

Proposed national rules cannot assume, as this one does, that "one size fits all," that a rule that works well in one part of the country will work just as well elsewhere. Given the significant differences in regional geomorphologic and hydrologic conditions between the states, it is particularly important to thoroughly consider whether there might be other approaches to the rulemaking that would work better to ensure consistency and predictability in jurisdictional determinations. One alternative that should be considered is whether states are in a better position to address any water quality issues that EPA and the Corps are trying to target with the proposed rulemaking. The states have jurisdiction over groundwater, and are in the best position to address water issues that may arise due to the "interconnectedness" of water bodies. This alone militates against EPA and the Corps' proposal of making wetlands and isolated waters jurisdictional on the basis of a "shallow subsurface hydrologic" connection.[82] Alaska has authority and responsibility to protect all waters in the State regardless of whether the federal government has concurrent jurisdiction.

A rule-making should not leave the agencies and public wondering who or what is covered by a new rule and what requirements are being added or changed. There is significant uncertainty, particularly under Alaska's unique circumstances, of how the proposed concepts of "adjacency" "tributaries" and "interconnectedness" would be applied to specific field situations. For example, it is unclear whether these terms would exclude alpine muskeg peat bogs, or forested wetlands on steep slopes in southeast Alaska that do not have a traditional hydrological connection (defined bed, bank or ordinary high water mark). There are also wetlands that exist on the North Slope of Alaska as a result of relatively flat terrain, and seasonal snowmelt that cannot penetrate frozen soil. These areas can be tens, or even hundreds of miles from the nearest navigable water. The proposed rule only creates greater uncertainty for Alaska. (p. 12-13)

Agency Response: **See Summary Response. The agencies are developing guidance specific to section 404 to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there**

[82] Introduction of the term "shallow subsurface hydrologic connection" without definition in the proposed rule as if the term was distinct from a "groundwater connection" raises questions on whether EPA and the Corps are asserting authority where they have none. This makes the agencies vulnerable to charges they are seeking to secure more expansive federal jurisdiction than historically asserted.

are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

12.370 At more than 403 million acres, the State of Alaska encompasses the largest geographic area of any state in the nation (more than twice the area of the next largest state). Alaska has more coastline than the entire conterminous United States (nearly 34,000 miles), over three million lakes greater than five acres in size, and over 15,000 water bodies that are known to support resident or anadromous fish.[83] Its size is such that when a map of Alaska is superimposed on the lower 48 states, Alaska's boundaries would extend roughly the equivalent of east coast to west coast (see Attachment 4).

Wetlands and deepwater habitat combined occupy over 204 million acres, or over 50 percent of the State's surface area.[84] By comparison, wetlands and deepwater habitat comprise a little more than nine percent of the surface area of the lower 48 states.[85]

Setting aside deepwater habitat, the State of Alaska has over 174 million acres of wetlands, comprising approximately 43 percent of the surface area of the State.[86] The

[83] Alaska Department of Fish and Game, *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*, available at: http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.overview
[84] Hall, Jonathan V., W. E. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf
[85] Id.
[86] Id.

rest of the U.S. contains approximately 103 million acres of wetlands, comprising approximately four percent of the surface area.[87] Sixty-three percent of the country's wetlands are in Alaska. Using National Hydrography Dataset information from the Bureau of Land Management (March 2014) Alaska has 884,075 miles of streams and 21,655 square miles of lakes.

Despite Alaska's wealth of water, its water resources are not uniformly distributed. According to the U.S. Army Corps of Engineers, "[w]etlands occupy 61 percent of Northern and Western Alaska, and "vast expanses of treeless tundra underlain by permafrost dominate the area."[88] These permafrost wetlands are a unique feature of the Alaskan landscape not found elsewhere in the United States. Interior Alaska is 44 percent wetlands and includes, "millions of acres of black spruce muskeg and floodplain wetlands"[89] Here again, the scrub/shrub vegetation and taiga forests of interior Alaska are uncommon features in the rest of the United States and many of these wetlands are underlain by permafrost (See Attachment 5).

Adding to the uniqueness and complexity of Alaska's situation is that the majority of the waters in the vast northern, interior, and western regions exist as a solid for the better part of each year. Only for the short summer season do they exhibit some of the traits and provide some of the functions normally attributed to waters and wetlands. Southeast Alaska, a temperate, mountainous rainforest region with a maritime climate and average annual precipitation of 100 to 200 inches, has countless isolated surface waters and wetlands, as does much of the rest of the state.

There is a unique situation in northern latitudes, including Alaska, where continuous or discontinuous permafrost exists. This results from frozen ground water throughout all or the majority of the year. Permafrost can form a nearly impervious layer of soil which then creates seasonally saturated soil conditions above the frozen layer. Depending on topography, soil types, and other features permafrost tends to be associated with wetlands. Wetlands in areas with permafrost are very dynamic systems that are not completely understood. While they serve certain valuable habitat functions, these functions do not make them subject to federal CWA jurisdiction. Moreover, due to a very short growing season (that may be interrupted with frosts) and hydric soils that generally hover around a "biological zero" temperature, it can be difficult to demonstrate a significant nexus to downstream waters and wetlands within permafrost areas. There is often a significant temporal lag in hydrology (freeze/thaw cycle and lack of slope) that is more equivalent to groundwater flow and in most cases there is little evidence of a significant subsurface connection.

Making permafrost even more difficult to understand is the fact that it is not distributed evenly within the State. There are areas of the State, mostly located in the northern areas, where permafrost is generally distributed continuously beneath the surface. There are also areas within the State where permafrost is discontinuous and sporadically distributed

[87] Id.
[88] U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, September 2007. (Doc. #19465, p. 21)
[89] Id.

within isolated pockets on the landscape. This sporadic distribution can be related to soil types, aspect, or other geographic indicators. (p. 20-22)

Agency Response: **See Summary Response. The agencies are developing guidance specific to section 404 to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

12.371 Regional differences affect whether waters are jurisdictional.

The Corps' 1987 wetlands delineation manual (1987 Manual) was developed to provide criteria for identifying wetlands, and was viewed approvingly by Congress in subsequent legislation as a tool to assist the federal agencies in determining what may be jurisdictional wetlands under the CWA. Due to regional differences in vegetation, soils, and hydrology, application of the 1987 Manual to all regions proved unworkable. This is particularly the case for Alaska, given that permafrost is not even discussed in the manual. To address these and other issues, the federal agencies have developed over the years regional supplements to the 1987 manual to provide a more regional approach to wetland delineations.

These supplements, including the 2007 Regional Supplement for Alaska, are guidance. However, because they established criteria for determining whether a wetland is

jurisdictional under the CWA, they should have been adopted under formal APA rulemaking. EPA and the Corps must consider regionalized rulemaking for jurisdictional determinations and conducting significant nexus determinations, since the proposed rule does not account for regional differences, and application of the proposed rule could result in the assertion of jurisdiction when it does not lawfully exist for the majority of waters or wetlands in a particular climate region. (p. 22)

Agency Response: **See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The 1987 wetland delineation manual and the regional supplements provide guidance to field staff on how to delineate a Federal wetland (i.e. a wetland that the Federal definition of "wetland"). The 1987 manual and its regional supplements do not provide guidance on how to determine the Clean Water Act jurisdictional status of a wetland delineated using the 1987 manual and its appropriate regional supplement. To determine whether a wetland is jurisdictional, agency staff will use this final rule.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Alaska State Legislature (Doc. #2531)

12.372 We have a unique soil structure in Alaska called permafrost, currently defined as "ground which is soil or rock with ice or organic material that remains at or below 32°F for at least two consecutive years." The proposed rule will treat permafrost as "water", not as a soil element as it is currently defined. Permafrost is thickest in Arctic Alaska, north of the Brooks Range, but it is found to some extent beneath nearly 85% of Alaska soils (according to the Alaska Public Lands Information Center). To put 85% of Alaska's land under the jurisdiction of EPA, through use of the CWA, would be devastating to the people of Alaska and unwarranted.

Agency Response: See Summary Response. See the Economic Analysis for further discussion on the predicted jurisdictional changes under the final rule. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

12.373 The permafrost question is only one of many questions related to the new proposed rule. But it has not been considered. The omission of this issue demonstrates the hastily constructed nature of this rule-making process and the unforeseen consequences resulting from the narrow perspectives of those writing the document. (p. 2)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the scientific basis of the final rule. The public comment period was extended twice to ensure adequate time for the public to review and comment. Extensive public outreach was also conducted, including over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies and many others.

The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Mayor's Office - Aleutians East Borough, Alaska (Doc. #7618)

12.374 The Borough represents several island communities spread across the Eastern Aleutian chain. These are some of the most remote and inaccessible parts of the United States, reachable by boat traveling significant distance from Mainland Alaska and by plane, although weather and air strip size limit plane access in most of our communities. Our total population, almost all entirely living in 6 communities, numbers only 3,100 – a population density of less than one-half person per square mile.

The proposed rule will only expand these burdens and make carrying out our public infrastructure work even more challenging. If we had many polluted waters, then expanded regulation of small, interconnected waterways and wetlands would make sense. But we have very few listed "impaired" waters as defined by the Clean Water Act. Our streams and rivers are healthy and support thriving salmon runs. Our drinking water is clean.

For these reasons, we ask that EPA include an exemption from the final rule for communities that meet a profile like ours. Such an exemption should apply to the smallest and most rural communities that do not have significant water pollution issues. Current rules would continue to apply and would be sufficient to properly protect area waters as they have been for years. (p. 1-2)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section "Water and Features That Are Not Waters of the U.S." for a discussion on the types of waters that are excluded under the final rule. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. In addition, the rule does not affect

activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

City of Phoenix, Arizona, Office of Environmental Programs (Doc. #7986)

12.375 While we are supportive of the concept of providing more clarity, it should not come at the expense of loss of local discretion. Our arid desert environment is truly unique and often not well understood by those from other regions of the United States. It is more appropriate and serves the environment better to allow the jurisdictional decisions to be made at the local level, by those most familiar with the on-the-ground nuances. (p. 2)

Agency Response: See Summary Response. Local Corps districts and EPA Regions familiar with local resources and site conditions will still be making specific jurisdictional determinations when requested by a landowner. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Pennsylvania Department of Environmental Protection Water Management Office (Doc. #7985)

12.376 Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs. (p. 1)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and

certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Anne Arundel County, Maryland (Doc. #8574)

12.377 The proposed rule could potentially slow the recovery of the Chesapeake Bay and its tributaries, mandated by EPA, if it is not sufficiently permissive of restoration activities. The current definition of "Waters of the United States," which was left in limbo after the 2006 *Rapanos v. United States* case, is regularly being interpreted in a way that has prolonged permitting timeframes and incurred significant additional cost to Anne Arundel County government and partner agencies working to restore the health of the Chesapeake Bay and its tributaries. (p. 2)

Agency Response: See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures will not be further complicated by this rule. Furthermore, the final rule will not directly alter the content or implementation of other local, state, or federal mandates, including permitting actions, as the final rule applies solely to the Clean Water Act definition of waters of the U.S.

Hampton Roads Planning District Commission (Doc. #9612)

12.378 The localities represented by the HRPDC face many challenges improving and maintaining public infrastructure due in part to their geographic position within the lower coastal plain of Virginia. Much of the Region is underlain by hydric soils and experiences seasonally high groundwater fluctuations. The HRPDC is concerned that

additional Federal or state regulatory oversight proposed by this Rule will further constrict localities' ability to develop and maintain infrastructure. (p. 1)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with science, the existing regulations, and Supreme Court precedent. In addition, see the exemptions for certain maintenance activities under section 404(f)(1) of the Clean Water Act and the Corps nationwide permits for descriptions of specific activities which may be exempt from CWA regulation or which may have an efficient permitting mechanism in place to facilitate appropriate infrastructure development.**

Pike Peak Area Council of Governments (Doc. #9732)

12.379 Implementation of this proposed rule would show a marginal environmental benefit. The potential cost to comply with this proposed rule at a local, state, and federal level will probably far exceed the environmental benefit, especially in areas that are arid and semi-arid, such as Colorado. Water quality, aquatic habitat, and vegetation are much different in areas that have perennial versus intermittent flow. This rule should focus on areas where there is a known environmental or ecological benefit and a pilot study should be conducted in each unique ecological region so that the EPA and stakeholders can determine the rules appropriate for each area and potential impacts. It is essential that this proposed rule demonstrate how the downstream waters will be adversely impacted. (p. 1-2)

Agency Response: **See Summary Response. The Technical Support Document provides a summary of the scientific basis for the final rule and the Economic Analysis includes discussion on costs/benefits of the final rule. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Custer County Commission (Doc. #10186)

12.380 Custer County has over 800 miles of non-paved roads. These roads all have ditches to drain the runoff from rain and snow thaw, into creeks that eventually carry the run off into reservoirs or rivers if it hasn't evaporated or soaked into the ground before it reaches its destination. As issues come up with the county roads from nature and blading, the ditches are the logical place to get the needed dirt to repair the roads. If a permit is

needed for this purpose, it could cause delays and hardships for traffic and road crews. (p. 1)

Agency Response: **See Summary Response. The comment is outside the scope of this rulemaking effort as it does not pertain to CWA jurisdiction. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. which require authorization. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. In addition, the rule does not affect activities that are currently exempt from CWA regulation. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Clark County (Nevada) Regional Flood Control District (Doc. #11726)

12.381 The proposed rules states: "A review of the scientific literature, including the Report of the peer-reviewed science, shows that tributaries and adjacent waters play an important role in maintaining the chemical, physical and biological integrity of …waters… because of their hydrological and ecological connections to ... those waters." However, the post-meeting comments of the peer-review meetings says quite clearly that little is known of these hydrologic connections in the desert southwest. Those comments also indicate that the example used for Southwestern streams is not representative of streams in that region, most of which are ephemeral. (p. 2)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.382 We believe it is appropriate for regulatory guidance and the currently proposed rule to recognize and allow for the substantial differences that exist across the nation in terms of geology, topography and meteorology. (p. 3-4)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Weld County (Doc. #12343)

12.383 The agencies argue that the proposed rule will allow for infrastructure projects to be more easily and efficiently regulated throughout the nation. However, the geographic, climactic, and land use conditions of the Western United States are inherently different than other parts of the country. It is therefore difficult and dangerous to develop a "one-size-fit-all" rule to regulate water. Such a rule will likely lead to significant increase in time and cost for county governments. (p. 1)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff

as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.384 Some of the borrow pits look more like a ditch, some of them are simply a flat area which is the same elevation as an adjacent field, but lower than the raised road. When the borrow pits fill with water, they often appear to have a bed, banks, and a high water mark. During irrigating season, and during significant precipitation events, some of the borrow pits fill with sufficient water that a flow is established. However, this flow occurs during less than half of the year. Because of the unique nature of water and irrigation in the Western United States, it is important to parse through the new definitions provided by the agencies. Words like "tributary" "ordinary high water mark" "perennial flow" and "upland" may mean something completely different on the arid plains of Colorado than in the swamps of Florida. The agencies movement for clarification of the legal reach of the Clean Water Act needs to take into account the varying features of our national geography. (p. 4)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as water-filled depressions created in dry land incidental to mining or construction activity. The preamble section on "Tributaries" provides additional clarification on the terms "tributary" and "ordinary high water mark."**

The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

12.385 The decisions in *Rapanos* and *Solid Waste* both involve the need to remove water in order to make use of land. In Colorado, as in much of the West, the need is not so much to remove water or to dredge and fill, but to capture water and put it to beneficial use. The goal of much of water management in the West is to disrupt drainage patterns and to harness water so it may be transported not *into* other waters, but *out of* other waters and onto dry land for agriculture. This fundamentally different attitude towards water reemphasizes the importance of keeping decisions regarding intermittent water local. In the West, where water is bought and sold daily as a commodity, and a commodity

necessary to the livelihood of the region, a "one size fits all" type of rule will cause significant harm (p. 6)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures created in dry land.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.386 The proposed rule provides several new definitions and descriptions. It is unclear how these definitions would apply to the unique aspects of the western landscape. (p. 6)

Agency Response: **See Summary Response. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.**

The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The

agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.387 Another of the terms that requires better definition is "ordinary high water mark (OHWM)." The proposed rule relies heavily on the ability to determine whether a waterway has a bed, bank, and ordinary high water mark. The EPA notes that indicators of an OHWM may vary from region to region across the country. Fed. Reg. Vol. 79 No. 76 at 22202. This is especially true in the Western United states where the climactic conditions are so variable. The agencies acknowledge as much:

In many intermittent and ephemeral tributaries, including dry land systems in the arid and semi-arid west, OHWM can be discontinuous within an individual tributary due to the variability in hydrologic and climactic influences. Id.

This variability in water flow again makes it difficult to use Eastern definitions to impose rules on a Western landscape. The term ordinary high water mark assumes a level of regularity in flow that is often not present in the ditches and roadside borrow pits of the West.

The agencies clarify that even waterways that possess a bed, bank, and ordinary high water mark may not qualify as a "Water of the U.S."

> *Under [the new] exclusion, water that only stands or pools in a ditch is not considered perennial flow, and therefore, any such upland ditch would not be subject to regulation. Fed. Reg. Vol. 79 No. 76 at 22203.*

However, this does not clarify how long the water may stand or pool before it becomes regulated. This exclusion also does not clarify whether water which stands and pools in places and flows in others would be regulated. As a part of the irrigation necessary to farm in Colorado, water often pools when fields are being irrigated. The roads that are maintained by the county and laid out in a grid pattern provide barriers where this water collects. Pursuant to the definition above regarding standing or pooling water, the County's borrow pits should be exempt. (p. 8-9)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as water-filled depressions created in dry land incidental to mining or construction activity, wastewater recycling structures, and certain ditches. The ordinary high water mark manuals

developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

Although outside the scope of the rule, the agencies continue to work to ensure accurate ordinary high water mark and bed and bank identification across the nation and particularly in the Arid West, including the manual for identifying the ordinary high water mark in the Arid West.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.388 By attempting to use these terms interchangeably in a Western setting and an Eastern setting, the agencies are discounting geographic and climactic differences. Until the terms "tributary," "ordinary high water mark," "upland," and "perennial flow" can be defined more clearly in reference to the different regions of the country, the rule will simply serve to increase confusion and costs for local governments. (p. 9)

Agency Response: **See Summary Response. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate

regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.389 The proposed rule change seeks to apply the Clean Water Act in a uniform and consistent manner throughout the country. However, the hydrology of the nation is not uniform and consistent. Weld County and the Western Unites States have a unique relationship with water that differs from more rain abundant locations. The need to irrigate dry land in order to make it productive involves significant infrastructure projects. The vagueness of the definitions provided creates the possibility of a significant increase in the need for federal approval of local infrastructure projects. (p.20)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures and certain ditches.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff

as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Furthermore, the rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations, science, and Supreme Court precedent. The rule will improve efficiency and provide needed clarity regarding jurisdictional determinations, reducing uncertainties and delays.

Mesa County, Colorado Board of County Commissioners (Doc. #12713)

12.390 Under the Proposed Rule, any wetland or other water could be determined to be WOUS if it is found to significantly affect the chemical, physical or biological integrity of a TNW. This provision has the potential to bring a substantial number of wetland and open water features into the scope of Waters of the U.S., and is relevant in Colorado where there may be a biological or chemical nexus – even if semi-arid hydrologic conditions, as common in our area, result in infrequent surface or subsurface hydrologic connectivity.

Mesa County requests that the requirement of determining a "significant nexus" be required in the Proposed Rule for non-tributary waters and wetlands. (p. 3)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the scientific basis for the final rule. The agencies have determined that all tributaries, regardless of flow regime, have a significant nexus to the downstream (a)(1) to (a)(3) waters. Adjacent wetlands are also jurisdictional by rule. See the preamble section on "Case-Specific Waters of the U.S." for discussion on the (a)(7) and (a)(8) waters which require a case-specific significant nexus determination.

12.391 In the semi-arid western region of the U.S. including Mesa County, there are rural land examples of prior converted cropland and ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow. The proposed rule exempts a certain type of uplands ditch. There is little consensus on how this language would (or would not) impact roadside ditches. The EPA and the USACE need to determine and document whether these types of ditches will be considered in parts or in whole under the new rule, as well as whether other ditches, not strictly in uplands, would be regulated, including those ditches adjacent to a WOUS. (p. 4)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as certain ditches. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches.

It is important to note that unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8)

waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b).

The final rule provides increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

Pocahontas County, Iowa (Doc. #13666)

12.392 Our county is in one of the 25 Level III Ecoregions wherein the USEPA has proposed to categorically claim all waters to have a significant nexus. Our county is also in the prairie pothole region wherein the USEPA has also proposed to categorically claim all waters to have a significant nexus. We object to both proposed categorical claims of jurisdiction. Choosing either will place huge economic burdens upon the owners of agricultural land in Pocahontas County. More-over you will be implementing the beginning of a starving nation with the loss of crop production! (p. 2)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the scientific basis for the final rule. See the preamble section "Case-Specific Waters of the U.S." for discussion on the (a)(7) and (a)(8) waters which require a case-specific significant nexus determination .

The final rule provides increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. That refinement resulted in the determination that certain types of isolated waters in specific regions were "similarly situated" by rule and that a case-specific significant nexus evaluation is required to determine jurisdictional status.

Pinellas County Board of County Commissioners (Doc. #14426)

12.393 Across the United States there are significant differences in physical and environmental conditions that will make jurisdictional determinations problematic. For example, the proposed rule exempts ditches that only drain uplands and have less than perennial flow. In coastal areas like Florida, these types of ditches contain water year around due to high groundwater tables. Based on the proposed rule roadside ditches will be jurisdictional and per discussions with EPA "subject to all Clean Water Act requirements." During the development of Numeric Nutrient Criteria in the state of Florida it was recognized that a one size fits all rule for water quality criteria was not appropriate. Obviously, if there are regional differences within one state that required regionalization of water quality standards for various water body types, it must be recognized that there is tremendous diversity across the Country when evaluating natural systems. We recommend that region-specific guidelines be developed with local stakeholders and used for determinations. (p. 2)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as certain ditches. The final rule has been crafted to reduce existing confusion and inconsistency regarding the

regulation of ditches. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Waters of the United States Coalition (Doc. #14589)

12.394 If the Proposed Rule is adopted without appropriate exclusions, the Proposed Rule will have a profound negative impact on the existing operations of the Nation's water supply, flood control, transportation and waste treatment infrastructure. For one, throughout the arid west, water is moved vast distances from one traditional water of the United States to another to provide drinking water for cities and irrigation water for farmers. A strict reading of the Proposed Rule could make aqueducts and irrigation canals waters of the United States. Along with that designation comes the requirement to attain Water Quality Standards, and to obtain Clean Water Act section 404 permits.

Of even greater concern is the possibility that the EPA or a state regulatory agency would adopt a total maximum daily load ("TMDL") for an aqueduct, percolation pond or other water supply conduit on the premise that the conveyance is a water of the United States that is failing to meet applicable Water Quality Standards. A TMDL could in turn result in limitations on discharges into (and therefore use of) the aqueduct. This is not an unlikely scenario. In 2010 the California Regional Water Quality Control Board for the Central Valley Basin adopted a methylmercury TMDL that imposed requirements on the California Department of Water Resources ("DWR"). The basis for regulation was the Regional Board's position that the DWR and affiliated agencies discharged methylmercury through the Sacramento-San Joaquin River Delta Estuary as part of their ongoing operations moving water into Southern California.

If the aqueducts that DWR and other water purveyors rely on get reclassified as waters of the United States, it will only be a matter of time before similar actions are taken to control water quality within the aqueducts. Any limitations imposed would further constrain water availability in Southern California and limit the ability of local water districts and cities to provide supplies to their residents. Similarly, if flood control channels are considered waters of the United States, MS4 operators will have significant

difficulty maintaining their storm drain systems. Removing vegetation and sediment built up in the system would require a 404 permit as well as consultations with wildlife agencies. Even if no endangered species are found, the added cost and time constraints will unnecessarily hinder existing municipal operations. Inability to conduct timely maintenance could contribute to loss of life and property if storm channels are not maintained and flooding occurs. (p. 15-16)

Agency Response: **The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The agencies have not in practice asserted jurisdiction over these types of features when created in dry land. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.**

Pima Natural Resource Conservation District (Doc. #14720)

12.395 The District has no navigable streams nor any nexus to navigable streams. The requirement to obtain a 404 permit for standard work in a dry desert grassland appears to be totally irrational to our District Cooperators. It is a grotesque expansion of regulatory jurisdiction and bureaucracy beyond rational comprehension when there are no navigable streams in Pima County, Arizona and therefore none in the District which is geographically entirely within the boundaries of the County. (p. 1)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with science, the existing regulations, and Supreme Court precedent.**

The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

The rule requires specific characteristics to be present in order to determine a water to be a tributary or an adjacent water. The lack of a "navigable stream" in a county would not preclude waters in that county from being determined to be jurisdictional

under the CWA if the waters meet any of the (a)(1)-(a)(8) categories and are not excluded under paragraph (b) of the final rule.

Maryland Association of Soil Conservation Districts (Doc. #14932)

12.396 The situation here in Maryland is unique because of our proximity to the Chesapeake Bay and the TMDL with WIP requirements to install conservation practices. The potential for on farm ditches, ponds, and wetlands to be jurisdictional and require 402 or 404 Clean Water Act permits may significantly stifle voluntary conservation on farms. Also, failure to obtain a permit due to uncertainty as to whether it is required leaves farmers vulnerable to citizen suit, which we are unfortunately all too familiar with here in Maryland. Additional red tape and fear of Clean Water Act enforcement will not only leave us unable to continue to meet and surpass our TMDL goals for agriculture in Maryland, but also ultimately not attain the goal of clean water since most of the practices are installed for water quality benefit. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters, and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time. For example, under the final rule many ephemeral and intermittent ditches, and waters constructed in dry land, such as stormwater conveyance features, waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of the CWA, wastewater recycling structures and basins, and artificial lakes and ponds, including settling basins and cooling ponds, are all excluded from waters of the U.S. See summary responses for 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional, for further discussion of excluded waters. Also see summary response 12.3. The final rule definitional rule neither changes nor imposes new requirements for NPDES implementation or TMDL implementation. See section 7.2 for responses to comments on non-jurisdictional features such as artificial ponds and stock ponds. See also section 6 for responses to comments on the jurisdictional nature of ditches.

City of Cape Coral (Doc. #14976)

12.397 The City of Cape Coral is located in Southwest Florida. It is surrounded by the Caloosahatchee River to the east and Matlacha Pass to the west. Like many communities in the state, the City has little relief. Cape Coral was constructed throughout the 1960's and 1970's via dredge and fill activities. The City contains 400 miles of canals within our 110 square mile area. Approximately 100 miles of these canals around the perimeter are currently designated as WOTUS. The other 300 are upstream within the interior of the City. (Attached figure)[not included herein] The water from these interior canals flows into the downstream waters via elevation differences at concrete structures (weirs).

Should this rule go into effect, these freshwater canals would be considered to have a significant nexus, and over 300 miles of freshwater canals used for treating stormwater would be considered federal waters. The City would no longer have any area for treatment of stormwater runoff, and what is now considered our municipal separate storm

sewer system would be required to meet applicable water quality standards. This change would also impact Cape Coral's Basin Management Action Plan (BMAP), as we have been given credit for retention within these canals by the Florida Department of Environmental Protection.

Should this rule go into effect, all routine dredging and canal maintenance within these freshwater canals would be subject to USACE 404 regulations requiring the need for federal permitting in these waters. In summary, enacting this rule would leave the City with no area for treatment of stormwater, an increased need for projects to meet our BMAP, and greatly increased permitting issues. It will place an enormous burden on our taxpayers to meet the new criteria. (p. 1-2)

Agency Response: **See Summary Response. Paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." provide discussion on excluded waters such as stormwater control features and certain ditches. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." Many helpful comments on the proposed rule were received which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public, including the expanded exclusions related to stormwater management.**

Klamath Drainage District (Doc. #15139)

12.398 [T]he proposed Rule fails to take into account the significant differences that exist in the West from conditions that exist in the East, and the impracticality of imposing a one-size-fits-all approach to divergent climates, watershed characteristics, precipitation levels, and the shear economic impact of subjecting virtually all activities in any water source to regulation. Indeed if all water is deemed jurisdictional, litigation over the application of the rule may be diminished, which is one of the agencies stated goals, but the cost of subjecting many currently unregulated activities to regulation with the attendant delay is unwarranted. A further concern is whether in this current economic and political climate whether the Agencies can even administer a greatly expanded program without significant additional funding from a Congress that seems reluctant to fund the government and is openly hostile to increased regulation. (p. 4)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public. The Economic Analysis completed to support the rule contains details in this regard.

San Bernadino County, California (Doc. #16489)

12.399 (…) the DPW questions the scope of the scientific data presented in an EPA study, which is relied upon to make many broad conclusions in the proposed Rule.[90] Specifically, the DPW is concerned that the EPA Study used in the assessment does not adequately address the hydrogeomorphic conditions present in the "arid Southwest", and arguably makes generalized conclusions based on a few case studies.[91] (p. 17)

Agency Response: See Summary Response. The Technical Support Document provides additional information regarding the scientific support for the conclusions reached in the final rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.The Corps will develop the tools necessary to assist its staff

[90] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* Office of Research and Development, Washington DC., EPA/6001R-111098B September 2013.
[91] *Id*. Pages 4-57 to 4-70.

with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.400 As the managing flood control agency for the largest county in the Country, and based in the arid Southwest, the DPW must stress that the hydro-geomorphology of the arid Southwest is shaped by infrequent but intense storm events, as well as multiple smaller events. In an arid environment, infrequent intense storm events may leave residual indicators of an OHWM that may be present for decades even though indicators of "active flow" (presence/absence of vegetation, aggregate sorting, etc.) are lacking.[92] Because many of these historic or remnant features with a discernable OHWM lack "relatively permanent" flow, they would not be deemed jurisdictional under current assessment criteria even though they may have surface connectivity to downstream navigable waters. In addition, the smaller storm events, have a minimal impact and leave negligible, temporary or indiscernible indicators of an OHWM.

Similarly, in some watersheds, particularly those with urban development or transportation networks, flow from the upper reaches of the watershed have been historically diverted for flood control purposes. These diversions, basins and impoundments were constructed prior to the 1972 CWA amendments, and have permanently altered the hydrology in some watershed, resulting in remnant tributary networks with little or no active flow, yet still exhibiting a discernible OHWM with surface connectively to downstream jurisdictional resources. It should also be noted that creation of inactive, "remnant" or "historic" tributaries often result from natural changes within portions of a watershed. Such features may include remnant alluvial fan systems or any such historic feature(s) where flow has been altered. (p. 17-18)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark

[92] US Army Corps of Engineers, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the United States,* Robert W. Lichvar and Shawn M. McColley, August 2008.

in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Central Utah Water Conservancy District (Doc. #17024)

12.401 (…) the propose rule fails to take into account the significant differences that exist in the West from conditions that exist in the East, and the impracticality of imposing a one-size-fits-all approach to divergent climates, water shed characteristics, precipitation levels, and the shear economic impact of subjecting virtually all activities in any water source to regulation. Indeed if all water is deemed jurisdictional, litigation over the application of the rule may be diminished, which is one of the agencies stated goals, but the cost of subjecting many currently unregulated activities to regulation with the attendant delay is unwarranted. A further concern is whether in this current economic and political climate whether the Agencies can even administer a greatly expanded program without significant additional funding from a Congress that seems reluctant to fund the government and is openly hostile to increased regulation. (p. 3)

Agency Response: See Summary Response. See the Economic Analysis for additional information on predicted changes in jurisdiction and costs/benefits for the final rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Clyde Snow Attorneys at Law (Doc. #15139)

12.402 (…) the proposed Rule fails to take into account the significant differences that exist in the West from conditions that exist in the East, and the impracticality of imposing a one-size-fits-all approach to divergent climates, watershed characteristics, precipitation levels, and the shear economic impact of subjecting virtually all activities in any water source to regulation. Indeed if all water is deemed jurisdictional, litigation over the application of the rule may be diminished, which is one of the agencies stated goals, but the cost of subjecting many currently unregulated activities to regulation with the attendant delay is unwarranted. A further concern is whether in this current economic and political climate whether the Agencies can even administer a greatly expanded program without significant additional funding from a Congress that seems reluctant to fund the government and is openly hostile to increased regulation. (p. 4)

Agency Response: See Summary Response. See the Economic Analysis for additional information on predicted changes in jurisdiction and costs/benefits for the final rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Dolores Water Conservancy District (Doc. #19461)

12.403 Beyond the disturbing over-reach by the Agencies, the proposed Rule exhibits a striking lack of knowledge or concern regarding the nature of infrastructure for irrigation, municipal, and industrial use in the western United States. For example, the Rule would arbitrarily exclude from jurisdiction man-made drainage ditches common in the Midwest and the eastern United States (i.e., because they "are excavated wholly in uplands, drain only uplands, and have less than perennial flow") but include an enormous number of man-made irrigation ditches in the western United States (i.e., because they "contribute flow, either directly or through another water" subject to jurisdiction). This bias in the Rule will render it unworkable in the western United States and subject landowners and water development entities to significant risk and uncertainty for longstanding and customary water use practices, including many sponsored and subsidized by the federal government. (p. 4)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures and certain ditches.**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. These refinements included revisions to the ditch exclusions and the definition of "tributary". It is important to note that waters that meet the paragraph (b) exclusions are not jurisdictional waters of the U.S. even if they also meet one of the categories of (a)(1)-(a)(8) waters. Additionally, unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8) waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b). The preamble includes discussion on this point.

California Central Valley Flood Control (Doc. #19571)

12.404 Overall, these proposed rules fail to appreciate the unique nature of Delta and Central Valley waters and land, including the one-of-a-kind levee system and flood control challenges. Unlike many other levee systems, most Delta levees and many Central Valley levees are always in the water. Both inside and outside of the Delta, the presence of the existing system of drainage ditches and irrigation makes this land livable and productive.

Perhaps most importantly, the rules fail to appreciate existing State of California constraints upon the flood control system. It is important to note that all waterways in California are already regulated and Central Valley reclamation districts already monitor

and report their discharges to the Central Valley Regional Water Quality Control Board. For any projects that require a Central Valley Flood Protection Board permit, California's Title 23 regulations already allow the U.S. Army Corps of Engineers (Corps) to add its own requirements to the Board's permits. Combined, this means that: 1) discharges affecting California's waters already are regulated and activities related to those waters are already reported; and 2) the Corps already has the authority to add discharge conditions to projects that take place on or near levees if appropriate.

Instead of preserving this adequately functioning system, the proposed regulatory guidance package would add redundant, occasionally arbitrary, and inflexible regulations that would burden public safety projects and Corps permitting staff. (p. 2-3)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures and certain ditches.**

The agencies believe the final rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. These refinements included revisions to the ditch exclusions and the definition of "tributary". It is important to note that waters that meet the paragraph (b) exclusions are not jurisdictional waters of the U.S. even if they also meet one of the categories of (a)(1)-(a)(8) waters. Additionally, unless a water body is explicitly identified in paragraph (a) as being jurisdictional by rule [(a)(1)-(6) waters] or subject to a case-specific significant nexus determination to ascertain its jurisdictional status [(a)(7) and (a)(8) waters], a water body or landscape feature is excluded from jurisdiction under the CWA even if it is not explicitly listed in paragraph (b). The preamble includes discussion on this point.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Florida Association of Counties (Doc. #10193)

12.405 According to the Agencies, waters are "similarly situated" if they perform similar functions and are sufficiently close together such as to be evaluated as a "single landscape unit."[93] They are sufficiently close together when they are "within a contiguous area of land with relatively homogeneous soils, vegetation and landform,"[94] Guidance language included the Scientific Evidence Appendix provides for even more

[93] *79* Fed. Reg. *76,222* 1 3 (Apr. 21,20 14).
[94] Id.

concern. A staffer performing a case-by-case analysis will see that other waters *need nor have any hydrologic connection whatsoever*, and indeed, "in the aggregate, similarly situated wetlands may have significant effects on the quality of water many *miles away."*[95] Given the geology of the State of Florida, this language covers a lot of ground - arguably, much more than the adjacency standard under the current rule.

Similarly, the phrase "in the same region" and its guidance portend a much larger reach for federal regulators. The proposed rule provides that the Agencies intend to interpret this important phrase to mean "the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry."[96] The single point of entry qualifier is defined as "the drainage basin within whose [sic] boundaries all precipitation flows to the neatest of [such waters],'" Watersheds in Florida are complicated and diverse, dominated by Karst topography in the north, disjointed by drainage systems to the south, and with many areas of low-elevation sheet flow. There are 29 major watersheds in Florida, with 24 of these bordering on the Atlantic Ocean or Gulf of Mexico."' Most likely, the remaining five also drain toward jurisdictional waters. Watersheds of a smaller scale must also drain - most likely from a river, stream, tributary, wetland or impoundment – into a water of the United States. As a result, one could conclude that most any body of water in Florida can be interpreted to be "in the same region" and considered in combination with other waters to constitute a water of the United States.

Agency Response: **See Summary Response. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent) and a definition of "significant nexus" was included that also includes a descriptor of "similarly situated." The preamble and Technical Support Document provide discussion on these two topics.**

Association of Clean Water Administrators (Doc. #13069)

12.406 Due to state-to-state differences in geohydrology and water-related legal authorities, as well as uncertainty as to the effects of the rule on implementation of CWA Sections 303(d), 402, 404 and 319 programs, ACWA finds it very difficult to comment on whether the Proposed Rule is suitable for all states. For example, some states question federal jurisdiction over all ephemeral tributaries since some rain-dependent streams flow so infrequently as to render their effect on downstream waters inconsequential. However, some states are supportive of this inclusion, either because they have identified a strong connection between ephemeral streams and downstream protection in their state or

[95] Id. at 22247.
[96] *Id*, at 222 12.

because case-by-case determinations of whether ephemeral streams have a significant nexus to downstream waters would be too resource and time intensive. (p. 2)

Agency Response: **See Summary Response and Technical Support Document. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, Section 319, or Section 311 requirements which also require authorization. The rule limits Clean Water Act jurisdiction only to those types of waters that have a significant nexus on downstream (a)(1)-(a)(3) waters, not waters with simply any hydrologic connection. The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice. The agencies have determined that all tributaries, regardless of flow regime, have a significant nexus either individually or in combination with other tributaries in the region to downstream (a)(1)-(a)(3) waters.**

Tribes and states play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources. Tribes and states, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction.

The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

Western Coalition of Arid States (Doc. #14407)

12.407 The proposed definition of a tributary will virtually sweep in every natural or man-made water feature in the arid West and beyond the current reach of the agencies' CWA authority. Most ephemeral drainages only flow in response to precipitation events and typically occur only during the North American Monsoon or winter rain seasons. For example, of the documented 284,908 miles of linear streams in Arizona, over 96 percent were classified by the United States Geological Survey (USGS) as intermittent or ephemeral.[97] Rarely can a large industrial development project like a linear electrical transmission line or water transmission pipe line be constructed without crossing or disturbing at least one or more of these ephemeral features and triggering the need for a CWA permit. (p. 9-10)

[97] United States Geological Survey. Office of Water. Washington, DC. National Hydrography Dataset. October 2013.

Agency Response: **See Summary Response. The rule limits Clean Water Act jurisdiction only to those types of waters that have a significant nexus on downstream (a)(1)-(a)(3) waters, not waters with simply any hydrologic connection. The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice. The agencies have determined that all tributaries, regardless of flow regime, have a significant nexus either individually or in combination with other tributaries in the region to downstream (a)(1)-(a)(3) waters.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resurces.

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Florida Rural Water Association (Doc. #14897)

12.408 Changes to the definition can (…) have far-reaching impacts on Water Utilities. Florida's flat terrain makes it highly susceptible to changes in the jurisdiction of the CWA. (p. 2)

Agency Response: **See Summary Response. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.**

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The agencies will develop the tools necessary to assist with the jurisdictional determination process in the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Western Urban Water Coalition (Doc. #15178 and #15178.1)

12.409 It is important that the agencies consider the scope of the Proposed Rule in the context of the full panoply of environmental and water supply challenges being faced by local communities in the West. This includes those challenges associated with climate change, most notably drought, forest fires, post fire floods, and the overall health of forested watersheds.

The West is, in fact, the region which will be the most directly and significantly affected by the outcome of this rulemaking process. It is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, effluent dominated and dependent water bodies, and extensive ditch and canal systems designed to meet both agricultural and municipal needs. (Doc. #15178.1, p. 2)

Agency Response: **See Summary Response. The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies believe the clarity and certainty**

provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice.

12.410 It is also important to note that drainages in the arid West can have a mix of ephemeral and intermittent characteristics, which further add to their variability and the need for a case-by assessment to determine their jurisdictional status. Many intermittent drainages have reaches with shallow ground water levels that seasonally contribute flow to only a reach of the drainage, which can then be separated by a dry ephemeral reach. In the arid West, it is not uncommon to have intermittent drainages with scattered reaches of seasonal or sometimes perennial pools of water and/or wetlands fed by ground water seeps separated by dry ephemeral reaches. As the lengths of dry ephemeral reaches increase between the intermittent reaches, the potential decreases for seasonal flows to connect with a WUS and/or for affecting the chemical, physical, or biological integrity of a WUS, as discussed above for discontinuous features. (Doc. #15178.1, p. 16-17)

Agency Response: **See Summary Response. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. For example, the ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West.**

The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice.

12.411 [T]here is substantial variability in the types of waters within a given watershed in the arid West and as the proposed rule acknowledges, "[I]n the arid West, the agencies recognize there may be situations where the single point of entry watershed is very large

…." Aggregating highly variable waters over a very large region and using the combined potential effects of these waters on the physical, chemical, or biological integrity of a TNW to determine that all of these "similarly situated waters," individually or collectively, are jurisdictional is not an approach supported by the facts. There is simply too much variability within waters in the arid West, particularly ephemeral and intermittent drainages, as discussed above, to make such a sweeping generalization on which to base the jurisdictional status of the waters.

In the arid West, there can be substantial distance between "other waters" and a TNW and substantial time between precipitation and flow events. Within the watershed encompassing that distance, there can be numerous "other waters" with different relationships to the TNW including hydrology, landform, soils, vegetation, and distance to the TNW. It is not appropriate to assume that these "other waters" are similarly situated because it cannot be assumed that they perform similar functions and are located sufficiently close to a TNW to be evaluated as a single landscape unit. As an example from the Corps field guide to the identification of the OHWM in the arid West, "[E]xtreme weather events (e.g., summer thunderstorms) may produce locally intense precipitation over an entire watershed or perhaps just a portion of an entire watershed producing short-duration, potentially high-energy (depending on watershed size, relief, and soil conditions) flow in these areas and a complete lack of flow in others" (Lichvar and McColley 2008). These highly localized precipitation events are common in the arid West. When such events occur, the "other waters" in the entire watershed are not acting in a combined similar manner on a TNW (i.e., some drainages are conveying runoff that may reach a TNW, some drainages convey water for a short distance that does not reach a TNW, and other drainages remain dry).

Another issue with the proposed rule's approach of assessing the combined effects of similarly situated "other waters" in the region is that the approach is performing a cumulative effects analysis on the entire watershed without knowing what the action or actions are that are to be considered when determining the combined effects. Effects and connections differ in their intensity, duration, frequency, magnitude, predictability, location in the watershed, and significance on the physical, chemical, or biological integrity of a TNW. The importance of considering the difference in effects is evident in comments from the EPA SAB Panel for the Review of EPA Water Body Connectivity Report which state: "[T]he descriptions in the preamble of the proposed rule of evidence of physical, hydrological, and biological connectivity would be more scientifically rigorous if they focused on the magnitude or impact of the connection instead of the presence/absence (binary) perspective" (EPA SAB Panel 2014).

As proposed, the rule would assume that if all of the combined similarly situated "other waters" could affect the physical, chemical, or biological integrity of a TNW, then individually, each water comprising the similarly situated waters affects the physical, chemical, or biological integrity of a TNW. This assumption is not logical and does not consider scale. All does not equal one. This is particularly true when considering the proposed large single-entry watershed size and the variability of "other waters" in the arid West. What proportion of other waters in the single-entry watershed would need to be adversely affected to create a significant impact on a TNW? What is the measure of significance when aggregating other waters and their effects on the physical, chemical, or

biological integrity of a TNW? The proposed rule needs to clearly state these important criteria. (Doc. #15178.1, p. 31-32)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the scientific basis for the final rule. See the preamble section on "Tributaries" for further discussion concerning the jurisdictional status and flow regime of tributaries. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.**

The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. The agencies believe they are not regulating any waters that have not previously been covered under the CWA regulations.

The final rule and preamble provides clarity concerning when waters can be found to be similarly situated and therefore combined for the purposes of conducting a significant nexus evaluation. See the preamble section on "Case-Specific Waters of the U.S." for additional discussion. The final rule also provides a specific list of factors to be considered when conducting a significant nexus determination to provide clarity and predictability to the case-specific significant nexus determinations for (a)(7) and (a)(8) waters.

The agencies recognize there may be situations in the arid West where the single point of entry watershed is very large, and it may be reasonable to evaluate all similarly situated waters in a smaller watershed. The preamble provides additional discussion concerning when circumstances warrant conducting a significant nexus evaluations on a different scale than the single point of entry watershed in the arid West.

Oklahoma Municipal League (Doc. #16526)

12.412 The addition of new definitions for "adjacent," "neighboring," "riparian", "floodplain," "tributary," and "significant nexus" introduces widespread concerns for three reasons. (With regard to implementation of the proposed new rule) the examples provided in the definitions suggest consequences – whether intended or unintended – in many real-life situations the proposed rule is not addressing.

There are over 4 million miles of roads in this country with at least that many miles of ditches running alongside them. These ditches were constructed to shore up the road, not to transport water. How many of those miles have flowing water in them and how many of those lesser miles of water can in any candid way be said to significantly affect the integrity of a traditional jurisdictional water? Is there not another way to prevent degradation of navigable waters without subjecting all those millions of miles *a priori* to federal permitting authority with its attendant delays and costs?

Many states, including Oklahoma, are experiencing severe drought. This reality in conjunction with population and urban growth increase the need for reliable water supply. Consequently, they are promoting the very conservation measures encouraged by EPA, such as water reuse and green infrastructure. The proposed rule foreseeably will chill these initiatives by subjecting essential facilities to costly permit processes and delays. State and local governments are thus placed in an unnecessary "catch-22" by this inconsistency in EPA's programs. (p. 4)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures, stormwater control features, and certain ditches. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.**

The rule is intended to avoid disincentives to the environmentally beneficial trend in green infrastructure stormwater management practices. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Washington State Water Resources Association (Doc. #16543)

12.413 The West is still largely an arid region with thousands of miles of arroyos, ditches, washes, dry streambeds and ephemeral or intermittent water bodies. Many of these features rarely feature water in them. When water is present, it is often in response to large storm events and oftentimes much of the water that enters these features is absorbed into the ground.

Under current agency guidance many of these features have been determined to be isolated or lacking a significant nexus to traditional navigable waters and are not currently jurisdictional. However, under the proposed rule, many of these features could be considered jurisdictional by rule. The proposed rule makes ephemeral and intermittent tributaries jurisdictional and also eliminates, to a large extent, the concept of an isolated water or wetland. As previously noted, this is an expansion of the Agencies' jurisdiction and will make constructing and maintaining vital water supply infrastructure more

difficult and expensive. Given the unique nature of the West and its landscape, it appears that this jurisdictional expansion will ultimately impact the West disproportionately more than any other region. (p. 5-6)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures and certain ditches. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

12.414 Recently, the importance of water in the Western U.S. was noted in the Administration's 2014 National Climate Assessment, which states:

"The Southwest is the hottest and driest region in the United States, where the availability of water has defined its landscapes, history of human settlement, and modern economy. Climate changes pose challenges for an already parched region that is expected to get hotter and, in its southern half, significantly drier. Increased heat and changes to rain and snowpack will send ripple effects throughout the region's critical agriculture sector, affecting the lives and economies of 56 million people – a population that is expected to increase 68% by 2050, to 94 million. Severe and sustained drought will stress water sources, already over-utilized in many areas, forcing increasing competition among

farmers, energy producers, urban dwellers, and plant and animal life for the region's most precious resource."

The Administration is correct to express concern about meeting water supply needs in coming decades. Our members share this concern. However, we are genuinely concerned that the proposed rule will make it more difficult to meet water needs.

In order to meet water supply and wastewater treatment needs, as well as stormwater control requirements, municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will include new or expanded storage reservoirs; reuse facilities; desalinization plants; water collection, delivery and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Many of these facilities will, of necessity, be in somewhat close proximity to the types of "waters" discussed in the current proposal. It is essential that these critical activities, many of which may be undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures. (p. 6-7)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures, stormwater control features, and certain ditches. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

The rule does not diminish or in any way detract from the intent and purpose of Clean Water Act sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

The Corps regulations define an "emergency" as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and

letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."

12.415 To the extent ditches fail to meet the rigid and narrow exemption language, and waters therein are therefore treated as jurisdictional, the time and costs associated with ditch construction, repair, maintenance and replacement will increase. In addition, in the arid West, as water shortages loom, a critical component of future water supply is the "sharing" of water rights between senior agricultural users and junior municipal providers on an interruptible supply, e.g., leasing/fallowing, basis However, to implement such sharing opportunities, it is oftentimes necessary to construct new water collection and transportation infrastructure. If such construction activity triggers section 404 and NEPA requirements, it may mean that the transaction becomes technically, economically, or temporally infeasible. (p. 9)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as wastewater recycling structures, stormwater control features, and certain ditches. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public, including providing clarification of the ditch exclusions and of the definition of "tributary". The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.**

The rule does not diminish or in any way detract from the intent and purpose of Clean Water Act sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

12.416 Proposed Rule Could Hinder Disaster Response

The 2014 National Climate Assessment states that: "drought conditions present a huge challenge for regional management of water resources and natural hazards such as wildfire." NWRA's members agree that current and future drought conditions present a huge challenge. Western communities are not only dealing with droughts that place great stress on finite water resources. They are also combating the ever-larger and more frequent wildfires that strip the landscape of vegetation and the often massive flood events that come in the days and years after a wildfire has burned. These natural disasters impact people, communities and water managers. Responding to, and

recovering from, natural disasters is a daunting task that NWRA's members are dedicated to meeting. However, we are concerned that the rule in its current form will make it more difficult to respond to, and recover from, these events.

Disaster response requires the ability to act quickly and creatively. The proposed rule will make areas not previously jurisdictional subject to the timely and costly permitting requirements triggered by the CWA. As an example the proposed rule contains no exemption for stormwater runoff control facilities, such as those necessary to hold back debris and sediment from burn scar areas. This is just one example of how the proposed rule in its current form will make it more difficult to deal with disaster events. (p. 14)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion on excluded waters such as stormwater control features and certain ditches.**

The Corps regulations define an "emergency" as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."

U.S. Chamber of Commerce (Doc. #14115)

12.417 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 (p. 17)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will**

be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The rule provides a definition for "waters of the U.S." and does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations, science, and Supreme Court precedent. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S."

The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Pennsylvania Chamber of Commerce and Industry (Doc. #14401)

12.418 The PA Chamber would appreciate if the federal EPA recognized that a "one size fits all" approach of applying federal regulation under the Clean Water Act, as is proposed with this rulemaking, is inappropriate, given regional differences in topographical, meteorological, hydrologic and other conditions. (p. 2)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.419 While it is abundantly clear which waterways and wetlands in Pennsylvania are subject to state regulation, case-by-case determinations at the federal level are impractical, given the sheer number of routine regulatory decisions that must be made. Also, given the bevy

of activities and environmental resources that may or may not be subject to federal regulation under this proposal, the PA Chamber is concerned this proposal opens the door to selective enforcement. The PA Chamber continues to be concerned about the differences in regional decision-making among various EPA and Corps' district or regional offices, and it is likely that the significant number of subjective elements laid out in this rulemaking will only further add to those concerns. (p. 3)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public which will result in further consistency. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Comments specific to the implementation of CWA Enforcement Programs are outside of the scope of this rulemaking.

Resource Development Council for Alaska, Inc. (Doc. #14649)

12.420 RDC urges the EPA and Corps to withdraw the proposed rule for "water of the United States." (WOTUS), and halt efforts to further expand the EPA's jurisdiction of areas in Alaska and across the United States. RDC has many concerns regarding the proposed rule, including many Alaska-specific issues, as well as broader concerns at the national level. As the CWA triggers the onerous permitting process for areas in Alaska considered "waters of the U.S.," RDC is further concerned the broad expansion that will likely result from this proposed rule will devastate the Alaskan economy. The expense

and uncertainty in the process for obtaining a permit under the CWA discourages investment in Alaska, a place where the cost of doing business is already high and the extreme weather conditions often delay or impact projects. The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters – many of which are in Alaska. The proposal is too fluid, and asserts federal control over waters that were under jurisdiction of Alaska and each individual state. Ultimately, WOTUS includes wetlands, development projects will be subject to additional lengthy and expensive federal permitting, added benefit to the environment. (p. 1-2)

Agency Response: **See Summary Response. See the Economic Analysis for additional information on the costs/benefits of the final rule. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The agencies will develop the tools necessary to assist with the jurisdictional determination process in the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.421 Alaska contains approximately 174 million acres of wetlands' (65% of the nation's total), with nearly 80% the state underlain in permafrost. RDC is concerned about the potential vast consequences the proposed rule to define "waters of the United States" will have because of the immense wetlands and permafrost. Alaska has 63% of the nation's jurisdictional waters and is one-fifth of the U.S. land mass, yet EPA's analysis the definition of WOTUS rule making did not include adequate analysis of Alaska. RDC is

further concerned the rule will result in disproportionate impacts to Alaska, and the agencies should address the flawed economic analysis described in the rule. RDC's members, from oil and gas, to maritime, Alaska Native corporations, and rural communities, will he unreasonably burdened by this proposed rule. Alaska and other states should have the authority to develop land use practices and protections, not the federal government. (p. 2)

Agency Response: **See Summary Response. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

The rule does not diminish or in any way detract from the intent and purpose of Clean Water Act sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

The agencies also recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the regional supplements to the wetland delineation manual, which is outside the scope of this rulemaking, but is a related resource which discusses permafrost and wetlands.

12.422 The technical definition of permafrost as "soil and/or rock that has remained below 32°F for more than two years, regardless if significant amounts of ice exist or not" will likely cause confusion for Alaska when considering how EPA and the Corps use it to define WOTUS. (p. 2)

Agency Response: **See Summary Response. For the purposes of wetland delineation in Alaska, the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (which is outside the scope of this rulemaking effort) defines permafrost as: "A thickness of soil or other superficial deposits, or even bedrock, which has been colder than 0 °C for two or more years (Muller 1945)." The agencies have not used "permafrost" in the definition of "waters of the U.S." See the delineation manual for further discussion on permafrost.**

12.423 In regards to "permafrost," as the larger part of Alaska is considered permafrost, clarify if the inclusion of permafrost would then put even more of Alaska under the CWA permitting regime. (p. 2)

Agency Response: **See Summary Response. For the purposes of wetland delineation in Alaska, the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (which is outside the scope of this rulemaking effort) defines permafrost as: "A thickness of soil or other superficial deposits, or even bedrock, which has been colder than 0 °C for two or more years (Muller 1945)." The agencies have not used "permafrost" in the definition of "waters of the U.S." See the delineation manual for further discussion on permafrost.**

12.424 Equally important is the inclusion and use of the best available science, as well as research that includes temperate regions and is reflective of connections in an arctic environment. (p. 2)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the scientific basis of the rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.425 Given Alaska's unique conditions, any revised or new guidance provided by the Corps should include regional guidance with examples or case studies. Development of regional guidance should include broad participation in the process from the regulated and regulatory communities. Likewise, the revised form the Corps and EPA are developing for field regulators for documenting the assertion or delineation of CWA jurisdiction should be specific to Alaska. Development of both national and regional forms should be a public process, open to review and comment.

Agency guidance should recognize Alaska's unique circumstances. While scarcity is an overriding concern elsewhere in the nation, the sheer abundance of wetlands in Alaska is an important element to take into consideration. Further, Alaska is a state with substantial, remote wetlands. Often there are challenges associated with identifying a nexus to traditional navigable waters, especially in ice-rich regions. The limited field season and the lack of understanding of functions for some types of Alaskan wetlands are two other challenging elements that should be recognized. (p. 3)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.426 Alaska, being a relatively young state with vast lands and few inhabitants, is mostly undeveloped. Alaska lacks critical infrastructure for community and resource development. RDC is concerned the proposed rule will further impact projects, given most of Alaska's non-mountainous lands are or would be considered wetlands.

Rural Alaska, which has a vital need for improved infrastructure and projects, such as roadways, power lines, and pipelines, will have to obtain additional permits and be under greater, yet unnecessary scrutiny in order to be approved. RDC notes the impact will disproportionately affect rural Alaska, and in particular, Alaska Natives.

Furthermore, much of Alaska's lands are already owned by the government, with less than one percent in conventional private ownership. As a large percent of wetlands is under public management, it's likely not to be available for development nor for compensatory mitigation.

Under the proposal, even if a project can get a permit, businesses will likely have to agree to costly restoration and/or mitigation projects. Moreover, the proposal does little or nothing to actually improve water quality. Instead, it gives EPA and the Corps virtually limitless authority to control community and development projects especially in Alaska. This proposed rule is seriously legally flawed and again, RDC urges EPA and the Corps to withdraw it. (p. 4)

Agency Response: **See Summary Response. The goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This goal includes the mission to maintain the integrity of the Nation's waters, including those waters which may be less polluted. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it**

is designed to clarify the statutory scope of the "waters of the U.S." consistent with science, existing regulations, and Supreme Court precedent.

The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Concerning potential environmental justice issues, please refer to the preamble section on "Related Acts of Congress, Executive Orders, and Agency Initiatives." The rule does not affect the private availability of lands for compensatory mitigation.

12.427 If ultimately necessary, and to develop a balanced rule to continue to protect wetlands, RDC urges the EPA and Corps to meet with Alaskans and stakeholders in other states. These groups can help the EPA and Corps better understand what is already in place and effectively working in each state, while protecting the livelihood of Americans. It is in the best interest of all Alaskans to protect the lands and waters within Alaska's borders.

RDC urges the EPA and Corps to improve and clarify the proposed rule to avoid litigation and unintended consequences. In an effort to provide a better understanding of the potential impacts to Alaska, RDC appreciates continued communications and opportunities to comment on the proposed rule. (p. 4)

Agency Response: **See Summary Response. The agencies have and do engage in sustained coordination and partnerships with states and other partners. The rule public comment period was extended twice to ensure adequate time for comment and during that time the hundreds of stakeholder and outreach meetings were held, including some with state agencies. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

Greater Houston Partnership (Doc. #14726)

12.428 The Houston region sits upon a deep layer of clay soil deposits that pose significant land subsidence challenges. This, coupled with our high rainfall and flat terrain, have led to the implementation of subsidence prevention and flood damage reduction projects which could also be adversely impacted by the proposed rule by unnecessarily hindering their development, operations, and maintenance. (p. 1)

Agency Response: See Summary Response. The rule provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation under Section 404(f)(1), which includes specific maintenance activities, nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve efficiency and provide needed clarity regarding jurisdictional determinations, reducing uncertainties and delays. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with Supreme Court precedent. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting affect on the regulated public.

12.429 … GHP is very concerned with the inclusion of tributaries in the waters of the U.S. The proposed definition of tributary includes natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches. This definition appears to inadvertently make constructed drainage infrastructure jurisdictional, which would trigger Clean Water Act (CWA) Section 404 permitting for many types of drainage system operations and maintenance. It would also complicate the determination of where a stormwater pollutant discharge occurs in Section 402 permitting situations. In contrast to other areas of the country, the Houston region receives 48 inches per year of rain, has largely clay soils, and is extremely flat. This geology has required local governments in the area to plan, design, build, and operate an extensive network of drainage conveyance and detention systems, which may be interpreted as tributaries of downstream waters. For example, the Harris County Flood Control District operates over 2,500 miles of open channels, the City of Houston operates hundreds of miles of roadside ditches, and Houston area counties operate hundreds of miles of roadside ditches as well. (p. 1-2)

Agency Response: See Summary Response. The final rule provides clarity concerning which ditches and other landscape features and water bodies are not

waters of the U.S. The final rule excludes from CWA jurisdiction ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary. The rule also excludes ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section. In addition, the final rule excludes stormwater control features created in dry land. These features remain excluded even if they meet any of the paragraph (a) categories.

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into or other activities such as Section 402 permitting within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation under Section 404(f)(1) nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S.

The rule improves efficiency and provides needed clarity regarding jurisdictional determinations, reducing uncertainties and delays. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent.

Please also see summary response at 7.4.4 that explains a new exclusion for stormwater control features.

FMC Corporation (Doc. #15533)

12.430 It appears that little effort was made to include western states and other western based entities in the development and peer review of this rule. The western U.S. has unique situations, including how water quantity, as well as water quality, is regulated. The CWA recognizes this through language dealing with produced water from oil and gas operations as well as language stating that the authority of states to regulate water quantities within their borders shall not be impaired. These sections in the CWA were in large part a response to arid western states concerns over the reach of the CWA. We are concerned that the proposed rule was not adequately informed, and encourage EPA to pause the rulemaking process and develop ways to ensure adequate input from the West. (p. 2)

Agency Response: See Summary Response. The agencies have and do engage in sustained coordination and partnerships with states and other partners. The rule public comment period was extended twice to ensure adequate time for comment and during that time hundreds of stakeholder and outreach meetings were held, including some with state agencies. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Water Advocacy Coalition (Doc. #17921.1)

12.431 Bed, banks, and OHWM can be seen even in features without ordinary flow. Particularly in the desert and semi-arid regions of the United States, field indicators of an OHWM can develop very easily. Naturally sparse vegetation and erodible soils of the deserts combined with monsoon storms results in a significant number of small channels (often only a few feet in width) yet with a defined bed and bank. Many of these features would likely not develop in humid regions of the U.S. and would be representative of unregulated sheet flow or upland-vegetated swales in humid regions. Therefore, the arid States are unfairly burdened by the OHWM concept, compared to Eastern and humid states. Crossing the threshold from a non-jurisdictional erosion feature to an albeit small channel with an OHWM in the desert occurs easily and is a significant source of jurisdictional uncertainty. Many of these exceedingly small channels would now become *per se* jurisdictional tributaries, even with discontinuous surface connections to another

water and a speculative nexus to traditional navigable waters, interstate waters, territorial seas, and/or impoundments. (p. 44)

Agency Response: **See Summary Response. See the preamble section on "Tributaries" for additional information. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.**

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Virginia Manufactures Association (Doc. #18821)

12.432 The Virginia General Assembly and the Virginia Department of Environmental Quality have enacted a comprehensive regulatory scheme that implements the federal Clean Water Act, and in many instances expands beyond the Act in order to address the unique water quality and natural resource characteristics of Virginia. The Proposal creates uncertainty because it fails to recognize the unique features of state programs, developed over decades of federal/state partnership, instead imposing a one-size-fits-all federal mandate without regard to individual state geography, climate, and water quality needs. (p. 2)

Agency Response: **See Summary Response. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The agencies understand that there is regional variation; however, the rule aims to reduce any inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.433 The Agencies' categorical approach to defining waters as jurisdictional, particularly the blanket *per se* inclusion of all tributaries, regardless of flow, is not only legally deficient, but would also be entirely unworkable in practice, particularly for implementation uniformly across all 50 states. The water features that are prevalent in Virginia are wholly different than those in other regions. Among other things, the Commonwealth is home to far more ephemeral waters than in other regions of the country. Under the Proposal such water would be categorically jurisdictional. Yet the Proposal does not account for geographic variability. The inevitable result is that certain states and regions, like Virginia, are going to be disproportionately affected by the Proposal. (p. 2)

Agency Response: **See Summary Response. The rule defines "tributary" by emphasizing physical characteristics created by sufficient volume, frequency and duration of flow; and the concept that a water must contribute flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is also consistent with current practice. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example,

the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process.

Southern Nevada Home Builders Association (Doc. #3251)

12.434 We believe that the EPA's proposed rule changes will have the effect of significantly expanding federal jurisdiction under the CWA to include small streams, dry washes, ephemeral streams and washes and other areas in Nevada and other arid southwestern states not previously subject to, or intended by Congress to be subject to, jurisdiction under the CWA. We understand from various statements that have been made by certain officials within the EPA that the stated purpose for the changes is to add clarity and certainty to the CWA and the rules and regulations promulgated by the EPA and Army Corps of Engineers thereunder. However, regardless of whether the expansion of jurisdiction is intentional or an unintended consequence, we are very concerned with the current proposed rules, which do not appear to adequately consider or address numerous unique geographic, hydrologic or climate conditions applicable to arid, southwestern states like Nevada. (p. 1)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw,

and is consistent with current practice. Landscape features that do not meet the definition of tributary are excluded from CWA jurisdiction.

El Dorado Holdings, Inc. (Doc. #14285)

12.435 The agencies' interpretation of the phrase "ordinary high water mark" is overbroad as applied to ephemeral washes in the arid West: One of the fundamental flaws in the agencies' construction of the term "tributary" is that it contains no clear definition of the upstream limit of jurisdiction. Current Corps rules and agency guidance indicate that the ordinary high water mark OHWM is the lateral limit of jurisdiction for non-wetland waters and that the upstream limit of this jurisdiction follows the watercourse until the OHWM is no longer "perceptible." 33 C.F.R. § 328.4(c)(1); 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The OHWM is intended to determine the extent of jurisdiction once a water has been determined to be jurisdictional. It was never intended to establish jurisdiction in and of itself. Nevertheless, the proposal effectively would use OHWM as a basis for determining jurisdiction in the first instance. Any channel that is part of a system that connects to a downstream TNW or interstate water is automatically regulated as a tributary if it has an OHWM and a bed and banks, and jurisdiction would extend to the point where the channel begins. See 79 Fed. Reg. at 22202. In the arid West, this means that the determination of jurisdiction upstream is almost certainly in an ephemeral wash, where application of OHWM is suspect at best.

The OWHM is the traditional limit of jurisdiction on navigable-in-fact waters and was imported into the Section 404 program out of administrative necessity, without any real analysis of whether it applied. *See* 33 C.F.R. § 329.11(a)(1) (definition of OHWM under the Rivers and Harbors Act program); *U.S. v. Cameron,* 466 F. Supp. 1099, 1111 (M.D. Fla. 1978) (discussing the origin and meaning of the term); 42 Fed. Reg. 37122, 37129 (July 19, 1977) (discussing the origin of the term in Rivers and Harbors Act program and its use in the 404 program). The Corps' regulations provide: "The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(e) (italics in original). The OHWM is "intended to include those areas where water will be present with predictable regularity." *Id.* At its core, it defines the area where terrestrial vegetation cannot survive because of the constant presence of water. This is of questionable application in a desert environment where vegetation is already sparse and may be totally absent because of the absence of water.

Although the L.A. District has attempted to develop guidance for identification of the OHWM in arid systems, the guidance suffers from the same flaws that application of OHWM concepts to desert washes has traditionally exhibited: it is not difficult to apply on major ephemeral systems where well-established vegetation lines are present, but it lacks any measurable, comprehensive standard for determining where jurisdiction ends at the upstream limit. *See* Lichvar and McColley, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (August 2008). At the top of the watershed, there is often evidence of water flow ("presence of litter and debris") without a well-defined channel.

Given this lack of precision, the agencies are free to arbitrarily extend jurisdiction far up the watershed, past the point where any meaningful aquatic resources are present.

Proof of the difficulty of applying the OHWM at the upstream limit of ephemeral systems is demonstrated by the guidance documents issued in the wake of *Rapanos*. *See* U.S. Army Corps of Engineers, *Jurisdictional Determination Form – Instructional Guidebook* (2007) ("*Jurisdictional Guidebook*"). The Jurisdictional Guidebook contains numerous photographs of ditches and what it refers to as ephemeral tributaries and then includes a highlighted line superimposed on the photograph to identify where the OHWM is located. *See generally*, *id.,* p. 22 (Photo 18) (intermittent tributary), p. 23 (Photo 20) (ephemeral tributary but which is more of an erosional feature) & p. 25 (photos 27 and 28) (ephemeral tributaries). The fact that the OHWM has to be highlighted to be identified demonstrates its inapplicability in this context, i.e., it is not a clear line impressed on the bank. The same can be said of the OHWM identified on ditch features in the Jurisdictional Guidebook. *Id.,* p. 25 (photo 29) (stain mark on the side of a concrete ditch identified as OHWM), p. 36 (Photo 51) (non-jurisdictional ditch with an OHWM) & p. 37 (Photos 53 and 54) (flowing ditches with an OHWM highlighted). Again, these are not clear lines impressed on a bank.

Thus, the use of OHWM as a basis to determine jurisdiction is highly questionable. Justice Scalia was dismissive of this practice ("This interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark – if only 'the presence of litter and debris'"), *Rapanos*, 547 U.S. at 715, and Justice Kennedy merely speculated that use of an OHWM to identify jurisdiction "presumably provides a rough measure of the volume and regularity of flow." *Id*. at 781. As is evident from the foregoing discussion, the use of OHWM on ephemeral systems, particularly at the top of the system, does *not* provide a "rough measure of flow." Justice Kennedy goes on to say that "[a]ssuming it is subject to reasonably consistent application . . ., it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Id.* In referencing consistent application, Justice Kennedy cites to the General Accounting Office report from 2004 that specifically criticized the Corps for inconsistent practices. *See* General Accounting Office, *Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (GAO-04-297), at pp. 3-4 (Feb. 2004). Those practices have not been subject to any national rulemaking that sets real standards on where jurisdiction begins and ends at the top of the watershed, nor have existing guidance documents been subject to public participation. This is simply too slender (and inconsistent) a reed on which to rest CWA jurisdiction.

Recommendation: The agencies should not consider the presence of an OHWM – as currently interpreted by the agencies in arid regions – to be sufficient evidence to assert jurisdiction in the absence of other evidence of connectivity. (p. 15-17)

Agency Response: The ordinary high water mark definition and manuals are not within the scope of this rulemaking effort. See Summary Response. See the preamble section on "Tributaries" for additional information. The agencies believe

that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice. The ordinary high water mark manuals developed by the Corps provide for the appropriate indicators to consider when delineating the ordinary high water mark in the field. Such indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of such waters in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

CalPortland Company (Doc. #14590)

12.436 The changes to the CWA jurisdictional language will be particularly impactful in the arid/semi-arid west, where ephemeral streams and isolated "other waters" are prominent features of the landscape. Given the specific hydrologic and geologic desert conditions that prevail in this area, the proposed rule's expansion of CWA requirements goes far beyond anything that could be justified as a reasonable interpretation of the CWA's jurisdiction over "navigable waters." The proposed rule inappropriately proposes to expand CWA jurisdiction to features that are effectively dry land so long as they ever – or might ever – contribute the slightest increment of water flow to downstream traditional navigable waters, no matter how small that flow or how far away a navigable water might be. Such an expansion would impose substantial costs and administrative burdens upon land development activities in the arid southwest, negatively affecting the local economy with no discernible environmental benefit. (p. 2)

Agency Response: See Summary Response. See the preamble section on "Tributaries" for additional information. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

See the Economic Analysis for additional information on predicted change in jurisdiction. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with

other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Business Alliance for a Sound Economy (Doc. #14898)

12.437 The Proposed Rule will unnecessarily expand the involvement of the Corps in development projects in coastal North Carolina without commensurate environmental benefits.

North Carolina already has in place a set of robust regulatory programs that protect surface waters, wetlands, and groundwater beyond the scope of Clean Water Act jurisdiction, especially in the coastal region where BASE members operate. The state has regulations that apply specifically to wetlands that the Corps has determined to be non-jurisdictional. See 15A N.C. Admin. Code Section .1300. There is a set of regulations that regulates development activities in riparian buffers adjacent to surface waters. See generally 15A N.C. Admin. Code 2B.223. There is a state stormwater program, separate from and in addition to the NPDES stormwater program that applies in the coastal counties and around certain other "high quality waters." See 15A N.C. Admin. Code Section .1000. The state's Coastal Area Management Act that affects development of coastal wetlands, which includes be isolated wetlands. E.g., 15A N.C. Admin. Code 7H.0205. Additionally, the Coastal Area Management Act does not apply solely to the discharge of fill material in a wetland but also regulates a variety of other activities that impact coastal wetland areas. 15A N.C. Admin. Code 7H.0205(e). Furthermore, groundwater is regulated by rules located in the North Carolina Administrative Code at Title 15A, Subchapter 2L. Under the subchapter, groundwater is classified according to best usage and assigned numeric water quality standards. Discharges of pollutants to groundwater can trigger corrective action requirements. Given this thorough regulatory regime, there is no need for additional federal regulation of surface waters and wetlands (p. 1-2)

Agency Response: **See Summary Response. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs or state laws as a result of the rule.**

ERO Resources Corporation (Doc. #14914)

12.438 In the arid West, the current Section 404 policies and practices steer many project proponents away from alternatives that involve rivers and perennial streams and toward alternatives that involve dry ephemeral and intermittent drainages that are isolated from and/or lack a significant nexus to a TNW because such drainages are non-jurisdictional and any discharge of dredged or fill material into them will not require a Section 404 permit. Avoidance of the need for a Section 404 permit is frequently a component for evaluating water supply project alternatives in the arid West (Dougherty et al. 2010). Currently, several proposed "off-channel" reservoirs in Colorado are located on ephemeral or intermittent drainages determined to be non-jurisdictional based on isolation. This same approach is also true for other types of projects in the arid West including pipelines, roads and drill pads.

Because current policy and practices steer many projects away from rivers and perennial streams toward non-jurisdictional ephemeral and intermittent drainages, fewer projects are proposed in jurisdictional waters and wetlands and there are fewer impacts on the resources and functions associated with jurisdictional waters and wetlands. The current regulations, policies, and practices work as they should to provide incentives to project proponents to develop alternatives that avoid impacts on these waters and wetlands, with greater potential to provide significant resources and functions (i.e., those with perennial water sources). As proposed, the rule would eliminate this incentive because all drainages that meet the definition of "tributary" would he jurisdictional by rule (including normally dry ephemeral drainages). In other words, under the proposed rule, there would no longer be an incentive for a project proponent to avoid perennial drainages because all tributaries would be jurisdictional by rule. This will result in greater adverse effects on the resources associated with perennial drainages. (p. 5-6)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the scientific basis for the final rule. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. In developing the rule, the agencies considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public. Prior to this final rule, most ephemeral and intermittent streams were jurisdictional waters of the U.S. afforded the same coverage as perennial streams.**

The final rule does not change the agencies' mitigation sequencing (i.e., avoid, minimize, compensate) and the provisions of the 404(b)(1) guidelines (40 CFR part 230). The final rule also does not change the compensatory mitigation requirements under 33 CFR part 332.

12.439 The proposed rule needs to recognize the *SWANCC* and *Rapanos* opinions and preserve the ability to determine that a water or wetland is non-jurisdictional because it is isolated. As discussed below, determinations of non-jurisdiction for ephemeral and intermittent drainages based on isolation occur in the arid West. These non-jurisdictional determinations include:

- Ephemeral and intermittent drainages with substantial breaks in jurisdictional features where the break in jurisdictional features makes it unlikely that flows reach a WUS.
- Ephemeral and intermittent drainages with no breaks in jurisdictional features that contain no surface flow during most years due to dry conditions and/or human surface and shallow ground water diversions that reduce streamflow to zero.
- Erosional gullies that do not have jurisdictional features except where they transport irrigation runoff.
- Ephemeral and intermittent drainages where the channel ends in a fan or sheet flows over the landscape and makes it unlikely that flows reach a WUS.
- Ephemeral and intermittent drainages where the channel loses definition due to agricultural or other activities that make it unlikely that flows reach a WUS.
- Ephemeral and intermittent drainages where the channel loses surface or subsurface that make it unlikely that flows reach a WUS.
- Ephemeral and intermittent drainages where the channel ends in a closed basin and it is unlikely that flows reach a WUS.

Currently, the channel above these breaks in jurisdiction would be considered isolated and/or lack a significant nexus to a WUS, even if portions of the channel above the breaks in jurisdiction had a bed and banks or an OHWM. These situations occur with enough frequency in the arid West that elimination of the criteria for isolation associated with breaks in jurisdiction and making ephemeral and intermittent drainages jurisdictional by rule would substantially increase the scope of CWA jurisdiction in the arid West. (p. 7-8)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the legal basis for the final rule. See the updated Economic Analysis for additional discussion on predicted change in jurisdiction. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. Some of these refinements included expansion of the exclusions in paragraph (b), clarification of the definition of "adjacent" and "tributary" and refinement of the definition of "significant nexus".**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The final rule was developed to increase CWA jurisdiction predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The definition of "tributary" and the preamble to the final rule in the "Tributaries" section discuss breaks in the ordinary high water mark of a tributary and the lack of scientific support for severing jurisdiction based on a break that can be reestablished.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.440 The agencies need to consider the unintended consequences of the proposed rule. If implemented as proposed, the determination of the jurisdictional status of an "other water" will potentially take on great regional significance as numerous concerned parties in a watershed will closely monitor the JDs of "other waters" that could result in an entire class of wetlands or waters being determined jurisdictional. The JD process, which in the past has typically been between a permit applicant and the Corps, will become a watershed-wide process with multiple parties entering into the jurisdictional debate in an effort to protect their interests. This will not simplify or streamline the JD process and is likely to increase delays, conflicts, confusion, and challenges. This is particularly likely to happen in the arid West due to the large size of the single-entry point watersheds, the variability of waters within the watersheds, and numerous dry drainages. (p. 27)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the applicable scientific basis for the final rule. Although the agencies believe that additional efficiencies will be gained through implementation of the rule, all jurisdictional determinations are site-specific, using available information for that review area. Site-specific conditions are considered when determining whether a water meets the (a)(7) or (a)(8) category requiring a case-specific significant nexus determination. The review area for a jurisdictional determination is generally limited to the area in which impacts to waters of the U.S. may occur. Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is only specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed. Only the agencies, and applicable states and tribes, have the authority to make a jurisdictional determination under the Clean Water Act.

Perkinscoie (Doc. #15362)

12.441 The Southwest Developers request that the agencies reconsider and rework the Proposed Rule's imposition of CWA jurisdiction on a certain category of regional aquatic features that are prevalent in the southwest, known as arid headwater streams. These streams, often found in arid areas in Arizona, Nevada, California, and other states where the Southwest Developers conduct development operations, arc both ephemeral and

intermittent. Moreover, they have characteristics like sporadic and variable f1ow, rapid infiltration and transpiration, vegetation uptake, channel deformation, isolation due to development or other impoundment, and distance to navigable or interstate waters. Because there is no significant connection between these arid headwaters and downstream navigable waters, they cannot be jurisdictional under Supreme Court precedent. Yet under the Proposed Rule, the agencies would extend CWA coverage over these regional aquatic features.

The Southwest Developers believe this proposed extension of jurisdiction is unwarranted. As a practical matter, if the Proposed Rule is finalized as currently written and unjustified jurisdiction is extended over these arid headwaters, it is likely to result in the Southwest Developers' inability to develop in certain areas in the southwest or, at a minimum, to bear unfair and unwarranted increases in the time and costs they incur for permitting their projects. Accordingly, for the purpose of encouraging the agencies to revise the Proposed Rule, we are providing the agencies with technical information and analysis relevant to the unique hydrologic conditions of these regional features, based on the attached report prepared by SWCA Environmental Consultants (the "SWCA Report"). We have already provided some of this information in our April 10, 2014 comments on EPA's draft report entitled Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Sep. 2013 External Review) ("Draft Connectivity Report") and the Science Advisory Board's ("SAB") draft review of the Draft Connectivity Report. Since our comments, the SAB has issued its final review of the Draft Connectivity Report (Oct. 17, 2014).

In a nutshell, the Southwest Developers submit that the Proposed Rule incorrectly deems certain aquatic features common in the southwest as jurisdictional without a scientific, and therefore without a legal, basis for doing so. As described in the SWCA Report, these arid headwaters often are not *significantly* connected to navigable waters. As a result, there is no basis for deeming these streams jurisdictional when they do not often (and maybe never) have an influence – much less a significant influence – on downstream waters. See SWCA Report at 1, 8, 12. Indeed, under the current *Rapanos* Guidance, these streams are almost always deemed non-jurisdictional after an on-the-ground significant nexus determination. *Id*. This is the crux of the Southwest Developers' concern: *Rapanos* requires a significant nexus between a headwater stream and a downstream water in order to deem that headwater jurisdictional. The Proposed Rule would do away with that requirement on the basis of the scientific conclusions of "connectivity" in the Draft Connectivity Report. But those scientific conclusions are without merit. (p. 1-2)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the legal basis for the final rule. See the updated Economic for additional discussion on predicted change in jurisdiction. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States"

protected under the Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The definition of "tributary" and the preamble to the final rule in the "Tributaries" section provide further discussion on tributaries.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters, including headwater streams which meet the definition of tributary. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Leigh Hanson, Inc. (Doc. #15781)

12.442 Furthermore, the extension of WOTUS to dry or intermittent streams is particularly troubling for sand and gravel operations throughout the southwestern U.S. Mining of sand and gravel beyond the floodway, but immediately adjacent to the 100 year floodplain, is common in many parts of Nevada, Arizona, New Mexico, Texas and California. Mine access roads, haul roads and excavation equipment operate daily within the boundaries of the 100 year floodplain. Plant processing equipment is located by design just outside the floodplain. The extension of the flood plain boundary to include tributaries or dry man-made structures will increase the cost and scope of permitting efforts and significantly limit the footprint of existing and future operations, which directly reduces the amount of mineable reserves.

If the inclusion of dry and intermittent streams is applied to 5 year floodplain permit renewals in metro Phoenix or Los Angeles, the uncertainty of whether existing operations' permit renewals are approved or denied is significantly heightened. In addition, if the extension of floodplain boundaries prompts the involvement of FEMA in the permitting process, additional time delays and increased costs will likely result with limited benefit. (p. 4)

Agency Response: See Summary Response. Only the agencies, and applicable states and tribes, have the authority to make a jurisdictional determination under the Clean Water Act. The FEMA floodplain will only be used in the determination of whether a water may be considered "adjacent." The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. In developing the rule, the agencies

considered all relevant implications that will result from the rule implementation including legal, economic, and implementation considerations, as well as the resulting effect on the regulated public.

The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Furthermore, the final rule will not directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the Clean Water Act definition of waters of the U.S. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

NAIOP, Commercial Real Estate Development Association (Doc. #16551)

12.443 It is not clear to us whether arroyos are intended to be regulated as "ephemeral streams." However, according to page 4-67 of the report issued to support EPA's rulemaking. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Report), "arroyos are ephemeral streams." a. The Report further concludes at page 4-69 that "Many tributary streams to southwestern rivers are ephemeral, but they exert strong influences on the structure and function of the rivers." This suggests that EPA and the Corps intend to regulate intermittent, ephemeral streams such as arroyos as "tributaries." Doing so would increase EPA's jurisdiction dramatically as shown on page 4-57 of the report, which is copied below.

We have several concerns.

- The New Definition Does Not Adequately Consider the Varied Nature and Function of "Ephemeral Streams." First, we feel that it is inaccurate to lump different kinds of intermittent and ephemeral water flows into the category of "ephemeral streams." The function of the "bed and banks' and the contribution of the flow to a regulated water vary among different types of ephemeral streams. Consider the difference among:
    - A stream that flows seasonally as it is fed by snowmelt. Such a stream is likely to flow at a relatively steady rate until its source melts out in late summer. It will support wildlife and recharge groundwater in a relatively constant manner while it is flowing.
    - A stream that flows underground in reaches. It is hard to determine whether such a flow is "groundwater" (i.e., unregulated by the Clean Water Act), and surely such a flow bears a strong connection to groundwater. Such a stream—sometimes flowing above ground and sometimes below – could have water flow year round and still fall under the category of "ephemeral streams."
    - An arroyo (also known as a "wash" or a "gully"). These pathways for storm water runoff have formed naturally over time because**,** for every upward wrinkle of the

dirt and rock, there is a downward low point into which water has carved a downhill path. In some cases, arroyos flow with rain water runoff very rarely. When they do flow, it can be with a heavy sudden flow that ends soon thereafter.

  - Each of these examples is a very different type of flow. Lumping them all together as "ephemeral streams" and regulating them similarly does not make sense to us.

- Lack of Clarity as to How Far Upstream. We believe there is a lack of clarity about how far upland the Clean Water Act extends. In the case of Smith v. United States Army Corps of Engineers, No. 1 :12-CV-01282-MV-LFG, filed in the New Mexico federal court in December of 2012, the Corps initially claimed jurisdiction over an arroyo 25 miles away from the Rio Grande. The Corps later determined that the arroyo did not have a significant nexus**,** and the case **was** settled.

  - This issue is of concern because**,** with New Mexico's rugged terrain, there are many arroyos and many opportunities for uncertainty.

- Gullies, Rills and Arroyos All Function Similarly. It further does not make sense that "gullies and rills" are exempted from WOTUS, but arroyos are not. Functionally, each is a path of storm water runoff… runoff which could reach jurisdictional water. From our research, the only difference is that "gullies and rills" (to the EPA) are paths on farm fields. We found no support in the Report for treating functionally similar storm water paths ("gullies and rills" on the one hand and arroyos on the other) differently.

- Recommendation. For the above reasons, we agree with the recommendation of our national NAIOP leadership that a more reasonable and justifiable approach is, as a matter of policy, to not regulate arid ephemeral streams. Obviously, exceptions to this policy also make sense. For example, exceptions based on history such as if ephemeral stream has been (a) proven to flow, at a rate that is more than de minimus, into a regulated water, for a determined number of hours (e.g., 240), for a determined number of years (e.g., 5 consecutive), based on historic flow, or (b) the Corps has made a case-by-case determination under the significant nexus criteria. Given the lack of justification for treating ephemeral streams differently than gullies and rills—which function similarly in transporting storm water—please replace *"(vii) Gullies and rills and non-wetland swales"* with: *(vii) Gullies, rills, non-wetland swales and arid ephemeral streams such as arroyos.* (p. 1-4)

Agency Response: **See Summary Response. See the exclusions under paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for further clarification on the types of features that are excluded under the rule. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule now requires the presence of a bed and bank and another indicator of the ordinary high water mark in order for a feature to meet the definition of "tributary." The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available**

science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice. The agencies understand the regional variation in indicators such as the ordinary high water mark, which was impetus for the regional manuals developed by the Corps for the identification of the ordinary high water mark in regions such as the arid West. The exclusion in paragraph (b) added the term "erosional features that do not meet the definition of tributary" to clarify that such features are not jurisdictional under the Clean Water Act.

Reclamation and Abandoned Mine Lands Divisions (Doc. #12857)

12.444 A large percentage of the closed depression prairie potholes in North Dakota do not overflow and don't contribute any water to the traditional navigable waters. However, it appears many of these could be determined to be jurisdictional under the proposed rule for other reasons. Also, flows in ephemeral streams located in arid and semi-arid regions frequently dissipate before reaching a navigable stream and otherwise provide very little water to traditional navigable waters. (p. 2)

Agency Response: **See Summary Response. If a prairie pothole meets the terms of a category (a)(1)-(a)(6) water then it is jurisdictional by rule. However, if a prairie pothole does not meet such categories then it may be considered under (a)(7) and would require a case-specific significant nexus determination to ascertain its jurisdictional status. The science has demonstrated that such waters can be determined similarly situated in the region by rule, and the final rule has done just that for the prairie potholes in the prairie pothole region of the U.S. However, the prairie pothole still requires a case-specific significant nexus determination to determine whether or not it is jurisdictional.**

The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public. The list of factors includes "contribution of flow," which may include an analysis regarding the hydrologic connection, or absence of such a connection, and contribution provided by the prairie pothole.

The rule defines "tributary" by emphasizing the physical characteristics created by sufficient volume, frequency and duration of flow, and that the water contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The definition is based on the best available science, intent of the CWA, and caselaw, and is consistent with current practice. First, to meet the rule's definition of "tributary" a water must flow directly or to another water or waters which eventually flow to an (a)(1)-(a)(3) water. If an ephemeral stream does not contribute such flow to an (a)(1)-(a)(3) water, then it would not meet the definition of tributary. Second, the rule requires two physical indicators of flow: there must be a bed and banks and an additional indicator of ordinary high water mark. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow.

Arizona Mining Association (Doc. #13951)

12.445 *Dry desert washes are unlikely to have any meaningful biological or chemical impact on downstream receiving waters*: As noted above, the proposed rule assumes that if any feature meets the definition of "tributary" by contributing flow to a downstream regulated water, the feature will therefore have a "significant effect on the chemical, physical or biological integrity" of such downstream water. This assumption completely falls apart when applied to dry desert washes.

In dry desert washes, flow is an abnormal condition, not the normal circumstance. Because sustained presence and flow of water is a necessity for support of biological processes or communities, biological processes or communities are simply absent from dry desert washes. This lack of biological impact is supported by the attached technical comments (prepared by Dr. Benjamin R. Parkhurst, HAF, Inc.). The comments addressed "stream connectivity as it relates to the aquatic ecology of ephemeral streams in the arid Southwest." The comments set forth the following important conclusions regarding the potential for any aquatic biological connectivity between ephemeral washes in the arid West and downstream receiving waters:

- Desiccation is the most important environmental stressor for aquatic life in ephemeral drainages in the arid West. When ephemeral drainages in the arid West are dry, which is typically their condition, any potential aquatic biological connectivity with downstream waters is precluded because of the absence of water and of any aquatic life in the ephemeral drainages.
- Despite the very limited time when ephemeral drainages contain flow as a result of storm events, such flows often create hydraulic turbulence and scouring that are major stressors for aquatic life. Consequently, even during flow events in ephemeral drainages, it is doubtful if any aquatic biological connectivity is occurring because of hydraulic turbulence and scouring and because of the lack of aquatic life in ephemeral drainages due to desiccation.
    - With respect to chemical processes, the proposed rule notes that "tributaries can influence the chemical composition of downstream waters, through the transport and removal of chemical elements and compounds, such as nutrients, ions, dissolved and particulate organic matter, pollutants, and contaminants" and that "ecosystem processes in tributaries transform, remove, and transport these substances to downstream waters." 79 Fed. Reg. at 22205. Chemical transformations of materials are one of the primary reasons for the agencies attempting to expand their jurisdiction beyond TNWs and upstream into tributaries. However, such chemical transformations are dependent on flows in the channel – during high flows there is limited potential for any chemical transformations. In the arid West, water flows in ephemeral drainage features are "flashy" – water moves quickly across landscapes and then dissipates. The potential for chemical transformation from "channels" that carry this type of flashy or high flows is minimal to non-existent.
    - Due to infrequent flow and other related factors, ephemeral washes in the arid West lack relevant chemical or biological processes that could result in any identifiable chemical or biological impact on downstream receiving waters.

Consequently, any justification for asserting jurisdiction over ephemeral washes in the arid West must be solely based on its connection to TNWs through a potential significant physical flow connection. However, as noted above, most ephemeral washes, especially those washes located some distance from a TNW, lack even this characteristic.

- In summary, the point at which ephemeral washes in the arid West may have sufficient functionality so as to affect downstream receiving waters is unknown and may not exist. As noted in the proposed rule, the mere existence of a potential connection "does not by itself establish that it is a "significant nexus"; rather, "there is a gradient in the relation of waters to each other." 79 Fed. Reg. at 22193. The agencies have entirely ignored these principles as applied to ephemeral drainages, in particular ephemeral drainages in the arid West by automatically extending CWA jurisdiction to all such drainages unless they qualify as a narrowly defined gully or rill. It is improper from both a scientific and legal perspective to assume that all dry desert washes have sufficient functionality to have a significant impact or nexus to downstream TNWs. (p. 13-15)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The scientific literature demonstrates that streams, individually or cumulatively, exert a strong influence on the chemical, physical, and biological integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.

The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary and be jurisdictional by rule. These physical indicators separate the jurisdictional tributaries from the erosional

features. The final rule also has exclusions for erosional features including gullies, rills, and other ephemeral features that do not meet the definition of tributary.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

Freeport-McMoRan Inc. (Doc. #14135)

12.446 Further, due to the highly erodible nature of soils in the arid west and the infrequency of precipitation events, there is no defensible bright-line test to meaningfully distinguish between jurisdictional tributaries and non-jurisdictional gullies and rills under the approach proposed by EPA and the Corps, despite the importance of this distinction and the manifest need to exempt gullies and rills to ensure that the Proposed Rule does not attempt to regulate beyond the Clean Water Act's statutory grant of authority. Consequently, we encourage the agencies to allow the collection of empirical data as well as identify factors, such as the magnitude, duration and frequency of flow to traditional navigable waters, that could be used to draw a line between those features that are erosional and in the nature of a gully or rill, and features that can more defensibly be considered jurisdictional tributaries. In the absence of a more defensible bright line test or site-specific empirical data demonstrating an actual meaningful connection between ephemeral features and the physical, chemical and biological integrity of a traditional navigable water, the Agencies have no authority to attempt to apply their proposed definition of "tributary" to ephemeral features in the arid west. We have raised these concerns in prior communications with the agencies (see attached letter to OMB), and provide more scientific and technical information as part of these comments. (p. 1)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The scientific literature demonstrates that streams, individually or cumulatively, exert a strong influence on the chemical, physical, and biological integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.

The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water

identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary and be jurisdictional by rule. These physical indicators separate the jurisdictional tributaries from the erosional features. The final rule also has exclusions for erosional features including gullies, rills, and other ephemeral features that do not meet the definition of tributary.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

12.447 Since the 1950s, virtually all of Virginia's coal production has come from the Southwest Virginia Coalfields ("SVC"). Certain water features are encountered frequently within and across the SVC. These include both naturally-occurring features (e.g., headwater and ephemeral streams, gullies and swales, natural drainages and other natural conveyances or waterbodies), as well as man-made water features associated with historic and ongoing mining activities (e.g., temporary and permanent diversion ditches, sediment and bench ponds, mine scar fills). To sustain the coal extraction methods authorized under the Surface Mining Control and Reclamation Act ("SMCRA") and related federal and state mining laws requires repeated and diffuse land-disturbances and intensive water usage. Thus, mine operations in the SVC are *constantly* encountering and interfacing with these endemic water features. This is equally true throughout all stages of a mine's "life ," from initial site development, to routine operation and expansion, to closure and reclamation. Importantly, the man-made and ephemeral features most frequently encountered during SVC mining operations have, for the most part, historically been considered non-jurisdictional. So, for the coal miners operating here, any sudden and sweeping changes to the jurisdictional status of these types of waters would carry an enormous weight, with the economic impact of more burdensome permitting and compliance, not to mention liability, compounded over all stages of operation. (p. 2)

Agency Response: See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Additionally, the final rule provides exclusions for water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water. These water-filled depressions would remain non-jurisdictional even after the life of the mine and such waters have been abandoned. Another exclusion provides that erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary are non-jurisdictional. The final rule also provides exclusions for

ephemeral and intermittent ditches that are not relocated tributaries or excavated in a tributary. These excluded waters may be encountered on an existing or proposed mine site and would not be considered jurisdictional waters under the Clean Water Act.

The Mosaic Company (Doc. #14640)

12.448 The proposed rule should provide regionally specific quantifiable methods for determining significant nexus. (p. 33)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.

The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public.

Nevada Mining Association (Doc. #14930)

12.449 We do not believe that it is an exaggeration to state that the Proposal is sufficiently vague and expansive that it could potentially be construed to assert the Agencies' jurisdiction over any type of liquid at a given site including, quite literally, a kitchen sink located outdoors. Indeed, the fact that EPA and the Corps, in the Proposal, believe that it is necessary to specifically exempt "puddles" (see 79 Fed. Reg. 22219) and "[artificial reflecting pools or swimming pools" (see, e.g., paragraph (a)(5)(iii) at 79 Fed. Reg. 22263)[98] from the definition of jurisdictional waters shows that the Agencies themselves view the Proposal as otherwise broad enough to encompass these types of "waters" – something no regulator or regulated entity would have previously thought might be the case.

The Proposal could be construed to encompass mining artificial ponds in the arid and semi-arid West designed to achieve zero discharge to surface water, and associated constructed channels and culverts carrying solutions, wastewaters and other liquids to and

[98] References to paragraphs of the Proposal such as (a)(5)(iii) refer to the Subsection in proposed 33 C.F.R. § 328.3.

from such ponds, despite the fact that SWANCC squarely held that isolated manmade bodies of water are beyond the reach of the CWA. Similarly, contrary to Rapanos, the Proposal would classify all ephemeral or intermittent drainages that ultimately flow, directly or indirectly, via surface channel to a TNW or tributary as per se jurisdictional, even if only one drop from such a drainage reached the TNW or tributary every 10 years, or even every 50 years. Of greater concern, the Proposal could potentially be interpreted to mean that even if an ephemeral or intermittent drainage infiltrates into the ground miles from a TNW or tributary, and therefore never contributes one drop of surface flow to a tributary system to a TNW, it might still be deemed jurisdictional, if all other "similarly situated" ephemeral or intermittent drainages in the same watershed, when considered in the aggregate, could be said to have a significant impact on a downstream TNW.

The result is that all mining companies with operations in the arid and semi-arid West might now be compelled to accept every isolated pond, ditch, constructed channel or drainage on their properties as a jurisdictional water, or would need to go through expensive and time consuming administrative proceedings with the Corps and EPA to get jurisdictional determinations otherwise. (p. 7)

Agency Response: **See Summary Response. See the Economic Analysis for discussion on predicted change in jurisdiction. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.**

The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The agencies have maintained the waters "generally not considered jurisdictional" from the 1986 regulations, adding them as excluded waters within the final rule, and have added to them artificial reflecting pools or swimming pools. To those excluded waters the agencies have added additional exclusions, such as puddles, in order to provide clarity and certainty regarding the identification of "waters of the U.S." None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, were modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Additionally, the final rule provides exclusions for water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water. These water-filled depressions will remain non-jurisdictional even after the life of the mine and such waters have

been abandoned. Another exclusion provides that erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary are non-jurisdictional. The final rule also provides exclusions for ephemeral and intermittent ditches that are not relocated tributaries or excavated in a tributary. These excluded waters may be encountered on an existing or proposed mine site and would not be considered jurisdictional waters under the Clean Water Act.

The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary and be jurisdictional by rule. These physical indicators separate the jurisdictional tributaries from the erosional features.

The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

New Mexico Mining Association (Doc. #15158)

12.450 Whatever the merits of the Proposed Rule in other parts of the country, it ignores the unique features of arid landscapes that render this approach scientifically invalid. The Proposed Rule does properly consider the fact that many watersheds in the arid west are characterized by a combination of highly erodible soils and infrequent rain events. Under these conditions, what is erroneously treated as the "ordinary" high water mark of a particular feature may, in fact, have been formed by a single event in the distant past and does not bear *any* relationship to where water may flow in the future. Indeed, the Corps' own research demonstrates that the presence of an "ordinary" high water mark in the west bears no relationship to present or future flows. Thus, rather than being an indicator of equilibrium conditions – as is the case in more humid environments – the "ordinary" high water mark will be produced by extraordinary events and will result in a broad regulatory overreach when used to define "waters" in the arid west.

In addition desert features meeting the proposed criteria typically lack regular flow, and as a result do not impact-the chemical or biological integrity of receiving waters. In many cases storm water seeps into the dry ground rather than flowing downstream, so

these so-called "tributaries" contribute no flow to downstream waters at all-meaning there is no physical connection that would establish jurisdiction under the Clean Water Act. Finally, the Proposed Rule seeks to regulate "tributaries" while exempting "gullies" and "rills," but the application of the proposed criteria in the arid west provides no way to distinguish between jurisdictional and non-jurisdictional features.

The Proposed Rule attempts to create uniform national standards that do not account for the very significant differences between tributary systems in the arid west and other parts of the country that receive significantly more rainfall. The Proposed Rule attempts to justify this flawed approach in the arid by relying on a single river system, the San Pedro River in Arizona, which is unrepresentative of arid west water bodies. In fact, the only justification the Agencies offer for relying on the San Pedro is that it is "heavily studied," which cannot be a sensible basis on which to base the regulation of an entire region when nearby watersheds that have demonstrably different geological characteristics and flow regimes. The consequence is that vast areas of dry land in the desert will be regulated as "waters," a substantial overreach by EPA and the Corps and one that will have significant impacts on the regulated community in the arid west, subjecting them to substantial burdens that will far exceed those experienced in other parts of the country. EPA and the Corps can and should do better, and limit their new regulations to features that are actually "waters" in some meaningful sense. (p. 2)

Agency Response: **See Summary Response. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.**

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Council of Alaska Producers (Doc. #15782)

12.451 The Council is … deeply concerned that the proposed rule fails to address how permafrost will be considered. Since most of Alaska is underlain by permafrost, this potential for almost total connectivity would significantly impact Section 404 permitting and wetlands mitigation. (p. 1)

Agency Response: See summary response. See the Technical Support Document for a summary of the scientific basis of the final rule. The agencies recognize the unique aquatic habitats present in Alaska and the challenges in determining jurisdiction when it may be different from the other States. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

FMC Corporation (Doc. #16505)

12.452 It appears that little effort was made to include western states and other western based entities in the development and peer review of this rule. The western U.S. has unique situations, including how water quantity, as well as water quality, is regulated. The CWA recognizes this through language dealing with produced water from oil and gas operations as well as language stating that the authority of states to regulate water quantities within their borders shall not be impaired. These sections in the CWA were in large part a response to arid western states concerns over the reach of the CWA. We are concerned that the proposed rule was not adequately informed, and encourage EPA to pause the rulemaking process and develop ways to ensure adequate input from the West. (p. 2)

Agency Response: See summary response. See the Technical Support Document for a summary of the scientific basis of the final rule. The agencies have and do engage in sustained coordination and partnerships with states and other partners. The rule public comment period was extended twice to ensure adequate time for comment and during that time hundreds of stakeholder and outreach meetings were held, including some with state agencies. The agencies recognize the unique aquatic habitats present in the western U.S. and the challenges in determining jurisdiction when it may be different from the other States. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The Corps will develop the

tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Petroleum Association of Wyoming (Doc. #18815)

12.453 As a headwaters state in an arid region of the country, Wyoming has extensive ephemeral and intermittent drainages and associated wetland features in upper reaches of watersheds far removed from TNW. PAW believes the potential impact of the WOTUS proposed rule would be much greater in Wyoming than states with higher annual precipitation and what is commonly recognized as TNW and associated wetlands. Many of the ephemeral or intermittent drainages in Wyoming flow very infrequently, in small volumes, and often only in response to high precipitation/short duration events or rapid snowmelt. In some years, these types of drainage features may not flow at all. In other years, they may flow for only a period of a few days. In many, if not most, cases, they are miles or tens of miles away from any connection to tributaries of waters identified in paragraphs (a) (1) through (3) of the proposed rule. It is not uncommon for wetland areas or ponds to exist adjacent to or within these drainages, but again, far removed from any connection to TNW. Under these conditions, to categorically define such drainages and other waters as "tributaries" or "adjacent" waters and regulate them as WOTUS is inconsistent with the "significant nexus" upon which EPA relies.[99] (p. 7)

Agency Response: **See summary response. See the Technical Support Document for a summary of the scientific basis of the final rule. The agencies recognize the unique aquatic habitats present in the arid West and the challenges in determining jurisdiction when it may be different from the other States. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow,**

[99] PAW disputes the application of and the agencies' analysis, description and use of the significant nexus test as used in the rule and concurs with the legal analysis in the IPAA/AXPC/WEA comments referenced above. That notwithstanding , PAW's point with regard to these water features in Wyoming is that the definitions of "tributary" and "adjacent" as categorical WOTUS is over-inclusive and exceeds the agencies' jurisdiction when viewed in a fact-specific context. PAW believes that many drainages that would be categorically included as "tributaries" or "adjacent" waters under the proposed rule would fail the significant nexus test for jurisdiction on a case-specific basis, and therefore should not be included categorically under the rule.

either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Independent Petroleum Association of America (Doc. #18864)

12.454 *Mid-Continent and Eagle Ford (KS, AR, LA, TX, OK)* – Upon assessment of the Mississippian Lime in north central Oklahoma, there is an approximate five-fold increase (418 to 2,043) in infrastructure intersections with streams when transitioning from the National Hydrography Dataset ("NHD") (more representative of maps used currently by the USACE) to the lidar (high-resolution) map where a synthetic streams network was generated that includes many ephemeral streams that are not delineated in the NHD dataset. If all ephemeral streams are considered tributaries, then the result would be a five-fold increase in the number of jurisdictional waters to consider.

Based upon current law and interpretation, using the National Hydrology Dataset, pipelines intersected mapped streams at 418 locations and were subject to nationwide permits. Using the High Resolution Mapping, pipelines intersected lidar (high-resolution mapping data inclusive of all the ephemeral streams not often depicted on existing USGS quadrangles and which would all likely become waters of the United States under the proposed rule) at 2,043 locations. That represents a better than five-fold increase compared to the intersections assessed from using NHD. An excellent example of expanded jurisdiction is that identified by the State of Kansas. In 2011, Kansas estimated

that inclusion of ephemeral streams would increase jurisdictional stream miles from 32,000 to 134,000 miles.[100] (p. 11)

Agency Response: **See Summary Response. See the Economic Analysis for the final rule for additional information on predicted change in jurisdiction. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.

The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

12.455 South Central Oklahoma Oil Province (SCOOP) (OK) - There is substantial potential under the proposed rule for expansion of jurisdiction along headwater drainages through capture of additional lengths of streams (up to 21,507 linear feet of additional jurisdiction within the approximately 1,500 acres of the study area). This represents a 52.4% increase in the amount of regulated waters. Additionally, there would be an approximately 100% increase in jurisdictional review area related to wetlands associated with typical floodplain soil types. The potential expansion of jurisdiction along headwater streams could result in increased permitting efforts. Specific examples include:

- Headwater areas would likely not be classified as "jurisdictional by rule" under the proposed rule, but rather would be placed in the class of waters that would require a case-by-case determination of whether they are jurisdictional (JD).

[100] Letter to Nancy Stoner, Acting Assistant Administrator of Water, USEPA from Sam Brownback, Governor of Kansas (July 14, 2011).

- Increased field studies could be required to determine whether headwater streams were jurisdictional.
- There also could be increased time for the USACE to complete IDs on each headwater drainage. Currently there is no regulatory time limit for USACE to complete a JD. Some USACE districts have placed substantial paperwork requirements on submission of JDs and eliminated presumptive JDs (i.e., assume water is jurisdictional and complete permit activity without formal JD), which would further lengthen the permit review and approval process.
- The JD process can be more costly than the permit application process with a presumptive JD and could increase the time for getting a permit by a factor of 3.

Agency Response: **See Summary Response. The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The agencies believe with the clarity and certainty provided in the rule, including the clarity and certainty pertaining to tributaries, that there will be efficiencies gained in making jurisdictional determinations.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.

12.456 Within a major stream setting study site, the proposed rule identifies floodplains as one mechanism that would be used to demonstrate connectivity to establish jurisdiction over waters, potentially including those with no direct surface connection. However, the

proposed rule does not define floodplain. As such, there is no indication of whether floodplains mapped by the Federal Emergency Management Agency (FEMA) that are based on current water flow modeling, would be the standard or if some other definition of floodplain would be used. Absent guidance in the rule, the analysis used the extent of mapped alluvial soils (Port Silt Loam) as the maximum boundary of the floodplain of subject creek. This resulted in an approximately 241 acre increase in jurisdictional area (nearly a 50% increase).

The potential for expanded federal jurisdiction and associated case-by-case JDs would potentially have the following impacts:

- Selecting locations for pipeline corridors, either for transport of oil/gas or transport of produced water, would likely become more at risk. The topography and length of any of these corridors would dictate potential delays and level of siting effort required to mitigate potential delays. In any case, these activities would potentially require greater cost and time to complete JDs and receive permits.
- Siting access roads to pads, infrastructure, and pipelines would likely become more challenging. Because these access corridors are likely to be more extensive, wider, and prefer to follow least cost routes, establishing acceptable routes would be challenged to avoid crossings of headwater drainages with associated greater cost and time to acquire permits.
- Development of SPCC plans and stormwater controls would likely become more involved as there potentially would be an increased number of receiving waters. The time to develop such measures also could be increased due to the need to wait for a JD. (p. 12)

Agency Response: **See Summary Response. The Science Report and the SAB review confirm that wetlands and open waters in floodplains are chemically, physically and biologically connected along a "connectivity gradient" with downstream rivers and influence the ecological integrity of such rivers. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. See the preamble section on "Adjacent Waters" for additional information on the floodplain and how to determine the 100-year floodplain.**

The additional costs that may be incurred as a result of the rule were taken into account during its formulation; however, the updated Economic Analysis indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The agencies believe with the clarity and certainty provided in the rule, including the clarity and certainty pertaining to tributaries, that there will be efficiencies gained in making jurisdictional determinations.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4. See also essay 12.5 on SPCC. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs.

12.457 Bakken (ND, MT): While none of the prairie potholes in the Bakken Study Area would be likely jurisdictional waters of the United States under the current regulations:

- Approximately 31 acres of 127 acres of prairie potholes in the Bakken Study Area probably would be considered waters of the United States under the proposed regulations, primarily because of their connection to downstream waters of the United States by ditches.
- The additional 96 acres of the 127 acres of prairie potholes have the potential to be considered jurisdictional under the proposed rule because of physical connection to downstream waters of the United States either by ditches or by subsurface flows. (p. 13)

Agency Response: **See Summary Response. If a prairie pothole meets the terms of a category (a)(1)-(a)(6) water then it is jurisdictional by rule. However, if a prairie pothole does not meet such categories then it may be considered under (a)(7) and would require a case-specific significant nexus determination to determine its jurisdictional status under the CWA. The science has demonstrated that such waters can be determined similarly situated in the region by rule and this final rule has done just that. However, the prairie pothole still would require a significant nexus determination to determine whether or not it is jurisdictional. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public. The list of factors includes "contribution of flow," which may include an analysis regarding the hydrologic connection, or absence of such a connection, and contribution provided by the prairie pothole.**

12.458 While the current regulations, for the most part, do not require permits at the federal level for impacts on prairie potholes and connecting ditches, there would be potential for considerable additional time and costs required to complete JDs for prairie potholes because:

- Desktop information (soil permeability and grain size) is not a good predictor for determining subsurface flow and, thus, more effort would be required to determine connectivity to downstream waters of the United States on a case-by-case basis. The USACE likely will require site-specific evaluations of connection to downstream

waters of the United States, including the use of soils data, climate (e.g., precipitation), geography, and other factors, and may require subsurface explorations (i.e., deep soil borings) to deduce the subsurface environment (i.e., permeability).

- While the proposed regulations are focused on physical connections (e.g., ditches or subsurface flow) of prairie potholes with downstream waters of the United States, indications are that indirect connections (e.g., prairie potholes acting as water sinks influencing downstream flows without a physical connection to downstream waters of the United States) could be involved in future regulatory proposals which would make all prairie potholes jurisdictional under such proposals.
- Although ditches draining prairie potholes generally are not considered jurisdictional waters under the current regulations, many ditches draining prairie potholes to downstream waters likely will be considered jurisdictional under the proposed regulations.
- The above factors affecting the determination of JD would likely require desktop and field studies to determine connection to downstream waters of the United States. These field studies could involve deep soil borings although it is likely that the USACE will accept applicant-prepared JDs based on the desktop and field studies.
- These studies, in addition to the added layer of review of the applicant JDs by the USACE, will add additional cost to a project and additional time of at least several weeks to the current typical permitting process and a project's schedule. Perhaps of even greater concern would be the inability to comprehensively plan with a level of certainty the layout for pads, infrastructure, and access roads and pipeline corridors to mitigate potential delays in obtaining JDs. (p. 13-14)

Agency Response: **See Summary Response. If a prairie pothole meets the terms of a category (a)(1)-(a)(6) water then it is jurisdictional by rule. However, if a prairie pothole does not meet such categories then it may be considered under (a)(7) and would require a case-specific significant nexus determination to determine its jurisdictional status under the CWA. The science has demonstrated that such waters can be determined to be similarly situated in the region by rule and this final rule has done just that. However, the prairie pothole still would require a significant nexus determination to determine whether or not it is jurisdictional. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public. The list of factors includes "contribution of flow," which may include an analysis regarding the hydrologic connection, or absence of such a connection, and contribution provided by the prairie pothole.**

Shallow subsurface flow has been used in significant nexus evaluations to inform adjacency calls associated with approved jurisdictional determinations under the 2008 Rapanos guidance. Thus, the Corps is experienced in determining flow, which may be used in a significant nexus determination, under the final rule.

The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit

is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

The agencies believe with the clarity and certainty provided in the rule, including the clarity and certainty pertaining to tributaries, that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.459 The potential for expanded federal jurisdiction and associated case-by-case JDs could have the following impacts in the Bakken Study Area:

- For well pads under existing regulations, most prairie potholes are non-jurisdictional, no USACE permitting is required, and siting considerations are related to resource and engineering design needs. Under the proposed regulations, many prairie potholes would become jurisdictional, and siting of pads near prairie potholes likely would have to include IDs and consideration of USACE permitting requirements in addition to resource and engineering design factors. Mitigating for these delays would require the siting of pads at locations that do not directly impinge on a pothole (or connecting ditch) and avoiding locations that could affect subsurface flow, where subsurface flow might be basis for a prairie pothole to be considered jurisdictional. Depending on the subsurface flow regime, putting a well pad anywhere down-gradient of prairie potholes could be problematic from a permitting perspective. Up-gradient siting also could be an issue, depending on the water source for the prairie pothole (surface runoff or subsurface flows). Permits would still be able to be acquired, but the process would add time to the Project schedule and cost to the Project budget.
- Under the proposed regulations, selecting corridors for pipelines in the Bakken area likely would become more involved due to the need to mitigate potential conflicts and delays with areas likely to be jurisdictional. Under the current regulations, these corridors could be sited along a line through the center of the prairie pothole area without regulatory conflicts. However, under the proposed rule, to avoid the pothole area might require considerable rerouting to avoid these potential costs and delays for ID determinations.

- As with the SCOOP Play, development of SPCC plans and stormwater controls in the Bakken Play area likely would become more involved because of the potential for an increased number of receiving waters (jurisdictional prairie potholes and connecting ditches). The time to develop such measures also could be increased due to the need to wait for a JD. (p. 14)

Agency Response: **See Summary Response. The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.**

If a prairie pothole meets the terms of a category (a)(1)-(a)(6) water then it is jurisdictional by rule. However, if a prairie pothole does not meet such categories then it may be considered under (a)(7) and would require a case-specific significant nexus determination to determine its jurisdictional status under the CWA. The science has demonstrated that such waters can be determined similarly situated in the region by rule and this final rule has done just that. However, the prairie pothole still would require a significant nexus determination to determine whether or not it is jurisdictional. The final rule further clarifies "significant nexus" by providing a definition under paragraph (c) of the term as well as a list of factors to be considered when making such a determination for additional clarity and predictability for the regulated public. The list of factors includes "contribution of flow," which may include an analysis regarding the hydrologic connection, or absence of such a connection, and contribution provided by the prairie pothole.

Shallow subsurface flow has been used in significant nexus evaluations to inform adjacency calls associated with approved jurisdictional determinations under the 2008 Rapanos guidance. Thus, the Corps is experienced in determining flow, which may be used in a significant nexus determination, under the final rule.

The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

The agencies believe with the clarity and certainty provided in the rule, including the clarity and certainty pertaining to tributaries, that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Washington Farm Bureau (Doc. #3254)

12.460 The language proposed in the rule and interpretive policy stretches Justice Kennedy's "significant nexus" plurality beyond the point of reason. In certain circumstances, it arguably erases the exemptions for normal farming and ranching, agricultural stormwater and irrigation return flow. At any rate, the vagueness in drafting invites litigation and costly argument over the post-rule / post-policy status of the exemptions.

This ambiguity is especially troubling in rainy areas like Western Washington, where it is not hard to imagine disagreements over what the rule and policy mean when they refer to *subsurface groundwaters* and hydrological connections between *"navigable"* waters (as newly and more expansively defined). In effect, this proposed change disconnects regulation from any reasonable connection to true *navigability* or commerce. One thing does appear certain: these proposed rule and policy actions will prompt new waves of citizen suit litigation against farmers and ranchers, producing uncertain legal precedents in court. That outcome is unacceptable and unfair to Washington's farm and ranch families. It also runs counter to other important policy goals, like farmland preservation. (p. 3)

Agency Response: See Summary Response. See the Technical Support Document for a summary of the legal and scientific bases for the final rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The rule is not designed to subject entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S." consistent with existing regulations and Supreme Court precedent. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The use of shallow subsurface flow has been removed from use as an indicator of adjacency under the final rule. See the "Adjacent Waters" section in the preamble for additional discussion on adjacent waters. This rule does not impact the citizen suit provisions under the Clean Water Act.

Washington Cattlemen's Association (Doc. #3723.2)

12.461 In Washington State citizens work directly with the Department of Ecology (DOE) in regards to regulation of non-point water quality. The EPA proposal will actually yield fewer advances in cleaning up and protecting water quality. This erosion in water quality will occur when landowners realize that they no longer are working with a State led agency DOE and now as they will be forced to work with the Federal Government. The EPA proposed rule steps directly on State sovereignty and flushes future work and efforts that might be invested over time on water quality efforts in Washington State. The rule should be withdrawn.

The WCA believes EPA clearly does not understand the challenges the DOE faces every day enforcing the Washington State Water Pollution Control Act RCW 90.48. In Washington State there are countless geographic features that are currently left to the DOE for regulation. Under this proposal it is unclear if the Corps would supersede the previously recognized authority that it has relied upon via the delegated authority and regulate or, if it would rely upon State regulations. This issue needs to be clarified. It appears that cattlemen and women would be required to work with the DOE for non-point issues as well as the Corps of Engineers. This is more time consuming and burdensome for landowners in Washington, and contrary to the stated goal of streamlining the jurisdiction and permitting process.

In Washington State it is common for cattle to graze within the "ordinary high water mark" of a water body and to drink directly from surface water. These types of activities have occurred on a continual basis predating Statehood in Washington State. It is not realistic for EPA to expect private landowners to obtain 404 permits for normal agricultural activities that are currently exempt under the Federal Clean Water Act. While WCA believed that the "normal farming and ranching" exemption previously exempted such activities from 404 permitting, it appears from the new IR that grazing is no longer an exempted activity unless the rancher has, and is following precisely, an approved NRCS Prescribed Grazing plan. (p. 3)

Agency Response: **See Summary Response. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Furthermore, the final rule will not directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the Clean Water Act definition of waters of the U.S. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

Montana Farm Bureau Federation (Doc. #12715)

12.462 Montana's landscape is much different than anything located on the east coast. Determinations such as this are better left in the hands of state level regulators such as Montana's Department of Natural Resources or Department of Environmental Quality. (p. 4)

Agency Response: See Summary Response. The final rule will not directly alter the content or implementation of other local, state, or federal mandates as the final rule applies solely to the Clean Water Act definition of waters of the U.S. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

Bayless and Berkalew Co. (Doc. #12967)

12.463 Dry desert washes might run twice a year in a good year for only a couple of hours. Yet, according to the proposed rule, would now be subject to EPA oversight before I could carry out ordinary ranch activities. In such an arid environment, it is very likely that an agricultural improvement meant to utilize ephemeral water could take on riparian characteristics, but have very little connectivity if any at all to navigable waters. (p. 3)

Agency Response: **See Summary Response. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule defines tributary and tributaries. The terms tributary and tributaries mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary and be jurisdictional by rule. Ephemeral tributaries have a significant nexus either individually or in aggregate.**

The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Nebraska Cattlemen (Doc. #13018)

12.464 Nebraska is comprised of over 77,000 square miles of area with over 92 percent of that area used for agricultural purposes. From west to east, the State moves from low precipitation high plains to higher precipitation grasslands in the east. There are an infinite number of scenarios that call for good judgment in determining whether or not a particular water body is or should be subject to federal CWA jurisdiction. This rule would impose a blanket jurisdictional determination over thousands of acres of private property. The effect would be to impose illegal and unnecessary property restrictions and uncertainty as to what that actually means to a farmer or rancher. (p. 9)

Agency Response: **See Summary Response. The final rule does not have an effect on farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, private property will not be negatively impacted by the Federal Government as a result of the final rule. The agencies only have authority to regulate jurisdictional activities under the Clean Water Act in waters of the U.S.**

Illinois Corn Growers Association (Doc. #13996)

12.465 Farmers near main waterways as the Illinois and Mississippi Rivers need to have clear direction as to which water and drainage bodies and features are jurisdictional/non-jurisdictional so that their rights can be protected by the courts rather than the varying discretion of agency regulators. (p. 3)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The final rule provides definitions of tributaries and adjacent waters, and includes exclusions for several types of waters, including certain ditches. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient and predictable process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The final rule aims to reduce any inconsistencies and provide a bright line of clarity for the agencies, other partner agencies, and the regulated public.

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. Additionally, the final rule includes a definition of adjacency, which states that waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.

Westlands Water Districts (Doc. #14414)

12.466 Recharge and percolation ponds that have a surface connection to traditional navigable waters would be subject to federal regulation under the Proposed Rule. These ponds are used to percolate groundwater and to hold water before it is put to use or discharged to waters of the United States. These ponds are critical to the use of recycled water in the West. If they are classified as waters of the United States, these ponds would need federal permits for maintenance and refurbishing. These permits could require mitigation treatment, and could require that the ponds meet water quality standards under the Clean Water Act. Again, nothing in the Clean Water Act suggests that these resources are subject to federal regulation under the Act. (p. 24)

Agency Response: See Summary Response. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule includes exclusions for wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

LeValley Ranch, LTD (Doc. #14540)

12.467 The proposed presumption that all waters that meet the definition of tributary are jurisdictional by rule is only accurate over a portion of the spectrum of potential tributary types. The presumption is applicable at the wet end of the spectrum (e.g., rivers and perennial streams) and becomes increasingly less applicable as one moves toward the drier end of the tributary spectrum, particularly with smaller drainages in the arid West. At the drier portion of the tributary spectrum, the presumption of jurisdictional by rule is no longer accurate and becomes arbitrary. (p. 6)

Agency Response: See Summary Response. The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

12.468 Designating the water in such internal infrastructure as waters of the United States would prevent local government agencies from using that infrastructure and hence from providing critical water supply services, recycling water for re-use, or responding to wildfires and other critical emergencies. This would result in project-specific and cumulative significant environmental impacts relating to water supplies, hydrology, emergency services, public services and utilities, agriculture, air quality, biological resources, soil erosion, land use and planning, population and housing, and others. These impacts, particularly the impacts to water supply, would be dire in certain areas of the West, including California, which are suffering from historical drought conditions and are experiencing enormous water supply, agricultural, socioeconomic and other impacts. Because of the potential impacts of the Proposed Rule on the human environment, the

agencies should prepare an EIS prior to adoption or implementation of the Rule that discloses and analyzes these impacts. (p. 30-31)

Agency Response: **See Summary Response. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The final rule includes a list of excluded waters and features under paragraph (b) which includes certain ditches and wastewater recycling structures created in dry land, including groundwater recharge basins and water distributary structures built for wastewater recycling. Such excluded waters cannot become jurisdictional even if they meet the terms of a jurisdictional category under paragraph (a) of the final rule.**

The Army has prepared a final environmental assessment and Findings of no Significant Impact in accordance with the NEPA. See Preamble for discussion.

California Association of Winegrape Growers (Doc. #14593)

12.469 Farmers and ranchers in California have expressed their frustration with the broad and inconsistent application of the CWA by Corps field staff. California has a diverse landscape that is unique from much of the rest of the United States; therefore, it is even more important for jurisdictional determinations to be considered carefully and on a case-by-case basis.

Based on how the Corps has been implementing the current Guidance, CAWG fears that the Proposed Rule (and forthcoming guidance based upon the Proposed Rule) will greatly expand the Agencies' claim of jurisdiction over many areas of California that were – appropriately – heretofore unaffected. This is particularly true of the transitional areas between the Central Valley floor and the surrounding low foothills, as well as the numerous other watersheds with similar topography. These areas often contain seasonal and/or isolated wetlands or swales. Because of the gradual elevation descent from the foothills to the Valley floor, water runs downhill during rain events. Remember that the Central Valley has an arid, Mediterranean climate in which it only rains three months out of the year. It does not rain continuously during this time, but rather, rain events occur sporadically throughout those three months. It is during major rain events – often only a few days per year – that swales will direct water downhill, onto neighboring properties, and into the regional watershed. These watersheds contain numerous tributaries that are considered "non-navigable relatively permanent" (i.e. contain water at least 3 months of the year) under the current Guidance. These tributaries eventually reach a traditional navigable waterway, but not for any extended period of time, and not in any significant volume. (p. 16)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The

science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, including those related to normal farming activities and irrigation and drainage ditch maintenance, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Oregon Farm Bureau (Doc. #14727)

12.470 Oregon's diverse geography and precipitation levels create unique issues in different regions. In western Oregon, over decades agriculture landowners have developed sophisticated drainage systems necessary for supporting family farms. Due to the importance of these drainage systems, by law Oregon has developed drainage districts to ensure that waterways are appropriately maintained to ensure water is efficiently and effectively drained from agricultural lands. In fact, these districts have a legal obligation to maintain ditches and waterways to ensure water can appropriately drain. Based on the new/expanded definition, and again for the first time, these drainage districts will require 404 permits prior to cleaning these ditches. Some of these activities require removal-fill permits under Oregon law, and by adding new, cumbersome, and expensive CWA regulations, these districts will have significant difficulty meeting their legal obligations of draining water. If a drainage district cannot meet its obligation, farmers and ranchers will ultimately suffer. (p. 5-6)

Agency Response: **See Summary Response. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing**

regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, including those related to normal farming activities and irrigation and drainage ditch maintenance, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Tennessee Farm Bureau Federation (Doc. #14978)

12.471 Tennessee's landscape is different than that found in Oregon or Florida. The proposed rule tries a one size fits all approach. This will not work. We have pointed out that many things have changed since 1972. We ask the Agencies to recognize this. We believe the U.S. Supreme Court has given the Agencies an opportunity to reconsider failed policies of the past, and move forward with clarity for landowners and cooperative federalism among states. (p. 8)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the legal basis for the final rule. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies,**

state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under Section 404(f)(1) of the Clean Water Act, including those related to normal farming activities and irrigation and drainage ditch maintenance, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Colorado Agricultural Aviation Association (Doc. #15033)

12.472 CoAAA and NAAA members would be affected as states adjust their policies: Most states have delegated authority for CWA permitting responsibilities including PGPs. The types of pesticide uses covered and compliance requirements of PGPs vary remarkably from state to state, affecting aerial applicators who routinely work across state lines. Furthermore, many state PGPs regulate pesticide discharges into, over or near "waters of the states.' instead of WOTUS, which could establish tensions between the agencies' proposed rule and state statutes and regulatory policies for water and pesticide programs. No doubt delegated states would have to adapt to the agencies' proposed rule, which could severely strain their budget s and manpower resources. In arid and semi-arid regions of the West particularly Colorado where a majority of headwaters originate, and throughout the country, policy makers and pesticide users likely will be scrambling to unravel the complex net of overlapping jurisdiction proposed by the agencies. It is not surprising that many state and local governmental organizations, agricultural and environmental commissioners, governors and Congress have called on the agencies to withdraw the proposed rule. We echo their statements, and urge the rule be withdrawn. (p. 5)

Agency Response: See summary response 12.3. The final definitional rule does not change or introduce new requirements for complying with the NPDES pesticides general permit (PGP).

Arizona Farm Bureau Federation (Doc. #15064)

12.473 The West, and specifically Arizona, utilizes a complex system of irrigation waterways, many of which are indirectly if not directly associated with navigable waterways. Irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water- and may channel return flows back to those sources. Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on farmland and pastures would be categorically regulated as jurisdictional tributaries und the proposed rule. (p. 2)

Agency Response: **See Summary Response. The final rule will exclude from regulation ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary. The rule will also exclude ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section. The rule also excludes wastewater recycling structures, including water distributary structures built for wastewater recycling. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.**

12.474 State agencies and local governments were not consulted in creating this proposed rule and therefore the benefit of local knowledge is lacking in the rule all together. The arid Southwest is evidently different from the Midwest and the East Coast, yet as is often the case, the EPA fails to recognize regional differences in applying a "one size fits all" permitting and regulatory program. (p. 4)

Agency Response: **See Summary Response. The agencies circulated the proposed rule for public comment and extended the comment period deadline twice in order to obtain comments from the regulated community, including state and local agencies. Thousands of comments were provided by state and local agencies. During that time hundreds of stakeholder and outreach meetings were held, including some with state agencies. The agencies have and will continue to engage in sustained coordination and partnerships with states and other partners.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Goehring Vineyards, Inc. (Doc. #19464)

12.475 Farmers and ranchers in California have expressed their frustration with the broad and inconsistent application of the CWA by Corps field staff. California has a diverse landscape that is unique from much of the rest of the United States; therefore, it is even more important for jurisdictional determinations to be considered carefully and on a case-by-case basis.

Based on how the Corps has been implementing the current Guidance, I fear that the Proposed Rule (and forthcoming guidance based upon the Proposed Rule) will greatly expand the Agencies' claim of jurisdiction over many areas of California that were -

appropriately – heretofore unaffected. This is particularly true of the transitional areas between the Central Valley floor and the surrounding low foothills, as well as the numerous other watersheds with similar topography. These areas often contain seasonal and/or isolated wetlands or swales. Because of the gradual elevation descent from the foothills to the Valley floor, water runs downhill during rain events. Remember that the Central Valley has an arid, Mediterranean climate in which it only rains three months out of the year. It does not rain continuously during this time, but rather, rain events occur sporadically throughout those three months. It is during major rain events – often only a few days per year – that swales will direct water downhill, onto neighboring properties, and into the regional watershed. These watersheds contain numerous tributaries that are considered "non-navigable relatively permanent" (i.e. contain water at least 3 months of the year) under the current Guidance. These tributaries eventually reach a traditional navigable waterway, but not for any extended period of time, and not in any significant volume.

Based on the plain language of the Proposed Rule and its preamble, it is conceivable that entire watersheds in California could be deemed jurisdictional. Clearly this was not the intent of the CWA, nor is it an effective use of resources to protect the true waters of the U.S. (p. 16)

Agency Response: **See Summary Response. See the Economic Analysis for additional information on predicted changes in jurisdiction. The agencies disagree that entire watersheds will be determined to be jurisdictional under the final rule. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion.

The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

12.476 This general comment refers to Section 328.3, *Federal Register* pages 22262-22263. Differences in regional conditions should be recognized and regional guidance should be developed and published with a public comment period. (p. 3)

Agency Response: See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Arizona Public Service Company (Doc. #15162)

12.477 In the arid Southwest, watersheds are extremely large with the potential that many small, insignificant waters would be determined to be WOTUS. (p. 11).

Agency Response: See Summary Response. The agencies recognize there may be situations in the arid West for the significant nexus determinations under (a)(7) and (a)(8) waters where the single point of entry watershed is very large, and it may be reasonable to evaluate all similarly situated waters in a smaller watershed. The preamble provides additional discussion concerning when circumstances warrant conducting a significant nexus evaluations on a different scale than the single point of entry watershed in the arid West. Only those waters that are determined to have a significant nexus would be jurisdictional under (a)(7) and (a)(8) waters. If there are water features that meet any of the exclusions then those water features would not be jurisdictional by rule. If a water feature does not meet any of the specified exclusions but does meet any of the (a)(1)-(a)(6) categories then they would be jurisdictional by rule. It is important to note that if a water feature does not meet an (a)(1)-(a)(6) category and is not subject to a case-specific nexus evaluation under (a)(7) or (a)(8), then it is not jurisdictional even if it is not specifically itemized as excluded in paragraph (b). The agencies believe that this approach will provide regulators and the public with the clarity and predictability to determine whether any water body is jurisdictional on a case-by-case basis.

Western States Water Council (Doc. #9842)

12.478 The WSWC recognizes that further discussion between the states and your agencies is needed to develop the specifics of such a process, particularly in light of the considerable variety of hydrologic and geologic conditions that exist across the nation. As such, the WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to identify and develop specific, quantifiable measures for determining significance consistent with the WSWC's rebuttable presumption concept. (p. 5)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Central Arizona Project (Doc. #3267)

12.479 It is under this revised definition of a tributary that we interpret the entire Central Arizona Project (CAP) aqueduct system as being considered a tributary of a traditional WOTUS because, among other connections, the CAP interconnects and uses Lake Pleasant to store water in winter months for release in summer months. If CAP were to fall under the revised definition, it would inevitably lead to more costly, complex and time-consuming permitting as well as the potential for significant water shortages for Arizona cities during aqueduct repair and maintenance activities. Arizona is a desert state and dependent on the CAP to provide an uninterrupted flow of water for essential users; recent studies also state that CAP water is responsible for one-half of the State's Gross Annual Product. (p. 3)

Agency Response: See Summary Response. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute and the existing

exemptions including water transfers. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

WaterLaw (Doc. #13053)

12.480 The West's arid nature necessarily means that ditches for the carriage of water for beneficial use originate *at the banks of a stream;* western ditches rarely, if ever, commence in upland zones. Yet the proposed rule exempts irrigation and water supply ditches from waters of the United States *only* if the ditch is "excavated wholly in uplands, drains only uplands, and [has] less than perennial flow". Fed. Reg. Vol. 79, No. 76, at 22203-4. Western irrigation ditches or water supply ditches do not function to drain uplands, are generally not constructed wholly in uplands, and by design, these ditches divert from a river, stream, lake or reservoir.1 Accordingly, the Rule will cast a broad net over tens of thousands of existing water supply pipelines, conduits, and irrigation ditches throughout the West. (p. 4-5)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as certain ditches. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule will exclude from regulation ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary and that would not have the effect of draining a wetland. The rule will also exclude ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

12.481 Colorado's legislative and practical requirement to return unused water to a stream rather than wasting it necessarily conflicts with the Rule's intent to regulate all ditches developed to apply water to beneficial use in Colorado. Other states have similar legislative provisions against waste. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response. Refer to the exclusions in paragraph (b) of the rule and the preamble section "Waters and Features that Are Not Waters of the United States" for further information regarding excluded man-made features such as stormwater control features, certain ditches, and water recycling features.**

Central Utah Water Conservancy District (Doc. #14534)

12.482 The propose rule fails to take into account the significant differences that exist in the West from conditions that exist in the East, and the impracticality of imposing a one-size-fits-all approach to divergent climates, watershed characteristics, precipitation levels, and the shear economic impact of subjecting virtually all activities in any water source to regulation. (p. 3)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

12.483 To the extent isolated waters, as aggregated, intermittent or ephemeral streams, or even all tributaries become jurisdictional, it will impede entities' ability to timely respond to the devastating impacts of the forest fires ravaging the West. Post-fire, it is necessary to both restore damaged infrastructure, including essential utility infrastructure which may be located in close proximity to so-called jurisdictional waters, and to construct new facilities designed to hold back debris flows and sediment laden water as rainfall races off

of what are now newly burned and hence impervious surfaces. Unnecessary permitting requirements will only add to the difficulties associated with meeting these challenges. (p. 4)

Agency Response: **See Summary Response. The agencies disagree that the rule will impede the ability to fight forest fires. The Corps regulations define an "emergency" as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit issuance. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. The Corps emergency permitting procedures can be found in 33 CFR 325.2(e). Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction."**

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits for discharges associated with certain non-exempt activities related to maintenance or clean-up and restoration, or activity exemptions under section 404(f)(1) of the Clean Water Act, such as those for normal silviculture activities, will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

12.484 In the arid West, as water shortages loom, a critical component of future water supply is the "sharing" of water rights between senior agricultural users and junior municipal providers on an interruptible supply, e.g., leasing/fallowing, basis. However, to implement such sharing opportunities, it is oftentimes necessary to construct new water collection and transportation infrastructure. If such construction activity triggers section 404 and NEPA requirements, it may mean that the transaction becomes technically, economically, or temporally infeasible. (p. 5)

Agency Response: **See Summary Response. If construction activity occurs in waters of the U.S. and results in a non-exempt discharge of dredged and/or fill material into such waters, then the activity would require authorization under section 404 of the Clean Water Act. However, the final rule has an exclusion for wastewater recycling structures created in dry land, including detention and retention basins built for wastewater recycling and water distributary structures built for wastewater recycling. Additionally, the rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.**

EcoSynthesis Scientific & Regulatory Services (Doc. #14586)

12.485 …the Definition is too broadly worded for some channel features of the arid West. For such areas, there must be substantial continuity, and stability in position, for an ephemeral feature to be interpreted as actually contributing enough flow, on a regular (even if not annual) basis, to have a significant nexus. For the discussion of connectivity and the jurisdictional definition to be so broadened that it is applicable also to all surrounding uplands – the runoff from which also flows into downstream waters – is not appropriate. (p. 1-2)

Agency Response: See Summary Response. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

EcoSynthesis Scientific & Regulatory Services (Doc. #14586)

12.486 In the arid West, there are innumerable drainage courses which have bed and bank only in their headwaters reaches, and then disappear into alluvial fans or merely into the generalized upland landscape for great distances, sometimes miles, before one reaches the next identifiable bed and bank. There are also many features which have no bed and bank, nor other indicators noted in 33 CFR 328, over most of their length, but which may have a bed and bank where they pass through areas of specific soils (such as semi-cohesive silty soils of valley bottom landforms). Another common situation is a gentle hillslope where the channel, such as it is, is not located in a stable location. A fragment of bed and bank might be found in one spot, and another disconnected one elsewhere on the slope (laterally), with no connectivity of either to downstream waters. The Rule's language is much too broad to conform to the discussions of connectivity upon which its determination of significant nexus depends. Peer reviewers made exactly these comments, in effect, but their concerns were not reflected in the Rule or Definition. (p. 2)

Agency Response: See Summary Response. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.

The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

Council of Country Club Presidents (Doc. #14919)

12.487 When we have heavy storm conditions, the County advises us what weirs will be opened, what lakes will be raised, so developed areas downstream will not be flooded. This is a very complex maneuver, a balancing act, mutually operated by our clubs and the County, literally on a moment to moment basis. To consider controlling this from afar is ludicrous, and dangerous to those of us who live here. Since the activities of the weather and the other described potential sources of problems are natural in origin, they will happen. But, after years of experience and huge investment the plans now in place and the experts we use to respond to problems are in control, and experience proves they have the situation well in hand. (p. 1)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as certain stormwater control features. The final rule will not affect the operation of any existing flood control structures. Additionally, the rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Utility Water Act Group (Doc. #15016)

12.488 [Referring to the proposed use of "subsurface and sporadic hydrological flowpaths" to determine CWA jurisdiction based on adjacency] In most parts of the country, these areas would be very difficult to identify in years of drought conditions or even in years of normal rainfall, and these "flowpaths" could be significant distances from upgradient isolated wetlands or pools of ponded water. In coastal plain regions, the landscape is full of wetlands over which the Agencies have not asserted jurisdiction. As shown in the following wetland map of a utility project site area in the Southeast (a map that has been verified by the Corps), many wetlands in this region are deemed "isolated" and therefore considered non-jurisdictional at present. However, these wetlands could have some flow connection to WOTUS (and therefore be considered adjacent waters under the Proposed Rule), or be considered to occur in the same floodplain (depending how it is defined), riparian area, or ecoregion (depending on how those concepts are defined), and therefore be considered "other waters" under the Proposed Rule. If these isolated wetlands were WOTUS, this would add substantial costs and burdens to work on the site. (p. 51)

Agency Response: See Summary Response. The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. However, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Already issued permits are not affected by this rule. Additional implementation guidance that is specific to section 404 will be provided by the Corps once the rule is effective which will contain more specific aspects of "grandfathering" situations. If there are remaining questions, after the publication of the Rule, you may contact your local Corps District Office for clarification of section 404-related concerns.

San Diego County Water Authority, California (Doc. #15089)

12.489 In the arid west, current policies and practices steer many projects away from rivers and perennial streams to ephemeral and intermittent streams where there are fewer impacts to wetlands and other jurisdictional waters. Expanding the definition will have the unintended consequence of taking away this incentive and could result in greater overall environmental impacts. To ensure clarity and avoid unintended consequences, we ask that the rule specifically incorporate critical elements to make it consistent with the *Regional Supplement to the Corps of Engineers Manual, Arid West Region (2008)* and the National Permit (NWP) regulations. For example, the rule should specify non-jurisdictional determinations for ephemeral or intermittent streams where it is unlikely that the flow would reach traditionally navigable waters considering any of the following:

- Substantial breaks in jurisdictional features
- Fan or sheet flow or gullies lacking stream definition
- Percolation of flows into groundwater
- Lack of jurisdictional features, such as an ordinary high water mark
- Lack of potential to affect the chemical, biological, and/or physical integrity of a traditionally navigable water. (p. 5-6)

Agency Response: See Summary Response. The final rule states that a water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. Paragraph (b) of the final rule excludes groundwater and erosional features such as gullies from jurisdiction under the Clean Water Act. The agencies have determined that all categories of waters jurisdictional by rule under (a)(1)-(a)(6), and those (a)(7)-(a)(8) waters on a case-specific basis, have a significant nexus to downstream (a)(1)-(a)(3) waters and are jurisdictional under the Clean Water Act.

The ordinary high water mark manuals developed by the Corps provide appropriate indicators to consider when delineating the ordinary high water mark in the field. Examples of OHWM indicators may include breaks in the slope, changes in vegetation, and changes in the sediment texture and substrate. The OHWM manual for the Arid West acknowledges the challenges in identifying the ordinary high water mark in the region; however, it provides the applicable indicators in the region to use when delineating the lateral extent of the OHWM in the Arid West.

Northern Colorado Water Conservancy District, Berthoud, Colorado (Doc. #15114)

12.490 This proposal would change the jurisdictional status of many ephemeral and intermittent drainages in the arid West that have long been regarded as non-jurisdictional. The vast majority of drainages in Colorado fit in this category. The expansion of jurisdiction under the regulatory changes proposed may have serious unintended consequences, including the risks inherent in a regulatory approach that will consume and dilute scarce federal and non-federal agency resources as the result of the extension of jurisdictional status to virtually the entire universe of drainages. (p. 5)

Agency Response: See Summary Response. See the Economic Analysis for additional information on predicted changes in jurisdiction. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The definition is based on the best available science, the intent of the Clean Water Act, and caselaw, and is consistent with current practice.

The final rule defines tributary, which can include tributaries with ephemeral and intermittent flow when they present the required indicators of OHWM and bed/banks to indicate sufficient volume, frequency, and duration of water flow. The science has demonstrated that tributaries with these features have a strong connection to (a)(1)-(3) waters and the agencies have determined that these waters have a significant nexus to these downstream waters either individually or in aggregate. Having these physical indicators separate the jurisdictional tributaries from erosional features. Erosional features that do not meet the definition of tributary are excluded under the rule.

The agencies believe with the clarity and certainty provided in the rule that there will be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Association of Fish and Wildlife Agencies (Doc. #15399)

12.491 (…) [T]he wide diversity of landscapes across our country provides great variation of hydrology, connectedness, and ecological integrity. This vast geography and variability cannot easily be defined by a single definition that fits all the unique characteristics across this country and that can appropriately integrate all of its variables without creating implementation challenges and unintended consequences. A broad definitional

framework is necessary to provide consistency and fairness in implementation across the country, but a process is also needed to fine-tune the definition by region or other appropriate scales so it is appropriately applicable to variations in region, hydrology, and landscapes. (p. 2)

Agency Response: **See Summary Response. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Grand Valley Water Users Association (Doc. #15467)

12.492 All "tributaries" would be categorized as jurisdictional, including ephemeral and intermittent drainages. This is problematic in the arid West where an ephemeral "tributary" may not be jurisdictional because there is no significant nexus to traditionally navigable water. (p. 3)

Agency Response: **See Summary Response. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further

consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Cache La Poudre Water Users Association (Doc. #15499)

12.493 Particularly troubling is the EPA's effort to gain jurisdiction over man made reservoirs and ditches. As the EPA is no doubt aware, in Colorado and throughout the West, very few such manmade ditches and reservoirs would qualify to be exempted under the Proposed Rule's very narrow exemption parameters. Thus, with the Proposed Rule, CWA jurisdiction would suddenly sweep in literally thousands of ditches and reservoirs that serve millions of people and irrigate hundreds of thousands of acres in the West. (p. 2)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as certain ditches and wastewater recycling structures. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

Lower Arkansas Valley Water Conservancy District (Doc. #15767)

12.494 Of particular concern to the Lower Ark WCD is the preservation and promotion of irrigated agriculture, the economic engine of the Lower Arkansas Valley of Colorado. Preserving the existing use of "native" in-basin water and so-called "foreign" water transferred into the basin from the Colorado River basin are critical issues for irrigated agriculture within the Lower Arkansas Valley. (p. 2)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as certain ditches and wastewater recycling structures. The agencies believe the rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-

federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles.

Cloud Peak Energy (Doc. #18010)

12.495 The current definition is problematic as many of the physical indicators used to define the OHWM may occur wherever land has water flowing across it, regardless of frequency or duration. Many of the indicators (e.g., changes in character of the soil, destruction of native terrestrial vegetation, presence of litter and debris) can be observed in very small drainages and even in upland areas, especially in arid areas in Wyoming. Use of the term OHWM "as is" will result in the inclusion of ephemeral channels that have little influence over the quality or quantity of downstream waters. (p. 3-4)

Agency Response: See Summary Response. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

Coalition of Renewable Energy Landowner Associations (Doc. #14626)

12.496 State Engineers and their staffs make hydrologic assessments of surface flow and ground water assessment within their respective states for planning purposes. Interstate compacts set protocol and establish legal foundations between states on surface flow and ground diversion. Does a significant nexus determination to create a new water of the United States violate existing compact laws between states? These agreements address interstate commerce and water quality and believe that as a regional concern the issues related to navigability and water quality are more than adequately addressed without invoking federal jurisdiction. These agreements in many cases establish comprehensive standards of practice required and necessary for water measurement and delivery and deal with the issues related to silt flow and use sound science based upon long-term monitoring and long-range forecasting. We are concerned that waters of the U.S. rules and the application on a case by case basis do not take into account regional variability in water quality, weather conditions, and flow patterns. (p. 5)

Agency Response: **See Summary Response. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. The agencies worked hard to ensure the rule reflects these fundamental principles. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Western Resource Advocates (Doc. #16460)

12.497 In other parts of the country, clarifying the definition of WOTUS may have an impact on many Clean Water Act programs. However, in the West, this rule will almost exclusively affect state certification and federal permitting for the discharge of dredged and fill materials under section 404 of the Act.[101] This is so because the all six states in WRA's region have delegated section 402 point source discharge programs and all have definitions of waters of the state that are already much broader than that of the federal agencies, but do not have authority to issue their own section 404 permits. (p. 4-5)

Agency Response: **See Summary Response. The agencies believe that the rule will significantly improve consistency and predictability for all Clean Water Act programs. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S., including for example, NPDES permits, and water quality certifications. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities**

[101] As well as state certification for other federal permits and licenses, i.e., Federal Energy Regulatory Commission hydropower licenses.

among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

The Association of State Wetland Managers (Doc. #14131)

12.498 We strongly urge that the federal agencies emphasize and increase coordination with state and tribal co-regulators in development of the final rule and associated guidance, and in implementation. Numerous states and tribes have developed effective and proven technical and field methods to document many of the connections and types of waters defined in the rule. We believe that where such procedures are consistent with the overall requirements of the rule, they should be readily accepted.

Numerous states and tribes also have existing agreements with Corps Districts and other agencies regarding regulatory procedures that are addressed by or may be affected by the proposed rule. To the extent that such agreements can be maintained (recognizing the need for consistency with the overall rule), regulatory delays will be minimized. (p. 4)

Agency Response: See Summary Response. The agencies extended the comment period twice in order to ensure adequate time for public comments. The public comment period also included hundreds of outreach and stakeholder events, including many with local and state agencies. The agencies received numerous letters from state and tribal co-regulators, which were reviewed prior to drafting the final rule and were helpful in developing the final rule language. Upon promulgation of the final rule, individual Corps Districts may find it necessary to re-evaluate any existing agreements with state/local agencies regarding jurisdiction under the final rule.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

12.499 We urge the federal agencies to continue attention to distinguishing between the jurisdictional definition of Waters of the United States and the waters that are assumable by states under §404(g) of the CWA.

The preamble to the proposed rule includes the statement:

> "Today's proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under Section 404(g) of the CWA. ... The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language of the CWA. ..."

We concur with this statement, but are also of the opinion that a more definitive clarification of the scope of assumable waters is needed to facilitate ongoing development of state-federal coordination. (p. 4)

Agency Response: **See Summary Response. The final rule does not affect the scope of waters subject to assumption under Section 404(g) of the CWA. The agencies recognize that the state governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

National Parks Conservation Association (Doc. #15130)

12.500 In addition to protecting scientifically-important headwater, ephemeral, and intermittent streams themselves, the rule also provides for the evaluation of these waters in "networks" and aggregation of small features. When considered together, these networks represent a collection of waters with strong connectivity to downstream water bodies and other features (Gomi, Sidle, and Richardson 2002), like park units. Taken individually, small streams in headwater systems may not always display discretely significant contributions to higher order streams; however, their strong biological and chemical connections become more apparent when headwater streams are analyzed as the networks that science has clear methods for identifying (e.g., see NCDWQ 2010 and various guidance documents from USACE).[102]

These stream types are important to national parks across the country. The southwestern U.S. and Colorado River watershed, for example, is especially reliant on intermittent and ephemeral streams (Levick et al. 2008). These streams constitute over 81 percent of all streams in this region, which includes such icons as the Grand Canyon National Park, Lake Mead National Recreation Area, and the Glen Canyon National Recreation Area. These parks alone have over 12 million visitors each year (NPS 2013). Colorado River headwaters are in Rocky Mountain National Park. The Colorado River supplies seven states with water, hydropower, flood control, recreation, and habitats. Many areas in the Colorado watershed have generally arid climates where many important streams dry up or flow infrequently. Reliable water flows in the Colorado are also necessary to fulfill the U.S.'s 1944 treaty obligation to annually deliver certain volumes to Mexico. Long-term trends in precipitation and temperature patterns suggest mean annual runoff in this area will decrease by 8.5 percent by 2050, making it especially important to protect the quality and quantity of what little water may be left (DOI 2011).

Glacier National Park's Flathead River region is an area where headwater pollution threatens U.S. national parks. The Flathead River feeds the iconic Glacier National Park, but the river has its headwaters in British Columbia, Canada. The U.S. Congress and Canadian Parliament both designated these combined areas as the world's first

[102] Overzealous application of the aggregation concept is prevented by the rule's requirement that the case-specific scientific analysis of aggregations be "more than speculative or insubstantial," as Justice Kennedy suggested. Furthermore, delineations of streams with significant nexuses are fairly reliable in areas with healthy bank vegetation, which helps channel locations to not naturally move over time; this is especially true in mountainous areas which contain many headwaters with winter permafrost that hardens banks and slows stream flow (Crawford and Stanley 2014).

International Peace Park, the Waterton-Glacier Peace Park, which the United Nations recognized as a World Heritage Area in 1995. However, recently, a Canadian land-use plan almost permitted significant pollution in the headwaters of the Flathead River Valley, thereby directly threatening the internationally significant natural resources in Glacier National Park (NPCA 2010a). Fortunately, the British Columbia Premier and Montana Governor agreed to protect the trans-boundary Flathead River valley from energy exploitation. Recent regulatory uncertainties regarding the "waters of the United States" threaten to expand the same problem within the U.S.

Shenandoah National Park is home to major headwaters for the Chesapeake watershed. The Shenandoah River and neighboring tributaries feed into the Chesapeake Bay, which is the largest estuary system in North America. There are over 55 national park units in the Chesapeake region, and the bay's rate of flow and quality affect drinking water, recreation, and commercial fishing in the surrounding regions. A 2010-2012 survey found that only 31 percent of the Chesapeake Bay was attaining water quality standards (including dissolved oxygen, water clarity, underwater bay grasses, and chlorophyll-a concentrations – all vital to aquatic ecosystem health). The goal is to have 60 percent attain these standards by 2025 (FLCCB 2014). Seventeen million people live in the Chesapeake watershed, which spans six states and the District of Columbia, has nearly 12,000 miles of shoreline, and is the largest estuary system in North America with 150 major rivers and streams, and 100,000 smaller streams, creeks, and rivers (Chesapeake Bay Program). The Shenandoah watershed provides some of the cleanest contributions to the Bay (USGS watershed online mapper), and this is largely a result of strong protections for the streams in and surrounding the park.

In addition, the Snake River's headwaters largely overlap the southwest areas of Yellowstone National Park (having strong connection to Jackson Lake). The Snake River passes through Grand Teton National Park, the Snake River Wild and Scenic River, and many non-national park lands in between. Flowing east, Yellowstone National Park also contains one of the branches of the headwaters of the Missouri River, which eventually flows into the Mississippi River and Gulf of Mexico. (p. 3-4)

Agency Response: **See Summary Response. See the Technical Support Document for a summary of the scientific basis for the final rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The agencies recognize that ephemeral and intermittent tributaries also have a significant nexus either individually or in aggregate to downstream (a)(1) to (a)(3) waters. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters, including headwater streams which meet the definition of tributary. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public.

Mercatus Center at George Mason University (Doc. #12754)

12.501 A danger of increased federal jurisdiction is one-size-fits-all rulings that ignore the realities of vastly different ecosystems across the United States. To produce a comprehensive economic and environmental benefit-cost analysis for each different ecosystem within the United States, An example of this difference is the common occurrence of ephemeral and intermittent streams in desert areas in the western United States. For example, 94 percent of Arizona's and 88 percent of New Mexico's waterways are intermittent or ephemeral in nature. Often, a variety of environmental factors create waterways during rainstorms where none existed previously. As such, this jurisdictional increase may disproportionately affect development in the Desert Southwest. The agencies' own study of ephemeral and intermittent streams noted that such formations are prominent in areas of high economic growth in Nevada and Arizona.[103] Extending de facto jurisdiction to these areas would require that much of this development be subject to lengthy, costly permitting processes. The agencies have yet to show thoroughly that the environmental benefits would outweigh the economic costs. (p. 5)

Agency Response: **See Summary Response. See the Economic Analysis for a discussion on the predicted changes in jurisdiction and costs/benefits of the final rule. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as erosional features which do not meet the definition of tributary. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The agencies will develop the tools necessary to assist with the jurisdictional determination process in the implementation of the final rule to make the process predictable, efficient, and effective.**

There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

[103] EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and semi-Arid American Southwest, November 2008, http://www.epa.gov/esd/land-sci/pdf/EPHEMERAL_STREAMS_REPORT_Final_508-Kepner.pdf.

U.S. Congress, Barrasso et al. (Doc. # 4901)

12.502 We fail to understand why the EPA has not adequately consulted our Governors about a rule that has such a significant impact on the economy of our states. For example, rural states in the West have sizeable ranching and farming operations that will be seriously impacted by this rule. Despite the claim that the Army Corps will exempt 53 farming practices as established by the Natural Resource Conservation Service, the list of 53 does not cover all existing agricultural practices. There are a number of farming and ranching practices, such as the application of pesticides, that are not covered on this list that occur every day in the West without penalty. Under this new proposed rule, it appears those farmers and ranchers will need to get a permit or be penalized if they continue to use those non-covered practices in new federal waters. (p. 1)

Agency Response: **See Summary Response. The proposed rule was placed on public notice, specifically to solicit from all interested parties, including states. The public comment period was also extended twice in order to accommodate additional time requirements for providing responses. Also, hundreds of outreach and stakeholder events were held during the public comment period including many with local and state agencies. The agencies received numerous letters from state co-regulators, which were reviewed prior to drafting the final rule and were helpful in developing the final rule language. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions under section 404(f)(1) of the Clean Water Act will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule. This comment also pertains to the Interpretive Rule regarding agricultural exemptions, which was withdrawn on January 29, 2015, and is beyond the scope of this rulemaking effort.**

U. S. Congress, Cartwright et al. (Doc. #4983)

12.503 We write as members of Congress representing areas located within the Chesapeake Bay watershed, to thank you for your leadership on efforts to restore the Bay and other critical waters throughout our region, and to urge you to continue to act to protect tributary streams and wetlands in our watershed and across the nation. (p. 1)

Agency Response: **See Summary Response. The agencies acknowledge the congressional support for the rule.**

United States House of Representatives (Doc. #17458)

12.504 Having access to a clean water source is vital to our region's continued economic growth. More than two million area residents and 42 million visitors who frequent our world-class hotels, casinos, restaurants, shows, and shops annually are dependent on our limited water resources. This necessity is all the more challenged by the fact that 90% of our water comes from one source, Lake Mead, which is fed by the Colorado River and in is adversely affected by a extreme drought. (p. 5)

Agency Response: **See Summary Response. The goal of the CWA is to protect the chemical, physical, and biological integrity of our nation's waters. The agencies have been implementing this mission since the inception of the CWA. The final rule was developed to increase CWA program predictability and consistency by**

increasing clarity as to the scope of "waters of the United States" protected under the Act.

12.505 Accordingly, I appreciate the hard work of the Administration on proposing a rule to do just that. I applaud the intent of the Administration to protect the waters of the United States, but do have some concerns about your proposed rule and how it will impact communities like mine in the desert Southwest. It is imperative that we get this rule right so there is predictability moving forward. (p. 5)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. There are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. This appropriate regional variation can make it appear that there are inconsistencies in program execution. The rule aims to reduce any inappropriate inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources. Tools exist that recognize this regional variation and provide assistance to field staff; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process consistent, predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.506 The proposed rule (Definition of "Waters of the United States" Under the Clean Water Act), includes for the first time a regulatory definition of "tributary." This language references "sedimentary tributaries" expanding coverage to systems that were not covered under the Clean Water Act before. Can you clarify the intent of this new definition and how systems, in particular ephemeral streams that are common in the desert Southwest, will be impacted? (p. 5)

Agency Response: **See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as erosional features which do not meet the definition of tributary. The final rule contains a definition of tributary which was modified in response to comments to provide increased clarity. The agencies believe that the characteristics required to meet the definition of "tributary" are indicators of sufficient volume, flow, and duration such that the tributaries have a significant nexus, either alone or in combination with other tributaries in the region, to the downstream (a)(1) to (a)(3) waters. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination**

process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources.

Congress of the United States (Doc. #19302)

12.507 As you are aware, Florida is unique in its topography and underground aquifer system. Our state is only slightly above sea-level and is relatively flat, which makes the state dependent upon an effective stormwater management system. The water management system also protects and improves the quality of water in Florida. Accordingly, the state has an extensive network of man-made ditches, canals, and ponds for flood control, irrigation, storm water management, and water quality improvement.

We have heard concerns from Florida stakeholders on potential impacts this proposed rule could have on our communities. We believe that these concerns warrant further analysis of the costs and benefits of the proposed rule on our state. Accordingly, we request an additional 60 day extension of the comment period to provide your agency additional time to work with our state agencies and stakeholders to review and understand the proposed rule and its impact on our state; and collect and analyze data on possible adjustments that could be made to the proposed rule. We look forward to learning the results of those discussions. (p. 1)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional information on excluded features such as certain ditches and stormwater control features. The proposed rule was placed on public notice in April 2014 and the public comment period was extended twice in order to ensure adequate time for comment.

12.2. 401

Summary Response

Section 401 of the Clean Water Act requires applicants for federal licenses or permits that will result in discharges into navigable waters to seek certification from the state in which the discharge originates that the discharge will comply with certain provisions of the CWA including state water quality standards as identified and adopted by the state. Although state standards must apply at a minimum to federally defined waters, the states identify which waters have standards and may adopt standards for additional waters within the state. In implementing section 401, the states have the discretion to certify, deny, or waive certification and some states do use a state issued permit to certify projects. Other states use a specific certification.

The final rule does not establish any regulatory requirements, and questions about implementation of the CWA Section 401 program are beyond the scope of the rulemaking.

Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities that currently are regulated under these programs that protect "waters of the United States" will continue to be.

Because the scope of regulatory jurisdiction in the final rule is narrower than under the existing regulation, the rule does not expand the number of dischargers who need section 402 or 404 permits or 401 certification. The rule does not change requirements in existing section 402 or 404 permits or 401 certifications, and does not change requirements for future section 402 or 404 permits or 401 certifications. The rule does not change the Clean Water Act's definition of "point source" or "discharge of a pollutant" and does not establish new categories of point sources or discharges. The rule was not changed to address comments to this effect.

Along with a narrowing of jurisdiction, the rule also significantly reduces the uncertainty and number of case-specific determinations that will be required, reducing state and federal workload associated with jurisdictional determinations. In addition, the existing state programs implementing the CWA were developed under the prior regulatory definition of "Waters of the United States," but may include other state waters beyond the scope of federal jurisdiction. Existing programs have in the past and can continue in the future to address the scope of "Waters of the United States" under the final rule without an increase in administrative and programmatic costs.

Specific Comments

Virginia Department of Transportation (Doc. #12756)

12.508 One unintended consequence of the proposed rule as written is the impact on State Section 401 programs, such as Virginia's Water Protection Permit (VWPP) program. While a feature may be considered a WOUS under the proposed rule, the Corps may not have permitting authority over most maintenance activities that involve the removal of material with bucket-type equipment and disposal at a suitable upland location. However, the VWPP requires a permit for this activity when the Corps does not require or issue a permit. (p. 9)

Agency Response: Comments noted, however, as noted in summary response 12.2, states may use a permit to provide certification which will be based on the scope of state water quality standards. In addition, the definition of a discharge is outside the scope of this rulemaking.

California State Water Resources Control Board (Doc. #15213)

12.509 (…) [W]e rely heavily on the Agencies' activities under the section 404 dredge and fill program to leverage our limited staff resources in the section 401 water quality certification program. A narrow definition of "waters of the United States" would require additional state resources to achieve the same level of protection as is afforded under the section 404 program today. By contrast, the proposed definition of "waters of the United

States" will not increase the type and number of water bodies that are protected only under state law, and will also reduce the number of case -by -case determinations. This will facilitate the processing of CWA section 401 certification applications, and decrease Water Boards staffs' time spent on ensuring that impacts to waters are addressed and appropriately mitigated and monitored. Improved alignment of federal and state jurisdictional waters will also likely decrease permit processing time to the benefit of applicants. (p. 3)

Agency Response: **The final rule includes several changes to provide the additional clarity mentioned while reducing the number of case-specific determinations of jurisdiction required. As noted in summary response 12.2, the state Section 401 certification is based on the state water quality standards which by definition apply to waters identified by the state.**

Georgia Environmental Protection Division (Doc. #16348)

12.510 Based on the proposed definition of WOTUS, more projects will likely be subject to 404 permitting requirements by the Corps. That would result in some increases to EPD's 401 water quality certification review and issuance process. This is a program within EPD that has already experienced a decrease in funding from EPA. The increase in work would be difficult for staffing and the impacts would be felt by all applying for permits.

The Corps routinely regulates impacts to ephemeral streams in Georgia, so any increases to the linear feet of stream that may be regulated will likely be less than the increases to acres of wetlands that may be regulated. This will particularly be true in the southern half of the state, where isolated wetland features that occur in the landscape may now be subject to 404 protections under the proposed rule.

More wetlands and ponded areas would be expected to become jurisdictional waters under the proposed rule. EPD already covers ditches and channels as point sources under our stormwater permitting program. EPD expects a likely increase in coverages under the NPDES stormwater permits.

In fully considering the economic impacts of the proposed rule, EPA and the Corps should also estimate the additional administrative and programmatic costs that might be experienced by state governments who implement various CWA programs. (p. 2)

Agency Response: **See summary response 12.2 above. For specific discussion of the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4.**

Water Advocacy Coalition (Doc. #17921.1)

12.511 Under CWA section 401, any applicant for a federal license or permit to conduct any activity that will result in a discharge into waters of the United States (e.g., a section 404 permit) must obtain a State water quality certification. Because the proposed rule will result in increased section 404 permitting requirements, and more activities will affect the expanded universe of waters of the United States, more activities will trigger section 401 state water quality certification requirements.[104] Project proponents will increasingly

[104] *See* 33 U.S.C. § 1341.

have to go through the 401 certification process and comply with applicable WQS, effluent limits, and other conditions imposed by the States. Furthermore, States may struggle to process certification requests as they work to manage the influx of new permit applications, thus increasing the burdens on States' already strained resources. There will also be more opportunities for States and interest groups to block or delay projects during the certification process. (p. 76-77)

Agency Response: **Please see summary response 12.2 above. The authorities granted under CWA section 401 to states are outside the scope of this rulemaking.**

National Association of Home Builders (Doc. #19540)

12.512 The Proposed Rule will Result in Increased Clean Water Act Section 401 Water Quality Certification Requirements.

Under the CWA, an applicant for a federal license or permit to conduct any activity that may result in a discharge to waters of the United States (*e.g.*, a Section 402 or 404 permit) must provide the federal agency with a Section 401 certification.[105] The certification, made by the state, declares that the discharge will comply with applicable provisions of the Act, including water quality standards. A state's water quality standards specify the designated use of a water body (e.g., for drinking water supply or recreation), pollutant limits necessary to protect the designated use, and policies to ensure that existing water uses will not be degraded by pollutant discharges.

Section 401 provides states with two distinct powers: one, the power indirectly to deny federal permits or licenses by withholding certification; and two, the power to impose conditions upon federal permits by placing limitations on certification. Generally, Section 401 certification has been applied to hydropower projects seeking a license from the Federal Energy Regulatory Commission (FERC) and to dredge and fill activities in wetlands and other waters that require permits from the Corps (CWA Section 404). It also is applied to permit requirements for industrial and municipal point source dischargers (CWA Section 402).

Under the proposed overbroad definition of waters of the United States, more waters will be subject to federal permits. As a result, states with already limited budgets will have to devote additional resources toward certifying those permits. This will increase the burdens already placed on states under Sections 303 and 305 of the Act. What's more, the time necessary to complete the state certification process only increases project delays for the permit applicant. And, in a worst case scenario, the state can deny the federal permit all together, stopping a home builder or land developer in his/her tracks. (p. 120)

Agency Response: **See summary response 12.2 above. The authorities granted under CWA section 401 to states are outside the scope of this rulemaking. Section 401 applies only to federally issued licenses or permits and does not apply to Section 402 or other permits issued by states that have been authorized to implement the program.**

[105] 33 U.S.C. § 1341.

CONSOL Energy, Inc. (Doc. #14614)

12.513 CONSOL is concerned with the impact the proposed rule will have on state and federal water quality standards. If finalized as proposed, the State and federal authorities would be obligated to develop new legislation, use restrictions, and water quality standards for the additional jurisdictional waters that would be created by the proposed rule. This would create a significant burden for the regulatory community, and industry, as these new standards are developed. (p. 3)

Agency Response: See summary response 12.2 above. Section 401 only applies to adopted state standards and applicable federal standards. States may adopt new standards during their normal triennial review.

Continental Resources, Inc. (Doc. #14655)

12.514 With a broader definition of jurisdictional waters, more activities are likely to require federal permits (e.g., Section 402 and 404 permits), and these activities are more likely to discharge into navigable waters. States will now need to consider whether the new federal permits are consistent with their Section 401 water quality standards. These impacts occur on the state level- not the federal level; however, Continental will face additional state permit requirements and the attendant increase in costs and delays. Given the extent to which uncertainty remains on the federal side, that same uncertainty will permeate state decisions. In addition, the need for additional water quality review and compliance determinations will undoubtedly put a heavy strain on states' resources, and any associated delays will hinder Continental's projects and their approval. (p. 19)

Agency Response: See summary response 12.2 above. Section 401 only applies to federally issued licenses or permits.

American Gas Association (Doc. #16173)

12.515 Under another Army Corps program, CWA §401 water quality certifications, states authorities issue companion certifications, and will not do so unless the Corps makes an advance jurisdictional determination of the presence or absence of WOTUS. As the states and other stakeholders attempt to apply the Proposed Rule, gas utilities can expect that these certifications will bring additional processing delays, increase determinations of the need for individual CWA § 404 permits in lieu of nationwide permit eligibility, and lead to more disagreement and conflict between state and federal field offices as to appropriate jurisdiction over projects.

AGA is also concerned that even if regulators and project proponents agree that federal action may not be necessary, a third party can intervene under the citizen suit provisions of the CWA to compel enforcement based on its own views that federal action was required under the broad terms of the proposed WOTUS definition. AGA therefore urges the Agencies to issue a revised proposed rule which adequately describes metrics for determining jurisdiction that can be clearly applied in the field, and provide a clear line of compliance that reduces regulatory exposure and third-party litigation risk. (p. 12-13)

Agency Response: The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific

determinations of jurisdiction required. The final rule does not change the Section 404 permitting program or which permits apply to activities. The proposed rule represents a narrowing of jurisdiction and does not directly impact the need for permits. The citizen suit provisions of the CWA and applicability were outside the scope of this rulemaking.

Nebraska Cattlemen (Doc. #13018)

12.516 NDEQ has also administered the §401 and §303 programs since delegation in the 1970s. The impact on §401 will be an increase in the number of certifications that the State will need to issue because there will be more federal actions to trigger certification needs. This may add more bureaucracy, time, and red tape to the existing process. Nebraska Cattlemen comment that this increase in the resources of state government will raise the NDEQ's budget and potentially state taxes. (p. 15)

Agency Response: See summary response 12.2 above.

Missouri Corn Growers Association (Doc. #16569)

12.517 It is believed the proposed rule will also impact state water pollution permitting as well as its 401 certification. It also presents the real possibility states will be left picking up the burden and costs of addressing and assessing the water quality in thousands of addition miles of streams, ditches and water bodies to determine whether they are impaired, listing them on the 303d list, and writing TMDLs. (p. 7)

Agency Response: See summary response 12.2 above.

Airports Council International – North America (Doc. #16370)

12.518 In an effort to further understand the jurisdictional reach and related impacts of the Proposed Rule the following question need(s) to be answered:

How would this rule cascade into State permitting, including 401 certification? (p. 6)

Agency Response: See summary response 12.2 above. Along with a narrowing of jurisdiction, the rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload.

Environmental Defense Fund (Doc. #14946)

12.519 In the wake of *SWANCC* and *Rapanos,* the CWA permitting programs have become more complicated, resource-intensive, uncertain and slow. Making case-by-case determinations · of whether individual waters have a significant nexus to downstream navigable waters is 8 to 10 times more resource intensive than the permitting process was pre-SW*ANCC* and *Rapanos*.[106] This also has had a significant chilling effect on CWA enforcement. EPA has declined to pursue hundreds of enforcement actions due to ‘‘.jurisdictional uncertainty.”[107]

[106] R. Meltz, C. Copeland, “The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond”, at 11 (Congressional Research Service, September 2014) http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf

[107] Id

A further source of urgency for finalizing the rule quickly is the strain and constraints the current uncertainty regarding the scope of waters protected by the Clean Water Act is having on state water quality programs. A recent study by the Environmental Law Institute reveals that least 36 states have legal restrictions that could impair the ability of state water quality agencies to protect waters left unprotected by the CWA in the wake of *SWANCC* and *Rapanos*.[108] In fact, many states have predicated their state water quality laws upon the federal Clean Water Act, providing that the state laws be "no more stringent than" the CWA. (p. 2-3)

Agency Response: The final rule has been developed to reduce the number of and uncertainty surrounding case-specific determinations of jurisdiction. Issues associated with enforcement are outside the scope of this rulemaking.

Society of American Foresters (Doc. #15075)

12.520 Water quality standards have been largely established based on expectations and needs for larger streams. But smaller headwater streams and other waterbodies, which can comprise the majority length of a stream networks, often have very different processes and water quality conditions (Ice and Binkley 2003). Therefore, expansion of per se WOTUS to include ephemeral headwater streams could confuse existing water pollution control measures like state BMP programs.

For example, dissolved oxygen (DO) concentrations in stream water tends to be high for cold streams and rivers (solubility of DO inversely related to water temperature), especially if not exposed to high biochemical oxygen demand (BOD) or bottom sediment oxygen demand (SOD). But recent research in forest streams finds that, during low flow periods, some headwater reaches can exhibit low DO concentrations even with cold water temperatures. This is probably due to a preponderance of recently emerged hyporheic or groundwater comprising the flow. Natural conditions, such as low gradient and high SOD, can also lead to low DO concentrations (Ice and Sugden 2006). These conditions are not currently fully recognized in water quality standards, and the extension of categorical WOTUS to include ephemeral streams and wetlands has the potential to not only expand jurisdictional waters but also lead to inappropriate classification of watersheds as impaired. (p. 4-5)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See summary response 12.2 above.

Water Environment Federation Member Association Governmental Affairs Committees Representing EPA Region 7 (Doc. #15185)

12.521 EPA has long struggled with evaluating water quality impacts and risk factors associated with short-term wet weather conditions, and to date this regulatory area has not been

[108] "State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act" (An ELI 50-State Study, May 2013), http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

adequately resolved. However, the Proposed Rule cites various nexus situations that would very much depend on such short-term wet weather conditions. Therefore, EPA needs to stipulate the basic technical and administrative approaches that are intended to be used at the source in order to define frequency, duration, and water quality-based risk factors that are directly associated with wet weather events that reportedly transport pollutants of concern to downstream designated beneficial use areas. In other words, how does EPA intend to establish applicable, defensible water quality standards and monitoring requirements at the claimed pollutant sources, such as ephemeral stream areas under short-term wet weather conveyance conditions?

Due to past litigation, the inherent problem with EPA guidance and many of the State water quality standards to date is that there has been no ability to establish upper bounds in stormwater flow and resultant stream flows for the evaluation of pollutants of concern within any water quality-based NPDES permitting activities. Quite the opposite – NPDES wastewater point-source discharge permits are primarily based on applying water quality standards under extremely low flow dry weather conditions for acute and chronic toxicity periods of exposure; that is, during times where transport of pollutants of concern from ephemeral source areas would not logically occur. Therefore, if the ultimate intent of the Proposed Rule under the various "Waters of the U.S." classifications is to include and manage short-term stormwater flow condition events, then EPA must also logically address the corresponding frequency, duration, and risk factors under such short-term conditions to be applied to pollutant source ephemeral areas and appropriate "Other Waters" areas under the Proposed Rule. It is not sufficient to simply cite cases of technical evidence for "connectivity" involving various physical, chemical, and biological factors without mentioning the underlying causative statistical stormwater flow boundary conditions for each of those cases.

As a related matter, such "connectivity" link to water quality standards will be very important in extending the Proposed Rule to the existing TMDL Program where downstream water quality shows impairment. In addition, the Proposed Rule mentions that certain means of stormwater conveyance may potentially be considered to be "point sources"; whereas such point sources may have been previously considered to represent non-point sources. This would imply that certain previous TMDL determinations, involving both point source waste load allocations and non-point source load allocations, may have to be re-examined and re-issued as a result of the Proposed Rule.

Bottom line: It is suggested that "connectivity" factors need to separately distinguish short-term wet weather impacts from long-term impacts (e.g., bio-accumulative impacts) and must describe how established water quality standards are to be addressed in a meaningful, defensible manner at the pollutant source. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See summary response 12.2 above.**

12.3. 402 - NPDES

Agency Summary Response

CWA Section 402 – NPDES Implementation

This response addresses comments regarding the rule's relationship to NPDES implementation, including NPDES permitting, pesticides and agriculture, and water transfers regardless of where such comments appear in the Response to Comments document. Comments and responses related to the waste treatment system exclusion and to stormwater are addressed in the comment compendium on non-jurisdictional features and waters.

Summary of Comments

NPDES Permitting – General Comments
The agencies received some comments on how the proposed rule would affect NPDES permitting. Commenters were generally concerned that the proposed rule did not adequately consider impacts to Clean Water Act permitting programs beyond Section 404, including Section 402. Some comments suggested that any change in CWA jurisdiction as a result of the new rule would trigger a need to review existing individual and general NPDES permits, as well as to revise future permitting requirements. Some comments generally perceived that the rule would expand CWA jurisdiction and therefore would require more entities to obtain NPDES permits for discharges of pollutants, therefore adding costs, uncertainties, monitoring requirements, and permitting delays for regulated entities and NPDES permitting authorities. A number of commenters raised issues concerning whether the rule would require NPDES regulation of sources currently considered to be nonpoint sources. A number of comments were concerned with whether certain features would be considered to be jurisdictional for purposes of both NPDES and Section 404 permitting; similarly, some comments raised concerns about discharges facing dual regulation under NPDES and Section 404. Some commenters held that states have adequate authority to regulate waters beyond the reach of the Clean Water Act, making a rule addressing the jurisdiction of the Clean Water Act unnecessary. There were comments suggesting that state NPDES programs only regulate waters under a state definition of regulated waters.

Agricultural-related Comments

A number of commenters raised issues concerning whether this rule will require farmers to get NPDES permits for the application of fertilizer (including manure), pesticides, or herbicides, etc. to fields, surrounding ditches, or ephemeral streams, where such permits have not previously been required. Similarly, there were comments concerning ways in which this rule might affect the applicability of FIFRA or the pesticides general permit (PGP) for mosquito or other pest control activities. In addition, there were comments concerning the applicability of the Clean Water Act exemptions for agricultural stormwater and irrigation return flows.

Water Transfers

The agencies received comments on how the proposed rule would affect NPDES permitting for water transfers. These comments generally fell into two categories: those that urged that discharges from water transfers should not require NPDES permits and those that urged that the conduit for the water transfer should not be considered a water of the U.S. Some asked the agencies to continue to defend the water transfers rule. Others urged that EPA use this rule to clarify that water transfers will not require NPDES permits. The second category of comments urged that the conduit for the water transfer should not be considered a water of the U.S. Some suggested regulatory language to accomplish that end. One noted that, because the discharge from the ditch is already permitted; the ditch does not need to be; and that treating the ditch as a WUS could reduce water quality protections because water flowing from the ditch would then be a water transfer that is not subject to NPDES permit regulations.

Summary Response

NPDES Permitting – General Comments

The final rule does not establish any regulatory requirements, and questions about implementation of the NPDES program are beyond the scope of the rulemaking. Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities that currently are regulated under these programs that protect "waters of the United States" will continue to be.

Because the scope of regulatory jurisdiction in the final rule is narrower than under the existing regulation, the rule does not expand the number of dischargers who need NPDES permits. The rule does not change requirements in existing NPDES permits, and does not change requirements for future NPDES permits. The rule does not change the Clean Water Act's definition of "point source" or "discharge of a pollutant" and does not establish new categories of point sources or discharges. The rule was not changed to address comments to this effect. As is current law and practice, entities discharging pollutants into waters of the United States must obtain and comply with an NPDES permit, including conducting any monitoring and reporting prescribed in the permit.

This rule does not change how NPDES permitting programs are administered by authorized states or EPA. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. EPA has authorized forty-six states and the U.S. Virgin Islands to administer the NPDES program and issue permits, and EPA issues permits in four states, in Indian Country, in the other territories, and for certain other discharger categories.

EPA authorizes states to administer NPDES programs after determining that the states' laws and regulations are at least as stringent as the federal regulations for running a NPDES program. Authorized state NPDES programs regulate discharges to waters of the United States located

within that state. Some states' laws allow them to regulate more waters than are jurisdictional under the Clean Water Act, and some states establish their own separate permitting systems for discharges that the Clean Water Act does not cover. This rule does not affect states' NPDES program administration, does not impose additional regulatory requirements on states or regulated entities, and does not inhibit states' abilities to regulate discharges to waters that are not covered by the CWA, if they choose to be more expansive. The agencies note that not all states have the ability to protect waters beyond the scope of the CWA. (see State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, Environmental Law Institute, May 2013.)

To the extent that a water is jurisdictional, it would be jurisdictional for the purposes of any section of the Clean Water Act. The rule itself does not impose any requirements on discharges to waters of the United States. Discharges of dredged or fill material require a Section 404 permit, while discharges of other pollutants require a Section 402 NPDES permit. Certain entities may have multiple kinds of discharges that require Section 404 or NPDES permits, depending on the discharge. Whether and how a particular activity is subject to CWA permitting requirements is a fact-specific question and is beyond the scope of this rulemaking. The agencies did prepare an economic analysis of the potential indirect costs and benefits that may result from an increase in the number of positive jurisdictional determinations associated with CWA programs. See, Economic Analysis Section 8 and Compendium 11.

Agricultural-related Comments

Issues relating to permitting requirements for the application of fertilizer (including manure), pesticides, herbicides, and any other substances are beyond the scope of the rule. This rule does not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields, nor does this rule affect the interplay between FIFRA and CWA requirements. If an activity was exempted or excluded before this rule, under the agricultural stormwater and irrigation return flows exemptions from the CWA or any other exemptions, it will remain exempted or excluded. The rule simply addresses which waters are subject to CWA jurisdiction, by clarifying those types of waters that have a "significant nexus" with downstream traditional navigable waters, interstate waters, and territorial seas.

Water Transfers

This rulemaking does not make any changes to EPA's Water Transfers Rule. Comments about the Water Transfers Rule and its application to particular situations are beyond the scope of the rulemaking. The Water Transfers Rule explains that "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" does not require a National Pollutant Discharge Elimination System (NPDES) permit. Nothing in the final rule affects this. The final rule does not change requirements in existing NPDES permits, and does not change requirements for future NPDES permits. The rule does not change the Clean Water Act's definition of "point source" or "discharge of a pollutant" and does not establish new categories of point sources or discharges. Some commenters urged that no conduit for a water transfer should be considered a water of the U.S., and some suggested regulatory language that would achieve that outcome. EPA is

declining to adopt this recommendation. The Water Transfers Rule addresses whether a water transfer is the "addition" of a pollutant that may require a section 402 permit. The definition of "waters of the United States is an entirely separate question, and the agencies do not believe jurisdiction should be linked to water transfers in this way. Also, as is evidenced in the record for the Water Transfers Rule, in some instances the conduits that transfer water between two waterbodies are themselves waters of the United States. The agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries. The agencies have not in practice asserted jurisdiction over these types of features where they do not have surface connections back into, and contribute flow to, "waters of the United States." The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial. See summary response at 7.4.2.

Some commenters urged that all waters used in industrial processes should be considered not to be waters of the U.S. In support of that position, some commenters noted that, under EPA's Water Transfers Rule, waters during transfers retain their status as WUS unless the water was subject to an intervening industrial process. As noted above, this rule and the Water Transfers Rule address entirely separate questions, and statements in the Water Transfers Rule should not be used in assessing the jurisdiction of the CWA. In response EPA also notes that in the case of the WTR, the intervening industrial process results in a CWA permit being required for the transfer. Thus, there is no inconsistency with that outcome and a finding that in some circumstances waters held for industrial process can be considered to be subject to CWA jurisdiction.

Specific Comments

Committee on Space, Science, and Technology (Doc. #16386)

12.522 Would a permit [under the federal NPDES General Permit] be needed to spray pesticide on land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present? Would that change if the land was in a flood plain? (p. 11)

Agency Response: **NPDES permit coverage is not required for applications of pesticides occurring outside of waters of the U.S. for the purposes of controlling pests on agricultural crops, forest floors, or range lands. The Clean Water Act (CWA) also exempts discharges of agricultural stormwater or irrigation return flow from the need for NPDES permits. Discharges of pesticides directly to a water of the U.S., whether wet or dry at the time of application, are required to be covered under an NPDES permit. A water of the U.S. does not lose its jurisdictional status if it becomes dry during extraordinary circumstances such as drought or if it flows continuously during parts of the year and has no flow during dry months. A discharger will need a permit regardless of whether the waters of the United States are wet, partially wet, or dry at the time of the discharge. General NPDES permits from EPA and the states are available for such discharges.**

12.523 The Forest Service sets Best Management Practices (BMPs) under the Clean Water Act.

Will the Forest Service submit these for approval to EPA?

Which Federal agency – EPA or the Forest Service – is responsible for assuring that these BMPs are consistent with relevant State laws and regulations, especially in (Section) 402 delegation states? (p. 12-13)

Agency Response: **This comment is outside the scope of the rulemaking. Although the specific context for comments regarding the U.S. Forest Service are somewhat unclear, we presume you are referring to the Forest Service's National Best Management Practices (BMP) Program, including their 2012 National Core BMP Technical Guide. With respect to that document, the U.S. Forest Service provided the draft Technical Guide to the EPA for comment, and the EPA provided comments to ensure that the document was most effective in protecting water quality. We defer to the U.S. Forest Service regarding their specific legal authorities and responsibilities.**

12.524 Can you explain why a home builder might need to get a Section 402 permit?

What does a home builder need to do to obtain a Section 402 permit?

What about a 404 permit?

What percentage of homes or commercial developments would need some type of Clean Water Act permit? (p. 19)

Agency Response: **Permitting requirements are outside the scope of the final rule.**

Pennsylvania Department of Environmental Protection Water Management Office (Doc. #7985)

12.525 The rule's focus on Section 404 permitting is problematic for Section 402 permitting. It appears that the rule, which grows out of Section 404 cases decided by the United State Supreme Court, is focused on providing clarification for purposes of Section 404 permitting. This clarity in the Section 404 context, however, will come at the expense of clarity and common sense administration of the Section 402 NPDES program. (p. 5)

Agency Response: **Please see essay 12.3 above.**

12.526 EPA staff assurances and presentations suggest that despite the new rule, the implementation of the Section 402 and 404 programs in Pennsylvania will not change. This does not provide sufficient certainty to Pennsylvania. Because the rule as drafted can be interpreted in ways that could significantly impact the administration of these programs, the language of the rule itself must be clarified in a manner that provides assurance to the public, the regulated community and to states such as Pennsylvania with The proposed rule will impose a significant impact on available resources to implement robust programs and bountiful water resources. (p. 5)

Agency Response: **Please see essay 12.3 above and Economic Analysis Section 8.**

12.527 The proposed rule will impose a significant impact on available resources to implement CWA program requirements. If the issues related to the definitions, and uncertainty about how EPA and ACOE administration of the terms described above are not addressed, the number of water bodies needing to be assessed, water quality standards established, and determinations of impairment will significantly increase. For example, a shallow subsurface aquifer with an established connection to a water body into which septic systems discharge under the proposed rule could now be defined as jurisdictional

triggering the need for an NPDES permit to discharge. Would the aquifer itself also have to be assessed, added to the list of water bodies and defined as impaired or not? (p. 6)

Agency Response: Please see essay 12.3 above, Compendium 11, and Economic Analysis Section 8. The agencies have never interpreted the CWA to include groundwater or shallow subsurface flow as a "water of the United States." As is current practice, non-jurisdictional features can help form a significant nexus between jurisdictional waters. See essay 5.0.

12.528 As written, many of the proposed definitions have the potential to expand the scope of "CWA jurisdictional" waters. This will result in states expending a significant amount of resources assessing, listing, and issuing NPDES discharge permits for activities that have traditionally, and should continue to be, treated as a nonpoint sources, with no real meaningful benefit to protection of water resources in Pennsylvania. For example, discharges from best management practices for the treatment of stormwater runoff, individual discharges to MS4 systems, and septic systems discharging into an aquifer with an established hydrologic connection could all potentially be subject to NPDES permit requirements, even though they are all subject to state law regulations and permit requirements. States do not have the resources to deal with the increase in workload that this change could potentially cause, without any increased water quality protection. (p. 6)

Agency Response: Please see essay 12.3 above and Economic Analysis [insert proper section]. The final rule does not establish any new regulatory requirements nor does it change or add to the CWA's definition of "point source." With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see compendium 7, summary response at 7.4.4

Virginia Department of Transportation (Doc. #12756)

12.529 Another unintended consequence is the impact on Section 402 programs, specifically Municipal Separate Storm Sewer Systems (MS4) permitting. MS4 permittees have been mapping outfalls to jurisdictional waters for over a decade. Features that the permittees have mapped as regulated outfalls may be considered regulated waters according to the proposed rule. The outfall mapping would no longer be valid and would have to be re-done at a multi-million dollar cost for VDOT alone. These newly regulated waters would then need to be evaluated for compliance with the Water Quality Standards and possibly end up on the impaired waters list. More impaired waters leads to more Total Maximum Daily Load (TMDL) requirements. More TMDL requirements lead to more Wasteload Allocations (WLAs) assigned to MS4s and point source discharges. WLAs lead to more action plans developed by MS4s at a multi-million dollar cost to VDOT alone. (p. 9)

Agency Response: Please see essay 12.3 above and compendium 7, summary response at 7.4.4.

California Association of Sanitation Agencies (Doc. #12832)

12.530 If these "adjacent" wastewater and recycled water facilities, including spreading grounds, are defined to be within the jurisdiction of the CWA, it would adversely impact CASA's member agencies' ability to augment groundwater supplies and to effectively provide wastewater treatment services. The plethora of additional and unnecessary requirements, regulations, and permitting associated with making these areas into jurisdictional waters,

including but not limited to the procurement of an NPDES permit, assigning designated uses, exposure to penalties and potential third party liability for effluent violations, and impairment of the ability to operate and maintain these areas, would erect new mandates with no benefit to the surrounding ecosystems and waterbodies. Such a result represents an extreme disincentive to sustainable water supply development and a significant impairment of wastewater agencies' ability to protect public health and safety through innovative and effective wastewater treatment. (p. 4)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling.

State of Montana Department of Justice (Doc. #13625)

12.531 As you know, Montana sought and was granted primacy to implement the National Pollutant Discharge Elimination System permit system in our State, but even beyond the NPDES (MPDES in Montana) permit protections, the Montana DEQ has broad authority to enjoin pollution of state waters or the placement of waste where it will cause pollution, to require cleanup of any material which may pollute state water, and to inspect and require monitoring to prevent pollution. Mont. Code Ann. § 75-5-601 et seq. The point is that Montana has taken primary responsibility for its land and waters as was assumed by Congress when it enacted the Clean Water Act (33 U.S.C. S l25l(b)). The laws and regulations we implement and enforce assure the protection of the quality of traditional navigable waters in and flowing from our State. There accordingly is no justification, in terms of protection of the nation's navigable waters, for extending the reach of the Clean Water Act. (p. 2)

Agency Response: Please see essay 12.3 above. See also Section I of the Technical Support Document for the legal basis for the rule.

Alabama Department of Transportation (Doc. #13948)

12.532 Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, and have a significant impact on my business and State due to the proposed increased jurisdiction over all waters. The expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe. (p. 1)

Agency Response: Please see essay 12.3 above. .

Interstate Mining Compact Commission (Doc. #14114)

12.533 Obtaining a discharge permit is a costly and uncertain process which can take years. In the absence of an appeal process under the proposed rule, individuals and entities may be

forced to obtain a permit to avoid potential federal enforcement action and criminal or civil penalties due to the uncertainties embodied in determining jurisdiction under the rule, when in fact there may well be no jurisdiction for the federal permitting process. (p. 3)

Agency Response: **Please see essay 12.3 above. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to address jurisdictional issues and make jurisdictional determinations on a case-specific basis.**

County Commissioners Association of Pennsylvania (Doc. #14579)

12.534 Production agriculture is one of the top industries and economic drivers in the commonwealth, with more than 7.7 million acres devoted to farmland. Farmers, ranchers and even water quality advocates have noted that the proposed WOTUS regulation is likely to curtail many voluntary water quality improvement projects if such projects would trigger the cost and delay of seeking federal permits, and make it increasingly difficult to meet required water quality requirements.

We also note that state pesticide/herbicide programs and regulations will need to be reevaluated under the proposed WOTUS rule, as the EPA has a pesticide/herbicide permit for all Waters of the U.S. within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near Waters of the U.S. a permit is needed, including strict program and paperwork requirements for pesticide use in communities of more than 10,000. In addition, the use of some pesticide products could be jeopardized by the proposed definition – for example, when farmers and other landowners seek to use land-based pesticides with labels that state "do not apply to water" or that require no-spray setbacks from jurisdictional waters to avoid potential spray drift. Confusion over what are federal "waters" may expose pest-control operators to litigation and threaten effective pest management. (p. 8)

Agency Response: **Please see essay 12.3 above.**

Arizona Department of Environmental Quality, et al. (Doc. #15096)

12.535 State agencies authorize the location of waste treatment lagoons and solid waste disposal units. If groundwater is considered a conduit to a water of the U.S., then waste disposal into a State authorized lagoon or disposal unit could be considered a discharge into a water of the U.S. that EPA can regulate through a permit under Section 402 of the Act. In fact, some may argue that the water in the lagoon or the leachate from a landfill should be considered a water of the U.S. In litigation, citizen plaintiffs have taken the position that if a discharge onto land or into groundwater can move through groundwater and reach a water of the U.S. that discharge is subject to regulation under the Clean Water

Act. Some courts have agreed.[109] In one case, the Conservation Law Foundation alleged that septic systems are point sources that must obtain NPDES permits because nutrients from septic systems move through groundwater and impact navigable water. In that case, EPA disagreed that the septic systems were categorically point sources, arguing that an NPDES permit can be required for a discharge to groundwater *only* where it is directly and immediately connected hydrologically to surface water. *Conservation Law Foundation et al. v U.S. EPA, et. al*., Case No. 1:10-cv-11455-MLW, Memorandum in Support of Defendants' Motion for Summary Judgment, at 20-21 (also noting that a hydrological connection to surface water via groundwater is a site-specific determination).[110]

In contrast to the position EPA took in its summary judgment motion in the *Conservation Law Foundation* case, in the proposed rule the Agencies take the position that groundwater connections *categorically* form the basis for Clean Water Act jurisdiction. Since the rule was proposed, more cases have been filed relying on this misguided theory. See Wildearth Guardians v. The Western Sugar Cooperative, (Case 1:14-cv-01503-BNB) (D. Colo., May 29, 2014) (alleging on-site wastewater ponds are point sources that discharge to waters of the U.S. through groundwater that has a significant biological, chemical and physical nexus to the South Platte River). (p. 5-6)

Agency Response: **See essay 7.1 regarding the waste treatment system exclusion and essay 7.3.6 regarding the jurisdictional status of groundwater. See also essay 5.0 and the response to comment 5.63 regarding using groundwater connections to establish significant nexus. Under existing regulations and the current final rule, waste treatment systems are not waters of the United States. Continuing current practice, any waste treatment system would need to comply with the Clean Water Act by obtaining a section 404 permit if constructed in waters of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. The agencies have consistently interpreted the Clean Water Act to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The final rule continues to exclude groundwater, including groundwater drained through subsurface drainage systems. This decision reflects current agencies' practice and provides greater clarity. This exclusion applies to all groundwater, including shallow subsurface flow. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. While groundwater connections may contribute to establishing a significant nexus, groundwater is not a water of the United States. See essay 5.0 and the response to comment 5.63. While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream**

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

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

waters. When assessing whether a water an (a)(7) or (a)(8) water performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves "waters of the United States." The final rule does not change the EPA's position that discharges that may move through groundwater to reach a water of the United States would require an NPDES permit.

National Association of State Departments of Agriculture (Doc. #15389)

12.536 State §402 National Pollutant Discharge Elimination System (NPDES) permits regulate a wide range of discharges, including for agriculture pesticide NPDES general permits and Concentrated Animal Feeding Operations (CAFO). Pesticide NPDES general permits were written by states in all but a few instances, and regulate pesticide applications "into, over or near" water. They vary widely by state in scope and whether they regulate discharges to "waters of the U.S." or "waters of the State." The proposed WOTUS rule will likely have significant impacts on the scope of such permits, state efforts to enforce them, and potential third-party lawsuits.

Because many ditches and ephemeral or intermittent features in or near farm fields, pastures, and woodlots could well become newly-jurisdictional under the proposed rule, application in or around those features of terrestrial pesticides (those products lacking a FIFRA label explicitly allowing application into, over, or near "waters") might result in CWA violations and citizen suit vulnerabilities from inadvertent pesticide contact with these types of newly-jurisdictional waters. For use of FIFRA-labeled aquatic pesticides, EPA's Pesticide General Permit (PGP) covers use patterns for: (1) mosquito and other flying insect pest control; (2) weed and algae control; (3) animal pest control; and (4) forest canopy pest control. Agricultural use patterns of terrestrial pesticides are not covered under the PGP. We are concerned the agencies have not given enough consideration to the financial and policy impact of the proposed rule or the legal conundrum represented by the interface between the requirements of the CWA and FIFRA relative to pesticide use in "waters."

For example, would farmers and ranchers routinely making seasonal treatment of, noxious weeds in fields containing dry ephemeral conveyances or manmade ditches now also be required to comply with NPDES permit requirements? If so, would these producers need to secure individual NPDES permits, since terrestrial pesticide use is not covered by the PGP? Most applicators using terrestrial pesticides may not be aware that treatment areas they are treating may for the first time contain newly-jurisdictional "waters," and in addition to FIFRA label requirements, they might now also need to comply with NPDES performance requirements for "aquatic" pesticide applications. This would pose an extreme difficulty for commercial applicators applying terrestrial pesticides by air, when such ephemeral features could well be unmarked, dry or hidden by vegetation.

Even if landowners and applicators were only to suspect that the new rule might extend federal jurisdiction onto areas where they routinely treat ditches or ephemeral

conveyances with terrestrial pesticides, the time it would take to verify the precise locations and WOTUS status of any jurisdictional conveyances, and then also satisfy applicable NPDES permit compliance steps, would be an unwarranted burden and source of ongoing legal uncertainty. Furthermore, timely pest control would be precluded if producers and others have to wait months for the agencies to apply their "best professional judgment" to determinations of whether a potential "significant nexus" exists that may influence their pest control plans or where the jurisdictional boundaries of encountered floodplains may be. These concerns extend beyond pesticide use – we are also concerned that the application of other agricultural inputs in a similar manner, such as fertilizer, would also be problematic under the proposed rule. (p. 5-6)

Agency Response: **Please see essay 12.3. Issues related to the permitting of pesticide or herbicide applications are outside the scope of the proposed and final rule. The rule does not change the requirements for complying with the pesticide general permit (PGP). Please also see Economic Analysis Section 8 – Estimate of Clean Water Act Section 402 Costs and Benefits.**

Governor's Office – State of Utah (Doc. #16534)

12.537 Utah has long been delegated from EPA the responsibility of administering the National Pollutant Discharge Elimination System (NPDES) Program. This is the program governed by Section 402 of the Clean Water Act. By statute, anyone discharging pollutants to "Waters of the State," which are defined as all Utah waters, both ground water and surface waters, including ephemeral and intermittent streams, must secure a permit to do so.[111] Utah has no other surface water permitting program other than the one administered under the federal NPDES program.

Under the proposed EPA rule, it appears that a significant number of Utah stream miles will become non-jurisdictional since the waters flow into closed basins that are neither tributaries of navigable waters or have a significant nexus to navigable waters. The state estimates this to be 983 stream miles, or 5.8% of all Utah perennial stream miles, 24,933 miles of intermittent stream, or 16.1% of all Utah intermittent streams and 24,933 lake acres, or 16.1% of all Utah lake acreage. It is not possible to determine, except on a case-by-case basis, the increased number of intermittent stream miles that would become jurisdictional under the proposed rule due to the need to identify if the intermittent streams are defined by a bed, bank and ordinary high-water mark.

If the proposed rule goes into effect, Utah may be obligated to develop a companion state surface water permitting program to the federal NPDES program, otherwise 62 NPDES permits may become invalid as a consequence of the receiving waters associated with those permits being deemed non-jurisdictional. (p. 11-12)

Agency Response: **See essay 12.3 above. Additionally, EPA notes that while some states' legal authorities allow the state to regulate waters more broadly than the Clean Water Act and may regulate discharges into groundwater, the agencies have never interpreted the CWA to include groundwater as a "water of the United States." Where the legal authority exists, some states currently choose to**

[111] Utah Code Ann. § 19-5-10 7 (West 1953).

administer a surface water permitting program for discharges into waters of the state in addition to administering an authorized NPDES program. Comments speculating on a state's potential for developing such a separate permitting program are outside the scope of this final rule.

Allen Boone Humphries Robinson LLP (Doc. #19614)

12.538 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 will impact grocery stores, shopping centers, big box stores, stadiums, airports, schools, churches, hospitals, and many other kinds of commercial and institutional facilities. (p. 6)

Agency Response: Please see Compendium 7, summary response 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

New Hanover County, North Carolina (Doc. #5609)

12.539 The issue of hydrologic trespass, or impacts caused outside of the property boundaries, is also a concern. Declaring portions of stormwater management systems as "waters of the US" will limit maintenance techniques available and could lead to hydrologic trespass offsite from existing drainage conveyances. (p. 2)

Agency Response: Please see essay 7.4.4.

12.540 Clarification of the proposed rule should be made concerning pesticide applications and permitting requirements per Section 402 National Pollution Discharge Elimination System program as many stormwater conveyance systems are currently treated. (p. 3)

Agency Response: Please see essay 12.3 above as well as essay 7.4.4.

City of Phoenix, Arizona, Office of Environmental Programs (Doc. #7986)

12.541 The overly broad definition of "tributary" substantially increases the areas considered to be WOTUS, and therefore, substantially increases the areas covered by the Stormwater Pesticide General Permit. This would increase the administrative effort and cost of many of the City's basic maintenance activities, again with no additional benefit to the environment. We respectfully request that all potential increase over the current regulated WOTUS be deleted. (p. 2)

Agency Response: Please see essay 12.3 above; Compendium 8 regarding tributaries, Compendium 11 regarding economics, and the Economics Analysis Section 8. Additionally, EPA notes that there is no "stormwater pesticide general permit" as the commenter states and the final rule does not affect the applicability or implementation of the pesticides general permit (PGP).

City of Aurora Water Department Administration (Doc. #8409)

12.542 Any change that redefines WOTUS has the possibility of also affecting other notable CWA sections such as the Water Quality Standards and National Pollution Discharge

Elimination Standards (NPDES). This change will likely add complexity and additional costly regulations to a substantially greater number of water bodies than are currently regulated. (p. 1)

Agency Response: Please see essay 12.3 above; Compendium 11; and Economic Analysis Section 8.

Southern California Association of Governments (Doc. #8534)

12.543 Congress established a system where discharges from point sources into Waters of the United States must be regulated with National Pollutant Discharge Elimination System permits and must be subject to technology-based standards. The point of compliance is ultimately the point of discharge into the Waters of the United States. If the point source is itself a Water of the United States then where is the point of compliance, and what standard applies? The Proposed Rule would thereby create substantial confusion about which standard applies and where. Moreover, if the treatment system is required to meet discharge standards within the system, where is treatment to occur? (p. 2)

Agency Response: Please see essay 12.3 above. The final rule does not change or establish NPDES implementation requirements, and permitting requirements are beyond the scope of the rule. EPA maintains its longstanding position that a ditch can be both a point source and a water of the United States. See the Technical Support Document. The final rule asserts jurisdiction only over ditches that meet the definition of "tributary." See essay 6.0 regarding ditches. Tributaries are waters of the United States and subject to the Clean Water Act. See also essay 7.1 regarding the waste treatment system exclusion. The final rule does not change the waste treatment system exclusion. Waste treatment systems are not waters of the United States. As is current practice, any waste treatment system would need to comply with the Clean Water Act by obtaining a section 404 permit if constructed in waters of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. The appropriate placement of the waste treatment system impoundment will be driven by the Section 404(b)(1) guidelines analysis during the course of the Corps' permitting process, and by the specific design of the permittee's treatment train.

Board of Commissioners, Carroll County, Maryland (Doc. #8667)

12.544 County-maintained, man-made conveyances and ditches, used to treat or mitigate stormwater in particular, should not be subject to a Section 404 permit. Ephemeral flows in these ditches are already captured through the CWA Section 402 NPDES MS4 permit process. Adding the Section 404 permit process to these facilities increases counties' maintenance costs and NPDES MS4 permit compliance costs, which further encumbers the process and decreases the expedience with which local jurisdictions can implement mitigation projects and measures.

Since stormwater activities are not explicitly exempt under the proposed rule, we are concerned that MS4 ditches could be classified as "Waters of the U.S." If these facilities flow into a Water of the U.S.," they are already regulated through the Section 402 NPDES MS4 permit process. Doubling up on the permit coverage and requirements will

just create a more cumbersome, expensive, and lengthy process for local jurisdictions, with greater cost to taxpayers and slower progress toward Bay clean-up.

This will create enforcement conflicts and overlapping responsibilities for Federal agencies. Even if this is not the current intention of the agencies, they may be forced to do so through citizen and interest group lawsuits. These additional requirements in the process will also create a need for additional staff for the Federal agencies. (p. 2)

Agency Response: Please see essay 7.4.4 on MS4s and stormwater control features.

City of Chesapeake Department of Public Works (Doc. #9615)

12.545 Under the proposed Rule, the City's ability to perform required routine maintenance and retrofitting of stormwater management facilities to improve water quality could be severely limited because most of the City's facilities would be regulated as WOUS. The proposed Rule may require unnecessary and resource intensive Section 404 permitting for routine maintenance and retrofitting of the City's stormwater management facilities. (p. 7)

Agency Response: Please see summary essay 7.4.4 on MS4s and stormwater control features.

Somerset County (Pennsylvania) Commissioners (Doc. #9734)

12.546 Shifting compliance for MS4, not only burdens a County with unanticipated, unaffordable, unnecessary expenses, but also reduces the opportunity to create other cost-effective storm water management systems. The proposal, therefore, represents a giant step backward from stretching fiscal resources with regional approaches. ... These infrastructure projects are maintained by municipalities and private developers and the rule will affect them. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Board of Commissioners of Carbon County, Utah (Doc. #12738)

12.547 The proposed rule also applies to all CWA programs, not just in Section 404. Storm water programs, traditionally regulated under CWA Section 402, are not exempt under the proposed rule and may be further regulated under numerical water quality standards (including total maximum daily loads). As stated, these new requirements would potentially extend EPA's reach into local land use activities for storm water management. (p. 5)

Agency Response: Please see summary response essay 7.4.4.

Association of California Water Agencies (Doc. #12978)

12.548 The proposed rule fails to recognize important distinctions between section 402 and section 404 of the CWA.

The Supreme Court and the Ninth Circuit Court of Appeals have noted that the definition of "waters of the United States" for both sections 402 and 404 is functionally equivalent (See *Rapanos,* 547 U.S. at 742; *San Francisco Baykeeper, et al. v. Cargill Inc.,* 481 F.3d 700, 705, 704, n.4 (9th Cir. 2007). Nevertheless, there are important distinctions between

the two sections. Section 402 is an exception to the general prohibition against the discharge of any pollutant to navigable waters (33 U.S.C. § 1342(a)). That section allows for the discharge of pollutants from point sources by permit and is primarily concerned with regulation of pollution – which when discharged into waters of the United States, travels downstream (*Id*. at § 1342(a); *Rapanos*, 547 U.S. at 744-745). By contrast, section 404, which allows for the discharge of dredged or fill material, is primarily concerned with the regulation of material "which is typically deposited for the sole purpose of staying put, [and] does not normally wash downstream . . . ." (*Rapanos*, 547 U.S. at 744). This distinction is important because, as discussed more fully below, the requirements of section 402 may still apply to man-made, non-stream conveyances that are not themselves jurisdictional, whereas, the requirements of section 404 do not.

The Supreme Court has noted that while the definition of "waters of the United States" is the same for both sections, just because a water body is non-jurisdictional under section 404, does not necessarily mean that it lies outside the purview of EPA for purposes of its enforcement of section 402 (*Rapanos*, 547 U.S. at 743). The Court has stated that "there is no reason to suppose that our construction [of 'waters of the United States' under section 404] significantly affects the enforcement of § [402] . . . . The [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.' "(*Id*. emphasis in original). Consequently, a water body that is non-jurisdictional under section 404, may still be subject to EPA's enforcement authority under section 402. For example, it is possible that a pollutant discharged to an intermittent channel such as a gully, rill, or non-wetland swale (not considered "waters of the United States" even under the proposed rule (79 Fed. Reg. 76, 22199)) may eventually wash downstream into navigable water. Even though the channel to which the pollution was originally discharged does not constitute "waters of the United States," EPA may still regulate such a discharge because it constitutes the addition of a pollutant to navigable waters (*Rapanos*, 547 U.S. at 743).

Thus, characterizing man-made, non-stream conveyances as tributaries is unnecessary for subjecting them to the permitting requirements of section 402. Such facilities, when discharging pollutants to waters of the U.S. (which may affect the physical, chemical, or biological integrity of navigable waters), are subject to the permitting requirements of section 402, whether they constitute tributaries under the definition of waters of the U.S. or not. Such man-made, non-stream conveyances, however, should not automatically be subject to the permitting requirements of section 404 because the discharge of "fill" material does not automatically affect the physical, chemical, or biological integrity of navigable waters that might be located some distance downstream. For example, replacing a length of pipe on a flume (such as those found on EID's Project 184) that may indirectly contribute flow to a traditional navigable water, does not affect the chemical, physical, or biological integrity of that water. In this sense, the proposed rule would unnecessarily expand jurisdiction of "tributaries" to man-made facilities. (p. 7-8)

Agency Response: **See essay 12.3. The final rule does not change or impose any new requirements for the NPDES permit program. The final rule does not change the EPA's position that discharges may move through groundwater to reach a water of the United States and such discharges require an NPDES permit.**

12.549 If expanded to include water conveyance infrastructure, the tributary definition would make EPA's water transfers rule exclusion from section 402 permits inconsistent with the requirements for section 404 permits. (p. 8)

Agency Response: **See essay 12.3.**

Pinellas County Board of County Commissioners (Doc. #14426)

12.550 The County has other permitted discharges and operations including our Solid Waste facility and reuse water operations that currently discharge into drainage systems not considered WOTUS; however, based on the proposed rule the areas in question would become WOTUS. How would such a determination impact these permits and operations? It is clear that additional CWA requirements including water quality standards and additional permitting for maintenance activities will apply to a larger portion of the County's stormwater system under the proposed rule. MS4's and other NPDES permittees are already heavily regulated and additional requirements that increase costs for achieving permit criteria and water quality improvements is concerning and unnecessary. (p. 3)

Agency Response: **Please see essays 12.3 and 7.4.4.**

Waters of the United States Coalition (Doc. #14589)

12.551 Discharges from water supply facilities into traditional navigable waters are generally exempt from the Clean Water Act's NPDES requirements under the Act itself, and EPA's water transfer rule. Nonetheless, if the actual conveyances are classified as waters of the United States, activities within the canals and aqueducts could require a separate permit from the ACOE. (p. 24)

Agency Response: **See essay 12.3.**

Klamath Drainage District - Clyde Snow Attorneys at Law (Doc. #15139)

12.552 The statement that "[t]he agencies propose ... no change to the regulatory status of water transfers" appears multiple times in the Preamble.[112] EPA's Water Transfers Rule excludes any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA.[113] The Water Transfers Rule does not define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change in the proposed Rule.[114] In addition to the statements in the preamble, the final rule should state expressly in the text of the Code of Federal Regulations that it does not change the regulatory status of water transfers. (p. 4)

Agency Response: **See essay 12.3.**

[112] 79 Fed. Reg. at 22189; *see also id.* at 22193, 22199 and 22217.
[113] 40 C.F.R. § 122.3(i) ("Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use .... ").
[114] *See* 40 C.F.R. § 122.2; 73 Fed. Reg. 33,697, at 33,699, note 2 (June 13, 2008).

Sacramento County, California (Doc. #15518)

12.553 Water reuse facilities are being built across the country to generate an additional water supply for irrigation purposes and sometimes drinking water. *It is unclear how the proposed definitional changes would impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems*. Additional clarification is needed by the agencies. (p. 5)

Agency Response: Please see essay 12.3. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP).

Montana Wool Growers Association (Doc. #5912)

12.554 By expanding WOTUS, the Proposed Rule makes more waters susceptible to *point* source regulation. Therefore, more agricultural activities are likely to result in a discharge into a WOTUS and be subject to point source regulation. The EPA has clarified "NPDES permits will NOT be required for the application of fertilizer or pesticides to farm fields. While this may be true of upland farm fields with no connection to WOTUS, it is not true of all farm fields and agricultural land. For instance, Section *IV(D)* of this comment letter explains how most ditches will be WOTUS under the Proposed Rule, meaning NPDES permits would be required for pesticide application along ditch banks (whether the ditches were currently dry or carrying water). (p. 11)

Agency Response: Please see essay 12.3. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP).

Western Coalition of Arid States (Doc. #14407)

12.555 We believe the proposed rule will unfairly require our WESTCAS members to obtain additional §402 and §404 permits to operate their groundwater recharge projects. At a minimum, our members would be required to apply for and obtain coverage under a §402 Pesticide General Permit to address herbicide application activities to control vegetation, and possibly coverage under a federal §404 Nationwide General Permit for any maintenance activities that involve excavating or grading to control compaction. In addition, our members that use treated effluent for recharge may also be required to apply for and obtain individual NPDES discharge permits before their flows could be discharged into the basins. (p. 9)

Agency Response: Please see essay 12.3. The final rule includes a new exclusion at (b)(7) for some groundwater recharge projects. The requirements for and implementation of the pesticides general permit (PGP) or any NPDES permits are beyond the scope of this rule.

Georgia Municipal Association (Doc. #14527.1)

12.556 The proposed rule affects all Section 402 National Pollutant Discharge Elimination System programs, which include municipal separate storm sewer systems (MS4s) and pesticide application permits (EPA Program). Section 303 Water Quality Standards (WQS) program will be affected as well as stormwater, green infrastructure, and total maximum daily load (TMDL) standards. Examples of programs which could be affected by the proposed rule include but not limited to are redefining local floodplain

management programs, the process and management of stormwater in regards to runoff control and the treatment to process runoff for water quality, redefining land use plans and ordinances, routine maintenance of dirt roads and watershed delineation are just to name a few. (p. 6)

Agency Response: **Please see essays 12.3, 7.4.4, and the Economic Analysis section 8.**

12.557 How does a local jurisdiction maintain a dirt road and ditch under the proposed rule without getting a permit? Roads are bladed, creating off-fall many times into the ditch, and the ditch usually has to have sediment removed for the runoff to move in a positive direction, which is usually a stream or at minimum a channel that is dry and when wet leads to the stream. As proposed, it would appear to me that 402 permits would be required for maintenance of dirt roads. Permitting would become a nightmare for the local jurisdiction. (p. 9)

Agency Response: **See Compendium 6 (Ditches). The final rule excludes many ditches from jurisdiction, including ephemeral ditches that are not a relocated tributary or excavated in a tributary; intermittent ditches that are not a relocated tributary, excavated in a tributary, or drain wetlands; and ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial.**

The United States Conference of Mayors et al. (Doc. #15784)

12.558 Local governments use pesticides and herbicides in public safety infrastructure to control weeds, prevent breeding of mosquitoes and other pests, and limit the spread of invasive species. While the permit has general requirements, more stringent monitoring and paperwork requirements are triggered if more than 6,400 acres are impacted in a calendar year. For local governments who have huge swathes of land, the acreage limit can be quickly triggered. The acreage limit also becomes problematic as more waterbodies are designated as a waters of the U.S. (p. 7)

Agency Response: **Please see essay 12.3. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP). Please see Compendium 11 and Economics Analysis for an explanation of how EPA evaluated the final rule's impact on other CWA programs.**

Washington State Water Resources Association (Doc. #16543)

12.559 As more so-called jurisdictional waterbodies (…) are considered jurisdictional, additional point and nonpoint sources will need to be included in TMDL calculations. It may also be necessary to reopen existing TMDL allocations for purposes of including within the calculations the new point and nonpoint sources. (p. 8)

Agency Response: **The final definitional rule does not change EPA's or states' procedures for assessing and listing waters. Please see Compendium 11 and Economics Analysis for an explanation of how EPA evaluated the final rule's impact on other CWA programs, including TMDLs.**

U.S. Chamber of Commerce (Doc. #14115)

12.560 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. (p. 8)

Agency Response: Please see essay 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

12.561 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. (p. 10)

Agency Response: Please see essay 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

12.562 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. (p. 10)

Agency Response: Please see essay 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

12.563 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. (p. 10)

Agency Response: Please see essay 7.4.4.

12.564 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. (p. 10)

Agency Response: Please see essay 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

12.565 Control of weeds growing near ditches and impoundments, whether through mechanical techniques or herbicide applicators, can trigger section 404 or 402 permitting requirements. (p. 10)

Agency Response: Please see essay 12.3. The requirements for and implementation of the pesticides general permit (PGP) are beyond the scope of this rule.

12.566 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. (p. 14)

Agency Response: Please see 7.4.4. Permitting requirements for municipal stormwater discharges and the scope of the stormwater regulatory program are outside the scope of this rule.

John Deere & Company (Doc. #14136.1)

12.567 The Proposed Definitions Will Increase Clean Water Act Section 402 Permitting Obligations Which Do Not Consider Agricultural Requirements

The proposed definitions will significantly expand the geographic area under which the agencies are obligated to exercise authority over discharging sources under the National Pollutant Discharge Elimination System (NPDES) set forth in Section 402 of the CWA. Essential farming activities, which vary significantly based on local soil, weather, pest, and overall crop conditions, will trigger the permitting and liability requirements for discharges of "pollutants" required by Section 402 of the CWA.

Under the NPDES, all facilities discharging pollutants from any "point source" into waters of the United States are required to obtain a permit. Although "return flows from irrigated agriculture" are exempt from the NPDES, sprayers and nozzles on farm equipment have been deemed to be "point source conveyances" requiring such a permit.[115] Thus, the application of nutrients or pesticides at, near, or over "waters of the United States" through the use of a nozzle or sprayer could be deemed the discharge of a pollutant requiring coverage under a NPDES permit. If residue in ditches remains after application, NPDES regulation will extend to areas that have potential to carry flow only rarely. A greatly expanded geographic area over which the EPA exercises jurisdiction will result in the agency's effective regulation over a significant portion of agricultural practices it currently does not regulate.

The expanded reach of EPA's geographical jurisdiction under Section 402 is of particular concern given court cases holding that permits for new or increased point source discharges into impaired waters must ensure compliance with water quality standards.[116]22 Under the CWA it is, therefore, conceivable that the EPA could require, and at the same time deny, a permit to a farmer for the application of nutrients to his/her field, resulting in the possible loss of such crops. (p. 10)

Agency Response: Please see essay 12.3. The Ditches are jurisdictional under the rule only if they both meet the definition of "tributary" and are not are not excluded under paragraph (b)(3) in the rule. Please see Compendium 6, Ditches.

12.568 The Proposed Rule Does Not Address How NPDES Permit Requirements Would Be Administered in Conjunction With Integrated Pest Management Systems and Would Duplicate Other EPA Regulations Addressing Pesticides.

[115] *National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009).
[116] *Friends of Pinto Creek v. EPA*, 504 F. 3d 1007 (9th Cir. 2007).

Over the past 40 years, government, associations, universities and farmers have worked on defining Integrated Pest Management (IPM) Plans. IPM is best defined as the practice of preventing or suppressing damaging populations of insect pests by application of the comprehensive and coordinated integration of multiple control tactics. IPM plans are used by growers around the country and are necessary to identify the pest and pressures that reduce yields, and determine the correct course of comprehensive action to ensure plant health. For example, growing cotton may require treating over a dozen insect and weeds over the life cycle of the plant. These decisions to address various pests are often made within a short timeframe, and once the pest is identified, immediate treatment is needed to ensure plant health. Requiring an individual NPDES permit each time one of those pest management decisions needs to be made could result in delays in treating insects and weeds, leading to damage and potential destruction of the crop.

Additionally, the NPDES permitting requirements made applicable to more land area would be a duplicative regulation, since the safety of the uses impacted has already been evaluated by EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). EPA's evaluation under FIFRA is extensive with consideration of potential for movement away from the site of application and any necessary restrictions for protection of water quality. Pesticides registered for use under FIFRA do not pose unreasonable risks to human health or the environment when used as directed by the approved label. (p. 10-11)

Agency Response: **Please see essay 12.3. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP). Permitting requirements are beyond the scope of this rule.**

Katy Area Economic Development Council, Inc. (Doc. #15182)

12.569 Working with the State of Texas and Counties, the EPA should refine and implement storm water quality processes, practices and procedures that are implemented under Section 402 of the CWA. Katy Area EDC and WHA feel that the storm water program represents a better and more effective avenue for achieving real and affordable improvements to water quality within the contemplated zone of CWA jurisdiction expansion in the Western Gulf Coastal Plain (WGCP). (p. 2)

Agency Response: **Please see essay 7.4.4.**

Automotive Recyclers Association (Doc. #15343)

12.570 Rather, ARA urges the agencies instead to focus its collective efforts on making the current programs under the CWA more effective and ensuring that all regulated industries are actually complying with the program mandates. ARA strongly believes that no new definitions of the waters of the US are necessary to protect and promote our nations waters; rather ARA members who are regulated under the NPDES urge regulators to better allocate program resources to ensure that ALL facilities subject to NPDES are permitted and monitored. Too often professional automotive recyclers hear from EPA inspectors that the "facility down the road will not be inspected because it is not on the inspection list".... implying that the facility has never fulfilled its statutory obligation to apply for a permit to discharge stormwater runoff to our nation's waters. EPA must work to obtain participation by all regulated facilities. Outcome measurements of the current

program need to be evaluated and if necessary changes need to be made before any new programs should be considered. (p. 3)

Agency Response: **Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. Comments on EPA's inspection policies are outside the scope of this final rule.**

12.571 Again, in an attempt to clarify exactly which waters are considered waters of the US, ARA believes that the agencies have made the entire NPDES unworkable. (p. 4)

Agency Response: **Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. NPDES permit program requirements are beyond the scope of this rule.**

12.572 EPA has developed technology based and water quality standards to prevent the discharge of 126 pollutants in toxic amounts in our nation's waters. According to EPA's Water Permitting Guide, these pollutants have been grouped into three general categories under the NPDES program: conventional, toxic and non-conventional. Also, NPDES permits are issued only to direct point source discharges and direct sources discharge wastewater directly into the receiving water body. Note that the discharge which is regulated is defined as going into only one water body. The proposed rule fails to detail how the direct point paradigm would apply to adjacent, neighboring waters or waters that have significant nexus with the water body which is directly receiving the discharge. (p. 5-6)

Agency Response: **Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. NPDES permit program requirements are beyond the scope of this rule.**

12.573 Also monitoring requirements are developed for each pollutant. If the number of waters receiving a permitted facility discharge increases, than so will the burden on the facility to monitor the discharge into an increased number of waters. The complexity of the proposal is daunting and will do little to actually improve the health of our nation's waters.

For instance, when a regulated facility applies for a stormwater permit, the body of water to which the facility expects to discharge stormwater runoff is well defined. The facility is informed by the permit authority about the required actions that must be taken in terms of monitoring and reporting and a stormwater pollution prevention plan is established based on the characteristics of the specific water body to which the stormwater runoff will discharge. Each water body is defined by state water quality standards and has limits on the levels of chemicals that it can absorb and remain "healthy." The proposed new definitions however, do not outline how a permit can cover discharges to neighboring, adjacent or significant nexus water bodies that are deemed to be connected to the main water body to which the facility is discharging. (p. 6)

Agency Response: **Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the**

final rule on states that administer the NPDES program. NPDES permit program requirements are beyond the scope of this rule. See also essay 7.4.4 regarding stormwater.

12.574 Many automotive recycling facilities are already subject to very complicated permits and do not understand the need for additional regulations. For example, a permit today may contain an effluent limit for total suspended solids (TSS) based on national effluent limit guidelines (technology based), a limit for ammonia based on prevention of aquatic toxicity (water quality-based) and a five day biochemical oxygen demand (BOD 5) limit based for part of the year on effluent limit guidelines and for the remainder of the year on water quality considerations for a specific body of water. ARA does not understand how the agencies will be able to develop workable permit limits when multiple waters which are adjacent or have a significant nexus to the main receiving waters are now defined as waters of the US and are next to or are downstream from the main water of jurisdiction.

Also, general permits may only be issued to dischargers within a specific geographical area such as city, county or state political boundaries. How will the proposed rule handle a discharger who now because of the new water body definitions will be discharging across established boundary systems?(p. 6)

Agency Response: Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. NPDES permit program requirements are beyond the scope of this rule.

12.575 Several other questions surface that are not addressed in the proposed rule, such as:

- Who will regulate, monitor and enforce the runoff to these multiple and connected waters? When there are multiple and alleged connected waters, on which water quality standards will the permit be based?
- Why will small industrial facilities want to absorb the additional regulatory burdens when facilities down the street often neglect to fulfill their permit obligations and as such are not on EPA's radar screen and therefore remain unregulated?
- How will the agencies account for the pollutants which come from multiple facilities which discharge stormwater runoff to the same water bodies?
    - These questions underscore the fact that this proposed rule is not only unnecessary but also unworkable. ARA urges the agencies to focus on improving the current program by ensuring that all discharging facilities are permitted rather than to try to amend a national program based on court decisions that are geographic and industry specific as well as often driven by special interests. (p. 6-7)

Agency Response: Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. NPDES permit program requirements are beyond the scope of this rule. Comments on EPA's or states' inspection and enforcement policies are beyond the scope of this final rule.

Aluminum Association (Doc. #15388)

12.576 (…) [I]f ditches are required to meet water quality standards, this would most likely eliminate any designated mixing zones associated with the previous receiving stream. The current NPDES permitting process requires the discharger to meet water quality criteria under the low flow condition of the receiving stream and meet all applicable acute and chronic toxicity levels, thus ensuring the receiving stream is protected for its designated uses. The additional criteria of meeting water quality criteria prior to the discharge point without a mixing zone is a significant unnecessary burden on the regulated community.

The agency should therefore consider the possible breadth of this part of the proposal and limit the scope of the tributary definition to exclude waters upstream of the point where federal regulation occurs (e.g., at the permitted outfall for facilities covered by an NPDES permit). (p. 5-6)

Agency Response: **See essay 12.3. See also Compendium 6, Ditches.**

Council of Industrial Boiler Owners (Doc. #15401)

12.577 Many CIBO members are subject to the NPDES permitting program. NPDES permits regulate the discharge of pollutants through point sources. A NPDES permit is required when a facility's point source is discharging into a federal jurisdictional water. With the uncertainty of what will be determined to be a jurisdictional water under the proposed rule, a facility may discharge from a point source into a water feature that is not recognized by the facility to be a jurisdictional water but that is determined to be one later Similarly, the rule creates regulatory risk for non-NPDES permitted dischargers. A source not currently subject to the NPDES permitting program could become subject to the program not by any change on behalf of the discharger, but by a change in the classification of the receiving ditch, puddle, or other water. This puts facilities at risk of violating their NPDES permits, the CWA, or unwittingly becoming subject to NPDES requirements, and it creates another regulatory burden for authorized states. Ditches, swales, ponds, and other waters that are part of specifically permitted or unpermitted stormwater and wastewater management systems at manufacturing sites should be clearly exempt from jurisdictional waters determinations. (p. 5-6)

Agency Response: **Please see essay 12.3 above, Compendium 11, and Economics Analysis Section 8 for an explanation of how the agencies considered the effect of the final rule on states that administer the NPDES program. . Additionally, the final rule retains the existing waste treatment system exclusion: waste treatment systems are not waters of the United States. Please see essay 7.1. The final rule adds a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Please see essay 7.4.4.**

Indiana Manufacturers Association (Doc. #15704)

12.578 It is incumbent upon EPA to more clearly explain the activities (i.e., filling, excavating, etc.) that are allowed to proceed without the requirement to obtain a permit. EPA should communicate with state agencies such as IDEM to clarify that all on-site structures associated with the management of water that transport, store, and treat waters are not jurisdictional when covered by a Section 402 permit. (p. 2)

Agency Response: **The final rule retains the existing waste treatment system exclusion: waste treatment systems are not waters of the United States. Please see essay 7.1. Exclusions from permitting requirements for discharges to jurisdictional waters are beyond the scope of this rule.**

DBMC & Associates (Doc. #15770)

12.579 It appears that the expansion of Section 404 jurisdiction that would result from this proposed rule will overlap that of the Section 402 program. At several locations in the proposed rule and its supporting documentation, a significant nexus is described as having three possible components; physical integrity, chemical integrity and biological integrity. Chemical integrity, including sediment run-off is already regulated by the storm water component of the Section 402 program. Industry, commercial and residential developments and utility projects, which are those most commonly getting Section 404 permits, are regulated for storm water quality across the country. The Section 404 program has traditionally regulated "dredge and fill" operations in TNWs and waters that flow directly into TNWs and adjacent wetlands. This program originated to maintain our country's big river navigation system[117]. To expand jurisdiction of the Section 404 program up into the headwaters of every watershed in the country, where most development projects occur, is not only outside the intent of Section 404 of the Act but also requires the regulated community to have to respond to two agencies on the same water quality issue. Please clarify if that is the intent of the jurisdictional expansion proposed by the rule. Please explain why the Section 402 program does not currently provide adequate protections to small tributaries. (p. 4-5)

Agency Response: **Please see section 12.4 regarding the implementation of the Section 404 permitting program. See also essay 12.3 regarding how the final rule does not change or impose new NPDES requirements. The commenter asks why "the section 402 program does not currently provide adequate protections to small tributaries." If, for example, a small tributary headwater stream is determined to be jurisdictional, it is jurisdictional for purposes of both sections 402 and 404. A discharge of pollutants other than dredged or fill material is subject to permitting under section 402. Discharge of dredged or fill material to that small tributary headwater stream is subject to section 404. A permit under one section of the CWA cannot be assumed to "protect the stream" if the discharge is subject to another CWA permit requirement.**

Federal Water Quality Coalition (Doc. #15822)

12.580 Based on the expanded definition of waters of the U.S. in the proposed rule, and based on EPA's Draft Connectivity Report that asserts that all water is part of an aquatic ecosystem, FWQC members must now reevaluate the regulatory status of all water located on their property, or near their activities, irrespective of the location or disposition of that water. That reevaluation could affect their ability to use water management features, because under CWA section 402 discharges into waters of the U.S. must be permitted and meet water quality standards. That reevaluation also could affect

[117] See history of corps on the USACE home page. http://www.usace.army.mil/About/History.aspx

FWQC members' ability to maintain those features, because under CWA section 404 dredging or filling a water of the U.S. must be permitted and mitigated. (p. 6)

Agency Response: See essay 12.3. See also section 12.4 regarding the implementation of the Section 404 permitting program, and Compendium 7 discussing features that are not jurisdictional. Section (b) of the final rule states that waste treatment systems are not waters of the United States (as is current practice), and additionally states that certain stormwater control features and wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling are excluded from jurisdiction.

12.581 The agencies also do not appear to have focused on how the proposed rule will affect permit programs. In her June 30, 2014 blog, Acting Assistant Administrator Stoner said that "permits will NOT be applied for the application of fertilizer to fields or surrounding ditches or seasonal streams."[118] This statement is not accurate. The proposed rule makes all water in a flood plain and all seasonal streams federally regulated waters of the U.S. The application of fertilizer or pesticides to a water of the U.S. can require a permit.[119] The blog also says that "The pesticide general permit only requires a NPDES permit where pesticides are applied directly to a water of the U.S." This statement also is incorrect. The pesticide general permit expressly applies to pesticide applications that take place near water, such as along the bank of a stream, because EPA takes the position that this pesticide will end up in a water of the U.S.[120] EPA's pesticide permit also says "Delineated Waters of the United States may or may not be wet at the time of discharge; however, discharges to such are still considered discharges to Waters of the United States."[121] Administrator Stoner's blog also says that "Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields." That would be true only if the field, or any other area of land, does not have erosional features that EPA or the Corps might consider an ephemeral stream. A permit could be needed to spray pesticide on any land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present. (p. 55)

Agency Response: Please see essay 12.3. The requirements for and implementation of the pesticides general permit (PGP) are beyond the scope of this rule.

Water Advocacy Coalition (Doc. #17921.1)

12.582 Under the proposed rule, any channelized features that contribute flow, including manmade features, are jurisdictional tributaries.[122] This extends to new features,

[118] http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/
[119] *Nat' Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009).
[120] U.S. EPA, Pesticide General Permit for Discharges From the Application of Pesticides, Authorization to Discharge under the National Pollutant Discharge Elimination System (2011), at 1-1, 9-21 (permit applies at water's edge as well as in water).
[121] *Id*. at A-8 (defining waters of the U.S. to include areas that are not wet at the time of discharge).
[122] *See* 79 Fed. Reg. at 22,263.

including a facility's internal conveyances that are not included in existing NPDES permits. A NPDES permit is required for the discharge of any pollutant from any point source into waters of the United States.[123] Thus, a NPDES permit would be required for the discharge of a pollutant from a point source into any system or feature covered by the proposed expanded waters of the United States definition, such as ditches and other manmade conveyances. Moreover, with the proposed rule's substitution of the new waters of the United States definition in 40 C.F.R. § 122.2, a NPDES permit will be required for stormwater discharges into newly covered features, including MS4 ditches and other stormwater conveyances. Ditches and conveyances, including those used for collecting and conveying stormwater, could be regulated as both point sources and as waters of the United States.[124]. In other words, point source flow into the feature or system would be regulated, as well as discharges from the system. This will result in the need for additional permits, duplicative regulation, and an increased risk of third party litigation.

As discussed in more detail below, as waters of the United States, these features would be subject to section 303 WQS, including numeric effluent limitations.[125] For features that do not meet WQS, a TMDL must be established.[126]

In addition, as waters of the United States, even routine maintenance on ditches or stormwater conveyances or other actions taken to comply with NPDES permit requirements (e.g., changing pH, dredging out solids, or building a structure to take samples) could now require either a 402 or 404 permit. For example, the installation of baffles and weirs to facilitate removal of pollutants such as sediment in stormwater (as required by stormwater permits) would now require complex section 404 permitting procedures. As another example, the stormwater program *requires* the construction of ditches/stormwater retention ponds to manage stormwater. And if the ditches and ponds created pursuant to stormwater BMPs are treated as waters of the United States, this will result in a never-ending cycle of regulation. Ultimately, these more burdensome permitting requirements will result in increased costs and delays.

The proposed rule covers tributaries that have been channelized or otherwise altered for use to create water delivery systems (or for water reuse systems) could now be subject to CWA regulation (including but not limited to the sections 303 and 404 requirements noted elsewhere in this section). And, adding the proposed rule's definition of "adjacent waters," which includes all waters in floodplain and riparian areas, it could mean that holding and recharge ponds that are part of such systems also would be jurisdictional. For example, regulators may have no choice but to require an NPDES permit for storm flows that are diverted to basins for possible water supply, or a section 404 permit for maintenance activities.

Furthermore, the transfer of stormwater from one stormwater conveyance to another stormwater conveyance may trigger permitting requirements because each conveyance

[123] 33 U.S.C. §§ 1311, 1342.
[124] *See* 33 U.S.C. § 1362(14) (a point source is a discernible, confined and discrete conveyance – which includes ditches)
[125] 33 U.S.C. § 1311(b)(1)(C); § 1313(e)(3)(A).
[126] 33 U.S.C. § 1313(d).

could be both a point source and water of the United States under the proposed rule. With the state of the Water Transfer Rule in flux,[127], this could lead to multiple permits required throughout a stormwater system. These increased permitting requirements may lead to lengthier permitting delays. For example, if the proposed rule is made final, and the EPA Water Transfers Rule is ultimately vacated, the Central Arizona Project ("CAP")[128] would be regulated under the NPDES program and would need to obtain a permit to discharge into a traditional water of the United States, such as Lake Pleasant.[129] Additionally, CAP could be required to obtain separate permits each time it introduces water into the CAP system. CAP anticipates that, "[i]n both instances, CAP could be required to treat water as it moves into and out of the CAP system based on differences in the chemical, biological, or physical characteristics of the source and receiving water." Because "treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive," this outcome would be "disastrous" for CAP and other water delivery systems across the country and their customers. The entire CAP likely would be considered a water of the United States, and a section 404 permit would be required for maintenance within the canal. Any State, tribal, federal, or regulated community costs related to regulating and/or permitting these areas has not been considered.

The cost of NPDES permitting requirements already has affected small businesses and cities, and in some instances the permits are cost prohibitive. For example, the court-ordered requirement for an NPDES permit for mosquito spraying is impacting public health, with jurisdictions having to decide whether to pay for the cost of the permit or not spray. Many have had to make the hard fiscal choice of not spraying because of the cost. In recent years, cities like Brewerton, Alabama; Orchard City, Colorado; and Cedaredge, Colorado could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western Slope and Delta County, Colorado have expressed concerns about citizen lawsuits, along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming struggled with increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon's Department of Environmental Quality had to halt invasive species treatments for the same reason as Brewerton and other jurisdictions. We are concerned EPA and the Corps' proposed rule will cause even more cities and small businesses applying pesticides to struggle with high permit costs.

Even if the agencies do not intend to extend jurisdiction to features such as ditches within MS4s and other stormwater conveyances under the proposed rule, ambiguity in the rule

[127] *see Catskill Mountains, et al. v. United States EPA*, Nos. 08- CV-5606 (KMK), 08-CV-8430 (KMK), 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014)

[128] The Central Arizona Project is a water provision system that brings about 1.5 million acre-feet of Colorado River water per year to Pima, Pinal, and Maricopa Counties (the counties in which Arizona's most populous cities, such as Phoenix and Tucson, are located). It has an approximately 336-mile long system of aqueducts, tunnels, pumping plants, and pipelines. *See* http://www.cap-az.com/.

[129] *See* Central Arizona Project, Action Brief: Discussion and Consideration of Action to Adopt Position on the Proposed Rule, 'Definition of Waters of the United States Under the Clean Water Act' (the 'Proposed Rule') (June 5, 2014), http://www.cap-az.com/documents/meetings/06-05-2014/6.%20%20Clean%20Water%20Act%20060514.pdf.

would invite third party challenges. The CWA allows for citizen suits over discharges that EPA and the Corps have decided not to regulate.[130] Here, the agencies have left ambiguity in the proposed rule with respect to items such as where the discharge point is, when a point source is discharging to a "water of the United States," the definition of "ditch," the definition of "upland," and the extent to which the rule would reach internal conveyances that are not included in existing NPDES permits. As in *Baykeeper*, the ambiguities in the proposed rule would leave the agencies and stakeholders vulnerable to citizen suits. (p. 77-79)

Agency Response: Please see essay 12.3. Please also see essay 7.4.4 regarding stormwater management, and Technical Support Document Section 1. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP), which are beyond the scope of this rule. The agencies disagree that the rule subjects ditches to regulation for the first time. Instead, the rule for the first time explicitly excludes certain ditches from the definition of "waters of the United States." See Compendium 6, Ditches.

North Houston Assoc., West Houston Assoc., Woodlands Development Co. (Doc. #12259)

12.583 We believe that the expansion of jurisdiction into the upper reaches of tributaries and into the isolated waters will not appreciably improve water quality of traditional navigable waters (TNW). The EPA should, in concert with the State and Counties, better refine and implement storm water quality processes, practices and procedures that are implemented under Section 402 of the CWA. We feel that the storm water program represents a better and more effective avenue for achieving real and affordable improvements to water quality within the contemplated zone of CWA jurisdiction expansion in the WGCP. (p. 3)

Agency Response: Please see essay 12.3 above, as well as essay 7.4.4 regarding stormwater.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

12.584 Under (the Pennsylvania Erosion and Sediment Control General Permit), erosion and sediment control and storm water management best management practices (BMPs) must be implemented and maintained, and a post-construction storm water management plan must be developed to manage changes in storm water runoff after the earth disturbance activities have ended and the project site is permanently stabilized. Where post construction BMPs stay in place, long-term operation and maintenance schedules must be prepared that allow for inspection of BMPs and repair, replacement or other routine maintenance to ensure proper operation. State oil and gas agencies typically will require drainage ditches to be constructed and stabilized with appropriate erosion and sediment controls. These controls may include installation of water bars within the ditches and lining the channels with riprap. Under the Proposed Rule, any maintenance or repair of these ditches required by the ESCGP-2, including the placement of riprap, would be prohibited by the Corps without a Section 404 permit. (p. 8)

[130] *See, e.g., San Francisco Baykeeper*, 481 F.3d at 706 (citizen suit alleging illegal discharge within an industrial facility into ponds that the agencies declined to assert jurisdiction over).

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Please also see Compendium 6, Ditches.**

Hispanic Landscape Alliance (Doc. #15171.1)

12.585 The proposed WOTUS rule will directly and negatively impact the landscape services industry, both with respect to new and existing landscapes that are designed, built, and maintained by such industry. The expanded jurisdiction in the proposed rule will expand the National Pollutant Discharge Elimination Systems (NPDES) permit requirements. Such an effect will require businesses in the landscape services industry, including those owned and staffed by Hispanics, to obtain permits to perform normal tasks associated with the proper and safe application of algaecides, herbicides, insecticides, and other related products near natural or constructed residential lakes, ponds, or other water bodies on residential properties. The same permitting requirements may extend to land-based pesticide applications which would greatly expand the jurisdiction of protected waters under the proposed rule and increase the direct and negative effects on NHLA members and their ability to maintain landscapes properly. Such effects would have the potential to limit the growth and proper management of landscapes, thereby also limiting the many scientifically documented social, economic, and environmental benefits of properly managed landscapes. Such benefits include significant carbon sequestration, water quality improvement through filtration, oxygen creation, psychological benefits, contributions to improved property values, and other factors. (p. 2-3)

Agency Response: **Please see essay 12.3 above. The requirements for and implementation of the pesticides general permit (PGP) are beyond the scope of this rule.**

12.586 The proposed WOTUS rule will also cause potential significant change to Section 404 of the CWA by requiring new legal and regulatory costs for NHLA members as important small businesses. Such changes may require new permits for common landscape management and development tasks (e.g. debris removal from a water body, pesticide and fertilizer application, minor site development) that did not previously require permits. Further, as defined by the proposed rule, Section 404 permits could be now required to plant vegetation or features in areas noted as floodplain or deemed to be under the jurisdiction of the definitions in the proposed rule. Requiring permits for such tasks would likely add significant time and cost and could require NHLA members to hire consultants and legal counsel to comply. This could have lasting and detrimental economic effects on the Hispanic component of the landscape services industry. Such permit requirement burdens may also diminish land value because of limitations on the future development of such lands. Diminished land values along with increased economic burdens on the small businesses that design, build, and manage such lands would have lasting negative economic effects. (p. 3)

Agency Response: **Please see section 12.4 for responses regarding the impacts on the section 404 permitting program.**

National Association of Home Builders (Doc. #19540)

12.587 The Proposed Rule will Result in Increased Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) Permitting Requirements.

Under the proposed rule, any channelized features that contribute flow, including man-made features, are jurisdictional tributaries.[131] An NPDES permit is required for the discharge of any pollutant from any point source into "waters of the United States."[132] Thus, an NPDES permit would be required for the discharge of a pollutant from a point source into any system or feature covered by the proposed expanded "waters of the United States" definition, such as ephemeral streams, ditches, and other man-made conveyances. Moreover, with the proposed rule's substitution of the new "waters of the United States" definition in 40 C.F.R. § 122.2, an NPDES permit will be required for stormwater discharges for newly covered features, including MS4 ditches and other stormwater conveyances. Ditches and conveyances, including those used for collecting and conveying stormwater, could be regulated as *both* point sources and as "waters of the United States."[133] In other words, flow *into* the feature or system would be regulated as well as discharges *from* the system. This will result in the need for additional permits, duplicative regulation, and an increased risk of third party litigation.

As discussed in more detail below, as "waters of the United States," these features would be subject to the CWA Section 303 water quality standards (WQS), including numeric effluent limitations.[134] For features that do not meet water quality standards, a total maximum daily load (TMDL) must be established.[135]

In addition, as "waters of the United States," even routine maintenance on ditches and stormwater conveyances or other actions taken to comply with NPDES permit requirements (e.g., changing pH, dredging out sediments, or building a structure to take samples) could now require either a Section 402 or 404 permit. For example, the installation of baffles and weirs to facilitate removal of pollutants such as sediment in stormwater (as required by stormwater permits) would now require complex Section 404 permitting procedures. Further, the stormwater program *requires* the construction of ditches and stormwater retention ponds to manage stormwater. If stormwater BMPs are treated as "waters of the United States," this will result in a never-ending cycle of regulation. Ultimately, these more burdensome permitting requirements will result in increased costs and delays, but result in little or no environmental benefit.

Similarly, the transfer of stormwater from one stormwater conveyance to another stormwater conveyance may trigger permitting requirements because each conveyance could be considered to be both a point source and a "water of the United States" under the proposed rule. With the state of the Water Transfers Rule (regulation in which EPA codified its position that NPDES requirements do not apply to water transfers from an

[131] *See* 79 Fed. Reg. at 22,263.
[132] 33 U.S.C. §§ 1311, 1342.
[133] *See* 33 U.S.C. § 1362(14) (a point source is a discernible, confined and discrete conveyance – which includes ditches).
[134] 33 U.S.C. § 1311(b)(1)(C); § 1313(e)(3)(A).
[135] 33 U.S.C. § 1313(d).

area where water is available to another area where water is scarce) in flux, this could lead to multiple permits required throughout a stormwater system.[136] These increased permitting requirements may lead to lengthier permitting delays. For example, if the proposed rule is made final and the EPA water transfers rule is ultimately vacated, the Central Arizona Project (CAP) would be regulated under the NPDES program and would need to obtain a permit to discharge into a traditional "water of the United States," such as Lake Pleasant.[137] Additionally, CAP could be required to obtain separate permits each time it introduces water into the CAP system. CAP anticipates that, "[i]n both instances, CAP could be required to treat waters as it moves into and out of the CAP system based on differences in the chemical, biological, or physical characteristics of the source and receiving water."[138] Because "treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive," this outcome would be "disastrous" for CAP and other water delivery systems across the country and their customers.[139]

Similarly, the proposed rule captures tributaries that have been channelized or otherwise altered to create water delivery systems (or water reuse systems) that could now be subject to CWA regulation (including, but not limited to, CWA Section 303 and 404 requirements noted elsewhere in this section). And, in light of the proposed "adjacent waters" definition, which includes all waters in floodplain and riparian areas, holding and recharge ponds that are part of such systems also would be jurisdictional. For example, regulators may have no choice but to require an NPDES permit for storm flows that are diverted to basins for possible water supply or a Section 404 permit for maintenance activities. Thus, the entire CAP, for example, likely would be considered a "water of the United States," and a Section 404 permit would be required for maintenance within the canal. Any state, tribal, federal, or regulated community costs related to regulating and/or permitting these areas have not been considered.

The cost of NPDES permitting requirements already has affected small businesses and cities and, in some instances, the permits are cost prohibitive. For example, the court-ordered requirement for an NPDES permit for mosquito spraying is impacting public health with jurisdictions having to decide whether to pay for the cost of the permit or not spray. Many have had to make the hard fiscal choice of not spraying because of the cost of obtaining and operating pursuant to a permit. In recent years, cities like Brewerton, Alabama, Orchard City, Colorado, and Cedaredge, Colorado, could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western

[136] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i) (2008)) (hereinafter Water Transfers Rule); *See Catskill Mountains, et al. v. United States EPA*, Nos. 08—CV-5606 (KMK), 08—CV-8430 (KMK), 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014).

[137] The Central Arizona Project is a water provision system that brings about 1.5 million acre-feet of Colorado River water per year to Pima, Pinal, and Maricopa counties (the counties in which Arizona's most populous cities are located, such as Phoenix and Tucson). It has an approximately 336-mile long system of aqueducts, tunnels, pumping plants, and pipelines. *See* http://www.cap-az.com/; *See also* Central Arizona Project, Action Brief, "Discussion and Consideration of Action to Adopt Position on the Proposed Rule, 'Definition of Waters of the United States Under the Clean Water Act' (the 'Proposed Rule')" (June 5, 2014).

[138] *See id*.

[139] Id.

Slope and Delta County, Colorado, have also expressed concerns about citizen lawsuits along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming, struggled with the increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon's Department of Environmental Quality had to halt invasive species treatments for the same reason. EPA and the Corps' proposed rule will cause even more cities and small businesses applying pesticides to struggle with high permit costs.

Even if the Agencies do not intend to extend jurisdiction to features such as ditches within MS4s and other stormwater conveyances under the proposed rule, the ambiguity in the rule is sure to invite third party challenges. The CWA clearly allows for citizen suits over discharges that EPA and the Corps have decided not to regulate.[140] Here, the Agencies have left ambiguity in the proposed rule with respect to items such as where the discharge point is, when a point source is discharging to a water of the United States, the definition of "ditch," the definition of "upland," and the extent to which the rule would reach internal conveyances that are not included in existing NPDES permits. As in *Baykeeper*, the ambiguities in the proposed rule would leave the Agencies and stakeholders vulnerable to citizen suits. (p. 120-122)

Agency Response: **Please see essay 12.3 above, as well as essay 7.4.4 regarding stormwater management, and Technical Support Document Section 1. The final rule does not affect or change the requirements for and implementation of the pesticides general permit (PGP), which are beyond the scope of this rule. The agencies disagree that the rule subjects ditches to regulation for the first time. Instead, the, rule for the first time explicitly excludes certain ditches from the definition of "waters of the United States." See Compendium 6, Ditches.**

Texas Mining and Reclamation Association (Doc. #10750)

12.588 Finally, the Agencies should explicitly recognize, as they have in prior practice,[141] that channels, diversions, ditches, feeder streams, wetlands, and other on-site features carrying flow to and from ponds and impoundments used to treat wastewater and stormwater are part and parcel of water treatment systems at mine sites. Such features are necessary to convey and manage wastewater and stormwater within the mine site, and they help sediment and other pollutants settle out before any water is released to downstream waters of the United States. Water that is conveyed from the mine site to downstream jurisdictional waters requires an NPDES permit and, not surprisingly, NPDES permitting authorities have typically agreed that it would be senseless to require additional permits above the point of discharge to downstream jurisdictional waters. Nevertheless, to avoid any potential confusion in the field concerning the scope of the waste treatment system exclusion, the Agencies should make it clear that the exclusion encompasses all components of the treatment system, including but not limited to ponds/impoundments *and* the related flowing waters within a mining project site that are necessary to convey waters to and from those ponds and impoundments. (p. 16)

[140] *See*, e.g., *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) (citizen suit alleging illegal discharge within an industrial facility into ponds that the agencies declined to assert jurisdiction over).
[141] *36See* fn. 7.

Agency Response: **Please see essays 12.3 and 7.1 regarding the waste treatment system exclusion.**

Kansas Independent Oil & Gas Association (Doc. #12249)

12.589 The agencies suggest that it is not possible to estimate the impact of the proposal on NPDES permitting. It is appropriate to presume if the landscape of jurisdictional waters is expanded, there will be a need to review existing individual and general NPDES permits, as well as to revise future permitting requirements. The agencies have not properly addressed the impact of this proposal on CWA 402 permitting. (p. 6)

Agency Response: **Please see essay 12.3 and Economics Analysis section 8 for an explanation of how the agencies considered impacts to all Clean Water Act programs, including the Section 402 program.**

Pennsylvania Coal Alliance (Doc. #13074)

12.590 As part of each mining permit application in Pennsylvania, the operator must develop, among other things, an operation plan, a description of the treatment systems, an erosion and sedimentation (E&S) plan and a reclamation plan. These plans will identify the anticipated locations of many water features, including existing streams and wetlands and planned diversion ditches, runoff collection ditches, sediment ponds, and treatment ponds. The E&S plan will identify the E&S control measures to be used during each stage of mining. The reclamation plan will identify the anticipated conditions of the property following mining activities. When issued, the mining permit will include an NPDES permit for discharges from the identified outfalls to currently recognized "waters of the United States." The NPDES permit will identify monitoring requirements for each outfall. For some discharges, effluent limitations will also be identified. (p. 9)

Agency Response: **The agencies did not identify a question contained in this comment, but see essays 12.3 and 7.1. NPDES permitting requirements are beyond the scope of this rule.**

12.591 Pennsylvania already has a comprehensive spill response program, with mine operators, among others, being required to develop and implement an environmental emergency response plan, including a Preparedness, Prevention and Contingency (PPC) Plan, as part of the NPDES permit application process for stormwater discharges associated with mining activities. (p. 12)

Agency Response: **Please see essays 12.3 and 7.4.4 for an explanation of how the agencies considered impacts to the Section 402 permitting program and how the final rule addresses stormwater control features. See also compendium section 12.5 and the Economic Analysis for an explanation of how the agencies considered impacts to the Section 311 program.**

12.592 The adverse consequences to mining companies of deeming their artificial ponds and associated ditches and other constructed channels to be jurisdictional waters would be enormous. Newmont would be required to obtain CWA 402 permits from the State to discharge tailings to its tailings impoundments, to discharge pregnant solutions and barren solutions to its pregnant and barren heap leach solution ponds, to discharge water into its quench ponds, and to discharge waters into ditches that are associated with these ponds. Indeed, Newmont might have to shut down operations, and lay off hundreds of

employees, while seeking CWA 402 permits. In addition, in order to modify any of its artificial ponds or constructed channels, or to close them or to reclaim them as operations cease or change, Newmont would need to obtain CWA 404 permits from the Corps. That is because changing the configuration or volume of the ponds or channels, or closing or reclaiming them, would invariably require that all or portions of these ponds or channels be filled in.[142] Such modifications to channels and expansions of artificial ponds are not infrequent. Thus, on top of the reclamation permits, closure permits, and construction permits that Newmont now obtains from the State of Nevada and from the BLM to build, close, and reclaim ponds or channels, Newmont would need extra permission from EPA and the Corps to design and construct its ponds or channels, and to close them at the end of operations. In addition, of course, a 404 permit would carry with it mitigation obligations.

But there is more. Arguably, the State (or EPA) would have to establish, and Newmont would have to meet, water quality standards and Total Maximum Daily Loads ("TMDLs") for these artificial ponds and their associated ditches, even though no one would ever think to fish in these ponds or channels, to recreate in them, or to use them for any purpose other than as industrial ponds. *See* CWA § 303(d). Indeed, Newmont might be required to make its ponds "fishable/swimmable," an absurd proposition especially with respect to tailings impoundments, which are designed as waste disposal units. (p. 24)

Agency Response: **Regarding the questions contained in this comment on the waste treatment system exclusion, please see essay 7.1. The final rule also establishes an exclusion for water filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water. See section (b)(4)(E) of the final rule.**

Tennessee Mining Association (Doc. #14582)

12.593 The Proposed Rule raises concerns as to whether federal jurisdiction over wet weather conveyances will cause confusion at the least or create obstacles and additional cost for mining operations. Impacts to wet weather conveyances from moving equipment across a wet weather conveyance during operation will also become a substantial issue and create enforcement concerns. Moreover, Section 402 Permits are not typically written to protect wet weather conveyances since they have no uses; rather the effluent limits are based upon impact to the jurisdictional stream. In the event wet weather conveyances are jurisdictional under the Proposed Rule, the state may be forced to unnecessarily impose more stringent effluent limits causing increased exposure of operators and permittees to citizen suits or federal and state enforcement. (p. 4-5)

Agency Response: **Please see essays 12.3 and 7.4.4.**

Continental Resources, Inc. (Doc. #14655)

12.594 Under Section 402, a NPDES permit is required for the discharge of any pollutant from any point source into any water or feature deemed jurisdictional under the Proposed Rule.

[142] Under Newmont's reclamation and closure plans, which are approved by the Bureau of Land Management ("BLM") and the State of Nevada, its artificial ponds and associated channels are typically drained at closure, and the ponds and channels filled, graded, and vegetated to support post-mining land use(s).

Given the expansions in jurisdiction described above, NPDES permitting obligations for non-stormwater discharges, and associated water quality standards, will increase exponentially. There are many implications for stakeholders, including the increased regulation of internal conveyances, conveyances subject to water quality standards and total maximum daily loads ("TMDLs"), permit delays, loss of flexibility in state regulatory programs, and increased risk of third party litigation and agency enforcement. (p. 18)

Agency Response: **Please see essay 12.3. See also Economic Analysis Section 8 and Compendium 11 for an explanation of how the agencies considered the cost impacts to the Section 402 program.**

12.595 Under Section 402, a NPDES permit is required for stormwater discharges into any water or feature defined as jurisdictional. Given the broad expansion of waters that would be jurisdictional under the Proposed Rule, previously unregulated conveyances used for collecting and conveying stormwater (e.g., ditches with ephemeral flow) might now be regulated as both stormwater conveyances and as jurisdictional waters. Currently, Continental incorporates numerous standard site construction features-such as access road ditches, run-on ditches, and retention ponds-that have been routinely considered non-jurisdictional under the current rule but would likely be jurisdictional under the Proposed Rule. Storm water maintenance activities along existing roads could also be subject to NWP 3 (maintenance), NWP 19 (minor dredging), NWP 43 (stormwater management facilities) or NWP 45 (repair of uplands damaged by discrete events) if ditches are broadly considered "tributaries." There are many implications for Continental associated with these new requirements, including increased permitting requirements, new conveyances subject to water quality standards, additional compliance conditions to implement erosion and sediment control measures, increased delays, and increased risk of third party litigation and agency enforcement. (p. 18)

Agency Response: **Please see essay 7.4.4 regarding the final rule's treatment of stormwater control features. Also see Compendium 6, Ditches.**

12.596 In North Dakota, the state has looked to EPA's Multi-Sector General Permit ("MSGP") for oil and gas extraction (Part 8, Section I) to require state permitting when there is a reportable spill off location that impacts a jurisdictional water. Normally, discharges of storm water runoff from field activities or operations associated with oil and gas exploration, production, processing or treatment operations, or transmission facilities are exempt from NPDES permit coverage. However, a NPDES permit is required under the MSGP if the facilities have a discharge of storm water resulting in (1) the discharge of a reportable quantity for which notification was required under 40 C.F.R. §§ 110.6. 117.21, 302.6; or (2) the contribution to a violation of a water quality standard. Given the expansion of jurisdiction to virtually all waters, ditches, prairie potholes, and drainages, and the adoption of broad geographic areas being aggregated (e.g., the floodplain and riparian area concepts in the adjacent definition and the single landscape unit in the significant nexus definition), Continental is concerned that it will need to obtain a NPDES permit whenever there is any minor spill. (p. 18)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. The final rule does not affect the current applicability or requirements for compliance with the MSGP. See also essay 7.4.4.**

12.597 The expanded jurisdiction is also likely to result in additional state permitting requirements. For example, the North Dakota Department of Health ("NDDoH") is considering reissuance of the NPDES storm water discharge general permit associated with mining, extraction or paving materials preparation. Under this permit, storm water discharges associated with industrial activities are subject to regulation requirements of Section 402 of the CWA, enforced by the North Dakota Pollutant Discharge Elimination System ("NDPDES") permitting program. Permit requirements include sampling for dewatering of uncontaminated storm water and melt water, and the requirement for companies to obtain NDPDES permits will inevitably increase with more jurisdictional waters. NDDoH currently requires an industrial discharge permit for hydrostatic test water, and additional permitting and compliance conditions may be required if that discharge goes to a newly classified jurisdictional water. In contrast, the Montana Department of Environmental Quality ("MTDEQ") does not currently require discharge permits for upland discharges of hydrostatic test water. More of these discharges would now require permit coverage and subsequent compliance requirements. (p. 18-19)

Agency Response: **Please see essays 12.3 and 7.4.4. NPDES permit requirements are outside the scope of the final rule.**

Nevada Mining Association (Doc. #14930)

12.598 The adverse consequences to mining companies of deeming their artificial ponds and associated ditches and other constructed channels to be jurisdictional waters would be enormous. NvMA member companies would be required to obtain CWA 402 permits from the State to discharge tailings to their tailings impoundments, to discharge pregnant solutions and barren solutions to their pregnant and barren heap leach solution ponds, to discharge water into their quench ponds, and to discharge waters into ditches that are associated with these ponds. Indeed, NvMA member companies might have to shut down operations, and lay off hundreds of employees, while seeking CWA 402 permits. In addition, in order to modify artificial ponds or constructed channels, or to close them or to reclaim them as operations cease or change, an operator would need to obtain CWA 404 permits from the Corps. That is because changing the configuration or volume of the ponds or channels, or closing or reclaiming them, would invariably require that all or portions of these ponds or channels be filled in.[143] Such modifications to channels and expansions of artificial ponds are not infrequent. Thus, on top of the reclamation permits, closure permits, and construction permits that NvMA member companies now obtain from the State of Nevada and from the BLM or US Forest Service to build, close and reclaim ponds or channels, operators would need extra permission from EPA and the Army Corps to design and construct its ponds or channels, and to close them at the end of

[143] Under reclamation and closure plans, which are approved by the Bureau of Land Management ("BLM") and the State of Nevada, its artificial ponds and associated channels are typically drained at closure, and the ponds and channels filled, graded, and vegetated to support post-mining land use(s).

operations. In addition, of course, a 404 permit would carry with it mitigation obligations. (p. 14)

Agency Response: **See essay 12.3 and 7.1. The final rule also establishes an exclusion for water filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water. See section (b)(4)(E) of the final rule.**

National Mining Association (Doc. #15059)

12.599 Calling on-site water features jurisdictional would also trigger increased Section 402 permitting obligations for mining-related activities. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches conveying waters to ponds and impoundments, if jurisdictional, would be subject to water quality standards, total maximum daily loads (TMDLs), and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges into those very same ditches.

By way of another example, under the proposed rule mining companies could be put in the impossible situation of having features designed to either store or treat mining-related materials to improve water quality be themselves required to meet water quality standards. Under such a scenario, how would any mining operation meet existing permit limits if the very systems the Agencies relied on in determining available compliance technologies – i.e. ponds, impoundments, ditches, and conveyances – are no longer available to assist with pre-discharge treatment? Were this to happen, nearly every U.S. mine subject to CWA requirements would be immediately out of compliance, and would have to treat any water before it entered any mine conveyance system. In other words, without clarifying language the proposed rule would create the absurd result of mandating that mining operators treat water to meet NPDES requirements before water is conveyed to water treatment systems designed to ensure that the water meets such NPDES requirements.

Likewise, with respect to Section 402, by essentially moving the extent of federal CWA jurisdiction upstream, the proposal would lead to confusion concerning outfall and receiving waters determinations. During the last 40 years, innumerable NPDES permits have been issued, each of which identifies one or multiple outfalls, which in turn each have a designated "receiving water" and monitoring location. Some of these determinations were made decades ago, and have been reflected in the last six or seven successive NPDES permit renewals. Will permittees and permit issuers now be required to reassess determinations that have been reasonably relied on by regulators and permittees alike for decades – and which the Agencies have not identified as causing any environmental problems – based on the new proposal? If not, the Agencies should specify that outfall and receiving water designations in previously issued NPDES permits cannot be modified based on the new rule. If so, the Agencies have not considered these costs in their economic analysis, and must do so. (p. 17)

Agency Response: **See summary response at 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

Ohio Oil & Gas Association (Doc. #15122)

12.600 Most comments are addressing the effects of this proposed rule on the CWA 404 program. There will be an equal effect on the CWA 402 NPDES permitting program. More NPDES permits may now be necessary for ditches that were never before regulated. These delays should be contemplated and accounted for. (p. 3-4)

Agency Response: Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402. Also please see Compendium 6, Ditches.

South Carolina Association of Counties (Doc. #15573)

12.601 Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide or moving cattle if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earthmoving activity, such as plowing, planting or fencing, except as part of established farming ongoing at the same site since 1977. Technically, EPA could absolutely require a permit for cows or hogs crossing a stream or wet pasture. Under federal regulations, manure is a Clean Water Act pollutant. If a low spot on a pasture is a jurisdictional wetland or ephemeral stream under the new rule, EPA or a citizens group could sue the owner of the livestock that discharge manure into those jurisdictional waters without a Section 402 permit. (p. 1)

Agency Response: Please see essay 12.3.

Coeur Mining, Inc. (Doc. #16162)

12.602 Coeur Mining is required to manage storm and runoff water in the course of conducting its business. The proposed rule will impose federal CWA regulation to features that are constructed and used pursuant to other federal and state regulatory programs. Mining companies, inclusive of Coeur Mining, may routinely maintain, modify, move, or reclaim ditches during the life of the mine because of the dynamic nature of mining operations. If mining companies must now obtain Section 404 permit coverage each time they have to conduct one of these ditch-related activities, operations would effectively come to a halt due to the delays and burdens of permitting. Or worse, mining companies might find themselves in a position where they are unable to comply with other regulatory requirements such as the reclamation requirements of the 43 C.F.R. 3809.

In addition to the implications for Section 404 permitting, the proposed rule is also likely to trigger increased Section 402 permitting obligations for mining-related activities as additional waters within mine sites that were previously non-jurisdictional become jurisdictional. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches conveying waters to ponds and impoundments, could likely be considered jurisdictional waters subject to water quality standards, total maximum daily loads, and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges to those very same ditches. Additionally, by way of another example, under the proposed rule mining companies could be put in the impossible situation of having features designed to either store or treat mining-related materials to improve water

quality be themselves required to meet water quality standards. The Agencies should meet with stakeholders and federal and state regulatory Agencies to fully understand the implications on other federal and state regulatory programs and revise the rule to avoid duplication and conflicting requirements. (p. 4)

Agency Response: **Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402. Also, see essay 7.4.4 regarding the final rule's treatment of stormwater control features and essay 7.1 regarding the waste treatment system exclusion.**

American Gas Association (Doc. #16173)

12.603 The proposed definitions (…) create a real risk that stormwater management structures erected or managed by natural gas utilities may be regulated dually as Waters of the U.S. and a point source under existing regulations. Natural gas utilities obtain National Pollutant Discharge Elimination System ("NPDES") permits for limited, temporary storm water discharges from digging short, narrow ditches to install gas lines, or for short-term (1-2 days) hydrostatic test water discharges, and erect structures as part of required stormwater management plans and best management practices to manage construction stormwater, run-off and post-construction stormwater. Under the proposed definitions, any time a natural gas utility erects a structure, removes sediment for testing, or pursues ongoing mitigation of a project on a site that experiences ordinary (non-perennial) flow that ultimately drains to a downstream water, those activities may be subjectively viewed as taking place in "adjacent" waters or "tributary"-like conveyances to navigable waters. Such a result would impose unduly burdensome requirements for natural gas utilities' routine work to be regulated under CWA programs. The Agencies should clarify these definitions so that such structures and conveyances, including ditches, would not be considered both a point source discharge and a WOTUS, merely because they drain into a feature that may or may not ultimately be connected to a WOTUS. (p. 9-10)

Agency Response: **Please see essays 12.3, 7.1, and 7.4.4.**

Dominion Resources Services (Doc. #16338)

12.604 We operate under NPDES individual and general permits for many of our industrial facilities such as, but not limited to, electricity generating stations, natural gas extraction facilities and natural gas compressor stations. We also regularly obtain construction general stormwater permits that regulate stormwater discharges associated with a range of construction projects including electric transmission and distribution construction and maintenance, natural gas transmission construction and distribution, and traditional and renewable electricity generation development and maintenance. These permits regulate discharges to WOTUS including imposing limits, treatment requirements and a range of monitoring and reporting requirements. To the extent that additional features are considered WOTUS under the proposed rules and do not fall under an exemption, these permitting requirements could be required "upstream" of what would be the current permitted discharge point. For example, ditches or ephemeral features that have historically been operated as stormwater conveyance structures could now be considered WOTUS. Instead of the permitted point of compliance being imposed at the point where

these features discharge to current WOTUS, discharges into these features could now require permitting if finalized as proposed. (p. 4-5)

Agency Response: **Please see essays 12.3, and 7.4.4.**

Kentucky Oil and Gas Association (Doc. #16527)

12.605 NPDES permits are required for the discharge of pollutants into "waters of the United States." Currently, there are many facilities that discharge wastewater into areas absent "waters of the United States." This proposed rule would vastly expand the presence of waters of the United Sates throughout the landscape. As a result, many facilities would be subject to the NPDES permitting requirements that require costly water monitoring and reporting that would likely not be protective of the environment as discharges are not polluted. (p. 7)

Agency Response: **Please see essay 12.3. The requirements for the NPDES permitting program are beyond the scope of this rule. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.**

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

12.606 There are broad effects on each and every CWA program, including Sections 401 Water Quality Certification, 402 NPDES Permitting, 404 Permitting, and Sections 303, 304, 305 Water Quality Standards. As a very simple example, an NPDES permit is required for discharge of any pollutant from any point source into any water or feature covered by proposed WOTUS definition. A broader definition will result in increased NPDES obligations and subsequent increased state resources – all unsupported by scientific need. (p. 7)

Agency Response: **Please see essay 12.3. See also compendium 11 and Economic Analysis Section 8 for an explanation of how the agencies considered impacts to all CWA programs, including the Section 402 program. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.**

Independent Petroleum Association of America (Doc. #18864)

12.607 Review of the agencies' waters of the United States related definitions leads to the conclusion of expanded jurisdiction of CWA 402 (NPDES) permitting authority, a point which is noticeably absent from economic analyses conducted by the agencies. For example, under the proposed definition, a rain dependent stream that is ephemeral would qualify as a water of the United States and discharge to such would require a permit.[144] Additionally, if there is a jurisdictional ditch that experiences perennial flow, pursuant to the proposal, it will fall within the definition of water of the United States.[145] Any direct discharge to a jurisdictional ditch would now require a NPDES permit. Also, if there are a series of "other waters", including wetlands, that are similarly situated when they perform similar functions that are sufficiently close together or close to a navigable water, discharges to such waters are now subject to NPDES permitting.[146] In spite of

[144] Executive Order, 58 Fed. Reg. 51735.
[145] *Id.* at 22203.
[146] *Id.* at 22211.

these examples of expanded implementation of waters of the United States, the agencies suggest that it is not possible to estimate the impact of the proposal on NPDES permitting. *Economic Analysis,* p. 27. With regard to new and existing individual and general NPDES permits, a review of those permitted activities relative to the new proposed definition will undoubtedly expand NPDES regulated activities and represent significant economic impacts. The agencies have simply failed to complete the economic analysis of the proposal relative to CWA 402 permitting. In order to accurately reflect the impact of this proposal, a more thorough assessment of impacts on CWA 402 permitting is essential. (p. 6)

Agency Response: Please see essay 12.3. See also compendium 11 and Economic Analysis Section 8 for an explanation of how the agencies considered impacts to all CWA programs, including the Section 402 program. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.

National Farmers Union (Doc. #6249)

12.608 The proposed rule does not address pesticide applications other than applications directly to a jurisdictional water. Similarly, it is clear that the proposed rule does not specifically address fertilizer applications. This is not the proper venue for discussing these applications. Future opportunities will arise to work with EPA on these topics, especially the problem of redundant CWA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulations governing pesticide applications. (p. 10-11)

Agency Response: Please see essay 12.3. Regulations governing pesticide applications are beyond the scope of this rule.

California Agricultural Commissioners and Sealer Association (Doc. #9670)

12.609 The significant change in the definition of "other waters" will lead to broad expansions in the numbers of locations coming under jurisdiction and likewise increase the number of new permits needed by agricultural operations to perform many routine farming practices. This will generate added burdens and costs and cause undue overlapping of enforcement upon agriculture. In the context of agricultural pesticide use, pesticides are already regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Their use is monitored for adherence to labeling restrictions to protect the environment, NPDES requirements are being addressed nationwide, and discharges to waters of the U.S. are already being regulated and monitored in California by both the State and Regional Water Quality Control Boards. (p. 1)

Agency Response: Please see essay 12.3. See also compendium 11 and Economic Analysis Section 8 for an explanation of how the agencies considered impacts to all CWA programs, including the Section 402 program. Regulations governing pesticide applications are beyond the scope of this rule.

Riverside County Farm Bureau (Doc. #12729)

12.610 The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps' Proposed Rule, along with the Interpretive Rule, will have material economic impacts on our members. Coupled together, the Proposed Rule and the Interpretive Rule will significantly increase potential liability for farmers and ranchers. Many ephemeral streams, ponds, depressions, and ditches found

across fields and pastures will now fall under EPA's and the Corps' jurisdiction, and may require permits for activities taking place on the land. While the Agencies have exempted 56 farming and ranching practices, as long as they meet the specific NRCS standards, any deviation from these standards can result in hefty fines. Further, the exemptions only apply to CWA Section 404 and do not provide any insulation from CWA Section 402 NPDES permitting requirements for waters that may become jurisdictional under the Proposed Waters of the U.S. Rule. For example, while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants. (p. 2)

Agency Response: The Interpretive Rule was withdrawn and comments on it are outside the scope of the proposed and final Clean Water Rule. Please see Compendium 14 – Miscellaneous.

Colorado Farm Bureau (Doc. #12829)

12.611 This jurisdictional expansion will be disastrous for farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. On much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer—including organic fertilizer (manure) – another necessary and beneficial aspect of many farming operations. It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields – and put EPA into the business of regulating whether, when, and how a farmer's crops may be fertilized. In fact, if low spots on pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue the owner of cows that "discharge" manure into those "waters" without a section 402 permit. They could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains.[147] Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits) if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time. (p. 3-4)

Agency Response: Please see essay 12.3. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.

[147] A plow has been found to be a point source. See Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001).

AEP Ohio (Doc. #12847)

12.612 CWA Expansion Talking Points:

- Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for mosquito control applications. This makes it more difficult for professional applicators to obtain permits and treat areas at high risk for West Nile Virus and Dengue Fever, creating a great concern for public health and safety. West Nile Virus claimed some 286 lives in 2013.
- This rule would make it more difficult to control harmful pests on private and public property if any water is near the area. Professional applicators and homeowners would have to obtain permits to protect properties from pests like ticks, which carry harmful diseases like Lyme Disease.
- The expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe.
- Under the rule, EPA could compel states to place restrictions on the amount or type of fertilizer that can be used on public and private property including individual home lawns, gardens, parks and golf courses.
- Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for algae and aquatic weed control applications. Golf course water hazards and man-made lakes in residential communities or on an individual's private property could be subject to these expanded permitting requirements.
- The expanded scope of the Clean Water Act could leave landowners and professionals applying fertilizers and pesticides vulnerable to nuisance lawsuits.
- Well-maintained lawns are important for the environment and properly-cared for lawns reduce runoff into nearby waters. One of the unintended consequences of EPA's proposed rule could be increased erosion and run-off into many connected water bodies.
- Uncontrolled growth of poison ivy, poison oak, and poison sumac poses risk to children and adults alike as more than one-half of the U.S. population is allergic to these noxious weeds, which must be controlled with herbicides which are labeled for use in riparian locations by the EPA. (p. 1)

Agency Response: **Please see essay 12.3. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.**

Bayless and Berkalew Co. (Doc. #12967)

12.613 The normal farming exemption only applies to discharges of "dredged or fill material" under Section 404. It does not apply to discharges of manure, fertilizer, herbicide etc. which are regulated under Section 402 and often come into contact with stock ponds and upland ditches. (p. 3)

Agency Response: **Please see essay 12.3. Exemptions from permitting requirements for discharges to jurisdictional waters are beyond the scope of this rule.**

Nebraska Cattlemen (Doc. #13018)

12.614 To further articulate this point Nebraska Cattlemen would like to point out a serious concern that the attempt to fix the §404 problem creates many more problems under other sections of the CWA. If enacted as proposed, the definition of "waters of the United States" would affect the scope of all provisions of the CWA that use the term. This would include the §402 National Pollutant Discharge Elimination System (NPDES) permit program; the §303 water quality standards and total maximum daily load programs; the §401 state water quality certification process; and the §311 oil spill program. As noted earlier, the Existing Guidance (the model for this rule) was limited on its face to §404 determinations and had no practical impact on the other sections listed above. By essentially overlaying the Existing Guidance (as modified by the proposed rule) on these other sections, EPA will create significant cost, confusion, increase unnecessary bureaucracy, infringe on state programs, and expose agricultural producers to new liability. (p. 12)

Agency Response: **Please see essays 12.2, 12.3 and Economics Analysis Section 8 describing how the agencies considered impacts to the other Clean Water Act programs.**

12.615 Many producers have gone through the NPDES permitting process and are currently operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water. (p. 14)

Agency Response: **The final rule does not change existing permits or other actions taken to implement the CWA. Existing permits will remain effective for the life of that permit unless the permit is withdrawn. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to address jurisdictional issues or make jurisdictional determinations on a case-specific basis. The definition of "adjacent" in the rule does not include those waters that are subject to established, normal farming, silviculture, and ranching activities. Wetlands and farm ponds being used**

for normal farming activities, as those terms are used in the Clean Water Act and its implementing regulations, are not jurisdictional under the Act as an "adjacent" water. Waters subject to normal farming, silviculture, and ranching activities instead will continue to be subject to case-specific review, as they are today.

12.616 The recent need to establish a process to obtain coverage for pesticide applications "on or near" water creates another point of potential turmoil if the proposed rule is adopted. The National Cotton Council decision caused much confusion on how states would issue permits for application of pesticides on or near water bodies. NDEQ developed and issued a General Permit with cooperation from the Region VII office of EPA. The General Permit is appropriate for Nebraska's varying conditions. It may not, however, cover all of the expansion of categorical federal jurisdiction and "other waters" as contemplated in the proposed rule. Nebraska Cattlemen is directly impacted by this issue and comment that the State has adequately addressed any concern here.

In summary, an expansion of CWA jurisdiction and an overlay of §404 decision-making process to §402 is not only unlawful, it does not make sense. The State of Nebraska has developed a surface water discharge permitting system that is now built on forty years of implementation. Do not fix what is not broken. Do not expose producers to liability and uncertainty by drastically changing the NPDES program with an unlawful expanded federal definition. (p. 14-15)

Agency Response: Please see essay 12.3. Please see the Technical Support Document for a discussion about one definition of waters of the U.S. that applies to all CWA programs. Also, please note that the final rule does not overlay § 404 decision-making processes onto the § 402 programs.

Missouri Agribusiness Association (Doc. #13025)

12.617 Administrator McCarthy stated that if you don't need a permit before, you don't need to get one now. In her June 2014 blog, Acting Assistant Administrator Stoner said that "permits will not be applied for the application of fertilizer to fields or surrounding ditches or seasonal streams" and that "the pesticide general permit only requires a NPDES permit where pesticides are applied directly to a water of the U.S." These statements are incorrect and would not withstand logical scrutiny. Floodplains and ephemeral streams are everywhere in the rural landscape. Thus under the proposed rule, fertilizer and pesticide applications would be near WOTUS. By any definition, the tractor is very 'near' the ditch in the picture used above. Because the proposed rule makes water in a flood plain and ephemeral streams WOTUS and federally regulated, it is totally logical that applicators of fertilizer or pesticides would now or soon in the future be forced to obtain a permit. The pesticide general permit expressly applies to pesticide applications that take place *near* water. Administrator Stoner's blog also says that "Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields." Again, refer to the above picture. It is totally reasonable to assume that a permit with set-back provision may someday be required under the proposed rule. (p. 4)

Agency Response: Please see essay 12.3. Permitting requirements pesticide applications are beyond the scope of this rule.

North American Meat Association (Doc. #13071)

12.618 The proposed rule would expand federal jurisdiction significantly, which will have a direct and indirect impact on many industries and entities, public and private. For example, 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 be subject to more stringent stormwater management requirements, which could force them to obtain NPDES permits for the first time and to treat stormwater before it leaves the property. (p. 10)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Iowa Corn Growers Association (Doc. #13269)

12.619 We believe this rule will create additional uncertainty for farmers who could face citizen lawsuits. In making many of these newly defined features WOTUS, the rulemaking could invite activist suits challenging the application of pesticides or fertilizers on, over, in or near these drainage features. This was the same rationale used in the 2009 *Cotton Council* decision on aquatic pesticides requiring a CWA National Pollution Discharge Elimination System (NPDES) permit. (p. 6)

Agency Response: Please see essay 12.3.

USA Rice Federation (Doc. #13998)

12.620 We understand that discharges of irrigation return flow to a water of the U.S. are exempt from NPDES permitting under CWA sections 402(l)(1) and 502(14). However, if a ditch on a rice farm is a water of the U.S. and fertilizer and pesticides are present in the water that is drained from the field, even at very low levels, citizen plaintiffs could allege that the return flow to the ditch was not composed "entirely" of irrigation return flow.[148] Even if the claims are spurious, it is beyond the means of many farmers to defend against such lawsuits. (p. 6)

Agency Response: Please see essay 12.3.

Western Growers Association (Doc. #14130)

12.621 How do these regulatory exclusions for ditches interact with the Clean Water Act's definition of "point source," which also clearly includes ditches? The statutory definition of "point source," another element of Clean Water Act jurisdiction, explicitly lists "ditch" as a point source.[149] Moreover, in *Rapanos*, the plurality Justices lead by Justice Scalia

[148] *See* CWA § 505. Such claims have been brought against farmers outside of the rice industry. For example, in *Fishermen Against the Destruction of the Environment v. Closter Farms*, 300 F.3d 1294, 1297-98 (11th Cir. 2002) the plaintiff sued a sugar cane farmer that a operated drainage system. There, the court ultimately agreed that the drainage was for agricultural purposes and therefore was exempt irrigation return flow. In another case, *Pacific Coast Federation of Fisherman's Associations, et al. v. Glaser, et al.,* No. CIV S-2:11-2980-KJM-CKD (E.D. Cal. Sept. 16, 2013) the plaintiffs' initial case against the Bureau of Reclamation and an irrigation district that drained water from farmers' fields was also dismissed. However, the court allowed the plaintiffs to file an amended complaint alleging that draining groundwater from the field did not have an agricultural purpose so this litigation is ongoing. *Pacific Coast Federation of Fisherman's Associations, et al. v. Murillo, et al.,* No. CIV S-2:11-2980-KJM-CKD (E.D. Cal. Mar. 27, 2014).

[149] 33 U.S.C. § 1362(14) (2012).

preferred to think of ditches and channels as point sources rather than as "waters of the United States," at least so far as the NPDES permit program is concerned. It is therefore entirely possible that a non-perennial upland ditch discharging into another water might qualify as the relevant point source even if it cannot be considered a "water of the United States." Neither the proposed new regulation nor the agencies' commentary deals with this potential dual legal status of ditches as the agencies should.[150] (p. 15)

Agency Response: Please see the Technical Support Document Section I and Compendium 6 - Ditches.

Kentucky Farm Bureau Federation (Doc. #14567)

12.622 The Agencies apparently do not adequately recognize the role States play as co-regulators of waters under the CWA. Under section 303 of the Clean Water Act, all States identify the designated uses of regulated waters within their respective State, as well as the criteria to protect those uses. Under section 401, States review federal actions and certify whether that action will meet State water quality standards. Under section 402, 46 States implement the National Pollution Discharge Elimination System (NPDES) permitting program. In addition, States have their own statutes authorizing State Clean Water regulatory programs and defining waters of the State in some cases more broadly than the federal definition. In Kentucky, state law established the Kentucky Water Quality Authority (KWQA) in 1994 to work with the Kentucky Division of Water to develop and implement regional and statewide water quality plans, and has performed exceptionally in working with the agricultural community to implement best management plans to reduce agricultural runoff and improve water quality. Under the KWQA all farms over 10 acres must develop and implement an effective Agriculture Water Quality Plan. This program has worked remarkably well. (p. 2)

Agency Response: Please see essay 12.2 and 12.3, as well as Compendium 11 and Economics Analysis Section 8 for a description of how the agencies considered impacts to all Clean Water Act programs.

Oregon Farm Bureau (Doc. #14727)

12.623 The new definition of "Waters of the United States" will undoubtedly undermine the progress Oregon has made in improving water quality. The new definition that expands the jurisdictional reach of the CWA will, for the first time, require permits for a number of ongoing activities. New permit requirements will most likely occur in a number of situations.

…the broad definition creates new land features that are subject to CWA. For instance, riparian areas, ditches and ordinarily dry ephemeral "tributaries" will be subject to CWA water quality standards, but also require landowners to obtain an NPDES permit prior to applying any herbicide or fertilizer to these non-water features. In many cases, to improve or maintain riparian areas in Oregon and to comply with the AWQMA, landowners need the ability to apply herbicides without unnecessary federal regulation.

[150] U.S. Army Corps of Engineers & U.S. EPA, *Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule*, 79 Fed. Reg. 22,188, 22,219 (April 21, 2014). Noting the potential jurisdiction as a point source but not discussing the issue at length.

Additional costs associated with new regulations will weaken any progress that can be made and may even reverse the good work by Oregon landowners. (p. 5)

Agency Response: Please see essay 12.2 and 12.3, as well as Compendium 11 and Economics Analysis Section 8 for a description of how the agencies considered impacts to all Clean Water Act programs. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. See Final Rule Preamble and Technical Support Document Section 1.

Windsong Farm Golf Club (Doc. #14746)

12.624 Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for mosquito control applications. This makes it more difficult for professional applicators to obtain permits and treat areas at high risk for West Nile Virus and Dengue Fever, creating a great concern for public health and safety. West Nile Virus claimed some 286 lives in 2013. (p. 1)

Agency Response: Please see essay 12.3. Requirements for coverage under the Pesticides General Permit (PGP) is beyond the scope of this rule.

12.625 The expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe. (p. 2)

Agency Response: Please see essay 12.3. Requirements for coverage under the Pesticides General Permit (PGP) are beyond the scope of this rule.

12.626 Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for algae and aquatic weed control applications. Golf course water hazards and man-made lakes in residential communities or on an individual's private property could be subject to these expanded permitting requirements. (p. 2)

Agency Response: Please see essay 12.3. Requirements for coverage under the Pesticides General Permit (PGP) are beyond the scope of this rule.

Santa Barbara County Farm Bureau (Doc. #14966)

12.627 The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps' Proposed Rule, along with the Interpretive Rule, will have material economic impacts on our members. Coupled together, the Proposed Rule and the Interpretive Rule will significantly increase potential liability for farmers and ranchers. Many ephemeral streams, ponds, depressions, and ditches found across fields and pastures will now fall under EPA's and the Corps' jurisdiction, and may require permits for activities taking place on the land. While the Agencies have exempted 56 farming and ranching practices, as long as they meet the specific NRCS standards, any deviation from these standards can result in hefty fines. Further, the exemptions only apply to CWA Section 404 and do not provide any insulation from CWA Section 402 NPDES permitting requirements for waters that may become jurisdictional under the Proposed Waters of the U.S. Rule. For example, while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need

for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants. (p. 2)

Agency Response: The Interpretive Rule was withdrawn and comments on it are outside the scope of the proposed and final Clean Water Rule. Please see Compendium 14 – Miscellaneous. See also Essay 12.3.

National Corn Growers Association (Doc. #14968)

12.628 The Agencies rightly point out that this rulemaking has not changed the application of the Section 404 exemptions for "normal farming activities" or the application of the "agricultural stormwater exemption" from Section 402 permitting. We agree. But there are far more troubling consequences of making these drainage features WOTUS.

In making these farm drainage features WOTUS the rulemaking would invite activist lawsuits challenging the application of fertilizers or pesticides onto, over, into or near to these drainage features as being an illegal point source discharge needing a Section 402 National Pollution Discharge Elimination System (NPDES) permit. That was the logic adopted by a federal court in the *Cotton Council* decision that ruled that aquatic pesticides applied from a nozzle onto, over, into or near WOTUS require a CWA NPDES permit. The court reached this conclusion even though the pesticides are only allowed to be used under separate, longstanding federal pesticide law following a mandated rigorous and expensive scientific study, review and labeling process. The lawsuits challenging farmers' use of terrestrial pesticides under the agricultural stormwater exemption, even though used under a label and requirements created in the federal process, would effectively result in the federal NPDES permitting of the use of pesticides in the entire farm field, or the establishment of mandatory, large buffers around these features in which agricultural production would not occur. The same is true for the use of fertilizers near or in these drainage features. This is despite the fact that it is universally recognized as appropriate and needed, including under federal conservation practice standards, to fertilize the grass stands in and immediately adjacent to these drainage features to ensure a healthy, erosion controlling and soil stabilizing stand. Such activist lawsuits and the resulting federal law would effectively end the agricultural stormwater exemption's meaningful application in farm fields where these WOTUS drainage features are located. (p. 11-12)

Agency Response: Please see essay 12.3.

Missouri Soybean Association (Doc. #14986)

12.629 The rule will bring into jurisdiction nearly every square inch of land within a floodplain and therefore the rule will obligate farmers, industries and municipalities to obtain NPDES permits for pesticide use on active farmland and other areas as well as prevent (and potentially make unlawful) the land application of wastewater, biosolids and sludge, animal manure to the land. NPDES permits as well as other state-only no-discharge permits prohibit the application of wastewater and manure to "waters of the state" which in Missouri includes "waters of the US". This fact alone will have enormous and immediate impacts on agriculture as land application of manure is the sole manure management method for Animal Feeding Operations. However, we are also concerned about how this will impact and restrict the use of commercial fertilizer on river bottom

farmland as no one would consider the placement of fertilizer in a jurisdictional Waters of the US as a sound "best management practice". Giving the lack of clarity in the rule, farmers may be forced to conduct jurisdictional determinations on all their crop land. It is expected that most river bottom crop land will be jurisdictional and therefore, farmers will need permits to legally conduct routine farming operations. Even if EPA "looks the other way", and uses some form of "enforcement discretion" for these sorts of circumstances, ultimately farmers are the ones left absorbing all the regulatory uncertainty and risk as well as exposing themselves to greater legal liability. All of this leaves farmers in a sort of legal jeopardy that is simply not acceptable to Missouri soybean farmers. (p. 8)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. Please see essay 12.3.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

12.630 Most of the storm water ditches within the City of Chesapeake are ephemeral or intermittent and many of them have bed and bank and contribute flow to a WOUS during rain events; therefore, under the proposed Rule, most of Chesapeake's stormwater ditches could be considered WOUS and subject to regulatory oversight under the CWA. These are the same stormwater ditches that require preventative maintenance and retrofitting to comply with the City's MS4 permit under Section 402 of the CWA. If stormwater management ditches become WOUS, would they then become subject to TMDL requirements? Would the EPA propose a TMDL for an impaired ditch? Would the Virginia Department of Environmental Quality then need to develop water quality standards for a ditch? Without more specific exemptions provided for purpose built stormwater management facilities including, but not limited to stormwater ditches and ponds, the proposed Rule may have unreasonable, burdensome and unintended consequences. (p. 3)

Agency Response: The final rule includes an exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Please see Compendium 7, summary response at 7.4.4.

Bayer CropScience (Doc. #16354)

12.631 The FIFRA jeopardy described previously for terrestrial pesticide products would be compounded if CWA citizen suits were filed by third parties alleging improper pesticide applications to newly-jurisdictional waters. Every state but four is primarily responsible for regulating discharges of pesticides to jurisdictional waters, and have developed and implemented Pesticide National Pollutant Discharge Elimination System (NPDES) General Permits following the 2009 *National Cotton Council v. EPA* decision of the 6th Circuit Court of Appeals. Any changes to the regulations and policies that govern which waters and man-made conveyances are jurisdictional will have a direct effect on these programs. Not only will this affect the activities of states and their budgets, but farmers, public health agencies, pesticide applicators, and other pesticide users will experience uncertain economic impacts and legal jeopardy. (p. 5)

Agency Response: **Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

American Horticultural Industry Association (Doc. #16359)

12.632 EPA and the Corps fail to assess the impacts of the proposed rule on the public health and our nation's infrastructure. The proposed rule would expand current NPDES permit requirements for mosquito and aquatic weed control to roadside ditches, rights-of-ways, small stormwater retention ponds, and man-made water features. Efforts to fight invasive species could also be hampered by new permit requirements. (p. 3)

Agency Response: **Please see essays 12.3 and 7.4.4. NPDES permit requirements are beyond the scope of this rule.**

South Dakota Farm Bureau (Doc. #16524)

12.633 The rule states "Any normal farming activity that does not result in a point source discharge of pollutants into waters of the U.S. still does not require a permit." When an area in a cropped field or pasture meets the criteria for waters of the U.S. and the owner or operator drives a sprayer applying herbicides or pesticide, or a fertilizer spreader applying plant nutrients, the implement is a point source. The owner or operator is now required to get a permit. In South Dakota this will affect an estimated 40% of the farmers and ranchers. These areas are "Waters of the U.S." under the definitions of "all tributaries of a traditional navigable water" and "adjacent or neighboring". (p. 1)

Agency Response: **Please see essay 12.3. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The definition of "adjacent" in the rule does not include those waters that are subject to established, normal farming, silviculture, and ranching activities. Wetlands and farm ponds being used for normal farming activities, as those terms are used in the Clean Water Act and its implementing regulations, are not jurisdictional under the Act as an "adjacent" water. Waters subject to normal farming, silviculture, and ranching activities instead will continue to be subject to case-specific review, as they are today.**

New York Farm Bureau (Doc. #16547)

12.634 To be in compliance, farmers will be forced to obtain approval under a Section 402 discharge permit just to carry out their comprehensive nutrient management plan to fertilize their fields. This means that EPA will be deciding when, how, and even if a farmer may fertilize crops or protect them from insects and disease instead of allowing agronomic conditions and conservation efficacy dictate how to best protect water quality through on-farm activities that vary from day to day. In this way, EPA's proposal will turn New York's CAFO program into a circuitous permit system focused on paperwork

instead of achieving any true environmental and water quality gains. In its simplest form, it is the difference between EPA's knowledge versus timely, site-specific conservation wisdom to achieve the common goal of sustainable clean water.

How long will approval for this type of discharge take when, for instance, an Army Worm infestation can claim a whole hay field in a single day and then move across the street to the next farm – as we saw in New York in 2012. It is impossible to imagine federal regulators being able to respond in the timeframes necessary to meet agriculture's season and often very timely needs.

We are also concerned about the classification of agricultural stormwater runoff. If EPA classifies a wet spot in a corn field as water of the U.S., then manure application in that area is immediately a point source discharge that requires a NPDES permit. Previously, depending on the size of the farm, the manure application was dictated by the farm's nutrient management plan approved as part of its CAFO permit. Any runoff from the field after a rain event was treated as agricultural stormwater and regulated by the state as a non-point source of pollution. However, under the new definitions, these exemptions are effectively removed and the state loses much of its non-point source oversight. (p. 4)

Agency Response: **Please see essay 12.3. Nothing in the final rule changes the exemption for agricultural stormwater or implementation of CAFO program.**

12.635 By effectively removing the agricultural stormwater exemption, as explained above, and regulating areas of fields and farmsteads as waters of the U.S., we have serious concerns that this will weaken or at least bring uncertainty to our successful state water quality programs. By changing the traditional role of the state to regulate this non-point source pollution – as in the past and as the CWA intended – this proposal undermines all the collaborations and measureable improvements that our non-point programs have achieved. (p. 5)

Agency Response: **Please see essay 12.3. Nothing in the final rule changes the exemption for agricultural stormwater or the implementation of the CAFO program.**

Missouri Corn Growers Association (Doc. #16569)

12.636 The rule will bring into jurisdiction nearly every inch of land within a floodplain. Therefore, the rule will obligate farmers, industries and municipalities to obtain NPDES permits for pesticide use on active farmland and other areas as well as prevent (and potentially make unlawful) the land application of wastewater, bio-solids and sludge, animal manure to the land. NPDES permits as well as other state-only no-discharge permits prohibit the application of wastewater and manure to "waters of the state." For Missouri, this includes "waters of the US". This fact alone will have enormous and immediate impacts on agriculture as land application of manure is the sole manure management method for animal feeding operations. We are also concerned about how this will impact and restrict the use of commercial fertilizer on river bottom farmland as no one would consider the placement of fertilizer in a jurisdictional Waters of the US as a sound "best management practice". Giving the lack of clarity in the rule, farmers may be forced to conduct jurisdictional determinations on cropland. It is expected most river bottom cropland will be jurisdictional. Therefore, farmers will need permits to legally

conduct routine farming operations. Even if EPA "looks the other way," and uses some form of "enforcement discretion" for these circumstances, ultimately farmers are the ones left absorbing all the regulatory uncertainty and risk as well as exposing themselves to greater legal liability. This ambiguity is simply not acceptable to MCGA as it potentially places farmers in legal jeopardy. (p. 7)

Agency Response: Please see essay 12.3. Nothing in the final rule changes the exemption for agricultural stormwater, the implementation of CAFO program, or the implementation of the pesticides general permit (PGP).

Florida Crystals Corporation (Doc. #16652)

12.637 Expanding the scope of federal CWA jurisdiction also will increase the dysfunction of the CWA § 402 program. Under the CWA, states must promulgate water quality standards for all of the "navigable waters" in their boundaries, which then are the basis for effluent limitations for waters that flow into them. 33 U.S.C. § 1313. This already is a cumbersome process for the significant waters to which the CWA clearly applies, but expanding the scope of the CWA's regulatory jurisdiction will make it even more cumbersome. If virtually every ditch, pond and lake becomes part of the federal "navigable waters," then States will need to promulgate water quality standards for all of those minor water bodies and issue CWA § 402 permits for a much broader array of activities. It makes little sense to completely federalize the management of all virtually all state waters, when the state already has more efficient, less onerous procedures to accomplish the same goal of environmental protection. (p. 11)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for a description of how the agencies considered the final rule's effects on the Section 402 program.

Montana Stockgrowers Association et al (Doc. #16937)

12.638 (…) under the current definition of waters of the U.S. if a rancher's cow crosses his irrigation ditch (possibly a "point source" according to the definition above) [Point source is defined as "any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.] and drinks ("discharging rock or sand, a pollutant," according to the definitions) into the water and the ditch flows into a stream several miles away that is not considered a WOTUS, then this activity would be clear of the NPDES permitting system. If the proposed rule redefining and expanding WOTUS were to come into effect, then that stream would now be considered a WOTUS meeting the threshold for a rancher needing a NPDES permit. Our organization is concerned (that) this additional regulation will significantly burden livestock producers and our state agency that administers the NPDES program. (p. 6)

Agency Response: Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for a description of how the agencies considered the final rule's effects on the Section 402 program.

West Virginia Farm Bureau (Doc. #17091)

12.639 While the rule claims to exempt specific conservation practices, the exemptions apply only to "dredge and fill" permit requirements and provide no protection from potential liability and Section 402 NPDES permit requirements for discharges of other pollutants. Routine farming activities commonplace across West Virginia such as weed control, fertilizer/manure applications, and fence building could trigger Clean Water Act liability and Section 402 permit requirements. This would be disastrous to farming in the Mountain State! The permitting requirements, paper jungle and threats of fines will likely drive many of our folks out of the business. (p. 1)

Agency Response: Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for a description of how the agencies considered the final rule's effects on the Section 402 program. Additionally, the Interpretive Rule was withdrawn and comments on it are outside the scope of this final rule. Please see Compendium 14 – Miscellaneous for other responses to Interpretive Rule comments.

Fresno County Farm Bureau (Doc. #15085)

12.640 (…) while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants. (p. 2)

Agency Response: The Interpretive Rule was withdrawn and comments on it are outside the scope of this final rule. Please see Compendium 14 – Miscellaneous for other responses to Interpretive Rule comments.

Agribusiness Association of Kentucky (Doc. #18005)

12.641 Because ditches and ephemeral drainages are ubiquitous on farm and ranch lands – running alongside and even within farm fields and pastures – the proposed rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering potential CWA liability and permit requirements. A CWA pollutant discharge to navigable waters arguably will be deemed to occur each time even a *molecule* of fertilizer or pesticide falls into a jurisdictional ditch, ephemeral drainage or low spot – even if the feature is dry at the time of the purported "discharge." Courts (and EPA) have long held that there is no *de minimis* defense to CWA discharge liability. Thus, farmers will have no choice but to "farm around" these features – allowing wide buffers to avoid activities that might result in a discharge – or else obtain an NPDES permit for farming. Such requirements are contrary to congressional intent and would present substantial additional hurdles for farmers who wish to conduct practices essential to growing and protecting their crops. (p. 16-17)

Agency Response: See essay 12.3. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.

12.642 For pesticide applications, a section 402 "general" permit may or may not be available, as many pesticide NPDES general permits have been drafted for specific types of applications that would not include row crop production. Several EPA public statements during the comment period have indicated that general permits are available for pesticide

use, but EPA has provided no specific information on how many states actually offer general permit coverage for pesticide applications to row crops. Meanwhile, EPA has been utterly silent on the absence of any general permits (to our knowledge) for fertilizer application (outside the CAFO context). Does EPA plan to pursue federally mandated and enforceable "nutrient management plans" for row crop farmers across the nation, as it has for CAFOs? Regardless, unless and until EPA and the states that administer the section 402 permitting program issue general permits for fertilizing crops, farmers may have no choice but to pursue individual permits simply to fertilize their crops grown within or near the countless newly jurisdictional low spots on farm fields. (p. 21)

Agency Response: See essay 12.3. Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations.

Airlines For America (Doc. #15439)

12.643 The first of (our) concerns relates to runoff from areas of airports that are dedicated to the operation of commercial aircraft. Discharges from these areas already are appropriately permitted under the Clean Water Act where they reach Waters of the U.S. as currently defined. Any expansion of the definition of WOTUS to include upstream waters on the airport site itself (e.g., collection ditches, conveyance pipes, and holding ponds) – as now implied by the Agencies' WOTUS proposal – would also imply new "discharges" within the meaning of the Act into those newly designated upstream waters. Under such an approach, permits would be required to authorize these new points of discharge and, under a likely interpretation of the CWA, those permits would establish effluent limitations and mandate treatment at new locations within the airport's footprint. This new regulatory reach could render billions of dollars of existing investment in collection and treatment systems obsolete. Further, it would create an untenable situation with respect to the extensive federal statutory and regulatory program that defines permissible structures and activities within this Aircraft Operation Area ("AOA"), which limit and may prohibit the replacement of existing pollution control systems with new systems putatively required by the new definition of Waters of the U.S. Yet it does not appear that the EPA has considered or accounted for this critical consequence in developing the Proposed Rule. (p. 2-3)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. The rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Please see the summary response at 7.4.4 in Compendium 7. For the final rule provisions related to ditches, please see Compendium 6. Comments concerning reconciliation of CWA and FAA regulations are beyond the scope of this definitional rule.

12.644 The Proposed Rule Will Disrupt the Existing, Effective Pollution Control Strategies Deployed at Airports Pursuant to Existing NPDES Permits and May Compromise Protection of Downstream Waters.

Airfield runoff from commercial airports is regulated through the National Pollutant Discharge Elimination System ("NPDES") program. Indeed, transportation facilities

with airport deicing operations (among other attributes) were expressly included as Phase 1 stormwater sources in 1990[151] and have been subject to regulation under the NPDES program from that time forward. EPA has participated in that regulation by issuing a series of general stormwater permits to authorize such discharges. The latest such permit is the federal *Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity*, dated September 29, 2008 (the "MSGP").

Adding aviation-specific content to the MSGP and the related state general permits is EPA's 2012 Deicing ELG. That nationwide regulation established standards for the discharge of runoff from pavement deicing operations at existing and new sources and, at new sources, from aircraft deicing operations. EPA is in the process of incorporating the provisions of the Deicing ELG into its upcoming renewal of the MSGP.

Finally, where non-stormwater discharges originate from airfields, or where permitting agencies determine that a general permit is unsuitable to control Phase 1 stormwater at a given site, individual NPDES permits authorize and control discharges from aircraft operations areas at airports.

In the aggregate, then, NPDES permits are in place to authorize and control discharges from airports subject to permitting as Phase 1 stormwater sources, as well as at airports that discharge non-stormwater from their aircraft operations areas.[152] These permits regulate discharges as they leave airport property and enter water bodies currently understood to be jurisdictional Waters of the U.S. As required of all NPDES permits, these permits impose requirements on these discharges that reflect applicable technology- and water quality-based effluent limitations, as well as monitoring and reporting requirements and NPDES Standard Conditions. Compliance with these permits is designed to assure and, in practice, does assure that downstream waters are insulated and protected from pollutant loadings originating upstream of the permitted outfalls.

Upstream of these permitted outfalls, however, within the fence line of the airport, are complex drainage basins consisting of water features, including surface water features, that are the subject of A4A's concern with respect to the Agencies' current rulemaking. These features routinely include a combination of engineered surface and subsurface collection and conveyance systems, often augmented by retention and detention basins or ponds, all designed to expeditiously move runoff away from active aircraft operations and direct it to some combination of treatment, recycling or discharge through permitted outfalls.

These systems of collection and treatment, which represent billions of dollars of investment, are sited and designed specifically to support the safe operation of commercial aircraft. Conveyance ditches and subsurface piping carry runoff away from active operational areas, per FAA mandates. Stormwater management systems are placed well away from aircraft operations and designed in compliance with strict set-back, lighting, height and other limitations that assure that they do not interfere with

[151] 40 C.F.R. 122.26(b)(14)(viii).

[152] EPA, of course, is aware of this extensive permit-based control, having developed an inventory of these permits which it assembled through information collection requests spanning the years 2004-2006. This inventory is available in the record of the Deicing ELG.

those operations. Moreover – and this is a key point discussed below in Section B2 – these systems are designed to serve functions that can conflict with certain goals of the Clean Water Act. For example, while the CWA aims to protect water bodies that attract bird habitat, FAA requirements call for the elimination of habitat for birds and terrestrial animals whose presence on the airfield would pose a threat to the safety of the flying public. The potentially conflicting mandates thus must be made amenable to reconciliation. (p. 4-5)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. See essay 12.3. The rule include a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Please see the summary response at 7.4.4 in Compendium 7. For the final rule provisions related to ditches, please see Compendium 6: Ditches.

Beaufort County (South Carolina) Stormwater Utility (Doc. #7326)

12.645 Since the regulations are jointly issued by EPA and USACE, there are at least two important consequences:

- Municipal Separate Storm Sewer System (MS4) permit requirements and water quality standards must be met in stormwater conveyances and retention structures that are determined to be WOTUS. Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as WOTUS, they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.
- USACE dredge and fill requirements would be applicable in WOTUS. Therefore, stormwater ponds and drainage ditches would be required to meet water quality standards and jurisdictional requirements – even during routine maintenance activities. (p. 4)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Orange County Sanitation District (Doc. #16335.1)

12.646 OCSD is concerned with the lack of clarity in the apparent intent for direct EPA NPDES permitting authority for non-point pollution sources. Since the definitions for "Waters of the United States" are being added to 40 CFR, Part 122 under the NPDES program, would the Proposed Rule conceivably provide EPA with direct NPDES permitting authority over certain qualifying non-point pollution sources for the first time? It is suggested that EPA clearly state its intent on this issue to avoid unnecessary confusion over the basis for program control, especially under the more difficult case-specific instances involving "Other Waters" and ephemeral areas.

A parallel authority issue with "Waters of the State" may be created in this proposed rule. The proposed rule does not address parallel "Waters of the State" authority already in place for various States as to which entity will likely have primary responsibility for program management and enforcement. For example, the Nebraska Department of Environmental Quality has legislation in place that already addresses the key elements

contained in the Proposed Rule, including groundwater nexus considerations, which the Proposed Rule excludes. Similar to above, it is suggested that EPA clearly state its intent on the issue of either independent EPA or parallel authority among States, in order to avoid unnecessary confusion over the basis for program control; especially where States already possess similar or even greater authority. (p. 3-4)

Agency Response: Please see essay 12.3.

Alliant Energy Corporate Services (Doc. #18791)

12.647 Alliant Energy (suggests that the) EPA and the Corps (…) defer jurisdiction of waters captured by activities already covered under other sections of the CWA, such as NPDES discharges into a WOTUS. (p. 4)

Agency Response: The definition of "waters of the United States" applies across all Clean Water Act programs. Discharges of dredged or fill material into waters of the United States are subject to permitting under section 404 of the Act. Discharges of other pollutants are subject to permitting under section 402. If a water is jurisdictional, either a 402 or 404 permit may be needed for discharges into the water, depending on the type of discharge.

Association of American Pesticide Control Officials (Doc. #1651)

12.648 PCO contends the proposed changes to the definition of "Waters of the U.S." will impact the full range of CWA programs, with specific concerns for the National Pollutant Discharge Elimination System, and other water quality standards programs. Moreover, both the WOTUS proposal and the Interpretive Rule will significantly impact FIFRA State Lead Agency programs and other state regulatory agency jurisdictions and responsibilities. Because of the scope of potential impacts on state programs, as well as the complexity of the scientific, legal, and technical elements of this proposal, additional time is needed to adequately respond to the WOTUS and Interpretive Rule proposals. (p. 1)

Agency Response: Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 regarding how the agencies analyzed the effects of the final rule on all CWA programs. Additionally, the Interpretive Rule was withdrawn and comments on that rule are outside the scope of the proposed and final Clean Water Rule. See Compendium 14 – Miscellaneous.

12.649 AAPCO's concerns address two major themes: 1) As FIFRA co-regulators with the EPA Office of Pesticide Programs, State Pesticide Control Programs have an active role in implementation of the Pesticide General Permit along with our delegated state NPDES programs; and 2) many of the 56 NRCS Conservation Practices listed by the Interpretive Rule contain pest control and crop protection components that fall under the authority of state pesticide regulatory programs and may actually trigger Pesticide General Permit or NPDES jurisdiction regardless of their exempt status under the Section 404 Wetlands Provisions. Therefore, additional time is needed to adequately study and prepare comments on the agencies' Interpretive Rule. Furthermore, the Interpretive Rule has raised a number of questions among state agencies, especially regarding the relationship among state regulatory programs, EPA and Army Corps, the national Natural Resources Conservation Service and NRCS State Office programs. Given the complexity of these

working relationships and that both the WOTUS proposal and the Interpretive Rule were published simultaneously, a 45 day comment period is not adequate to prepare informed comments on the Interpretive Rule. (p. 2)

Agency Response: Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 regarding how the agencies analyzed the effects of the final rule on all CWA programs. Additionally, the Interpretive Rule was withdrawn and comments on that rule are outside the scope of the proposed and final Clean Water Rule. See Compendium 14 – Miscellaneous.

NW Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

12.650 The proposed rule should clarify that groundwater collections systems are not exempt from Section 402 permits for several reasons. First, subterranean systems for draining reservoirs and other water bodies are common in the headwaters region; protecting downstream water quality with a Section 402 permit is essential to maintaining downstream water quality. Second, produced water from oil and gas extraction may be considered groundwater collection systems. In both of these cases, downstream water quality may be degraded if Section 402 permit jurisdiction is challenged.[153] The proposed rule should clarify that groundwater collection and drainage systems are not exempt from Section 402 requirements. (p. 8-9)

Agency Response: NPDES permitting requirements for discharges from groundwater collection systems are beyond the scope of this rule.

Professional Landcare Network (Doc. #11831)

12.651 The proposed rule would expand National Pollutant Discharge Elimination System (NPDES) permit requirements for products used to control algae, weeds, mosquitoes, and other pests in natural and man-made residential community lakes, ponds, and fountains, as well as on an individual homeowner's property. It could also expand these permit requirements to terrestrial pesticide applications that may include a ditch or other feature determined to have a "significant nexus" to a "Water of the United States." In addition, Clean Water Act Section 404 permits could be required to install trees, plants, and other landscape features on private property that are deemed to be in a floodplain or include Waters of the United States.

The rule will harm our public health and infrastructure. EPA and the Corps fail to assess the impacts of the proposed rule on the public health and our nation's infrastructure. The proposed rule would expand current NPDES permit requirements for mosquito and aquatic weed control to roadside ditches, rights-of-ways, small stormwater retention ponds, and man-made water features. The costs and legal liabilities associated with these permits could slow down or reduce efforts to protect the public health and infrastructure from destructive pests. (p. 2)

[153] While current Colorado law would not exempt groundwater collection systems from Section 402 permitting, QQ is concerned about the argument that a specific exemption in the Clean Water Act preempts state authority over groundwater collection systems.

Agency Response: **Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. The final rule includes a new exclusion for stormwater control features as waters constructed to convey, treat, or store stormwater that are created in dry land. The rule also includes a new exclusion for certain artificial waters. Please see Compendium 7 – Features and Waters Not Jurisdictional. See also essay 12.3 and Compendium 6-Ditches.**

Southeast Florida Utility Council (Doc. #11879)

12.652 The practical consequences of this massive inclusion of all ditches in south Florida as WOTUS will create a significant increase in the amount of new NPDES permit applications and unduly burden an already over tasked DEP. Thus shifting the focus of DEP from, focusing on enforcement and regulation environmental issues to issuing permits for discharges that would otherwise have no adverse impact on the environment. Furthermore, utilities will be forced to increase rates charged to customers because of the unwarranted need to identify and permit all point sources discharging into these roadside, stormwater, and irrigation ditches. (p. 2)

Agency Response: **Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. The final rule includes a new exclusion for stormwater control features waters constructed to convey, treat, or store stormwater that are created in dry land. Please see Compendium 7, summary response at 7.4.4. With respect to the jurisdictional status of ditches, under the final rule, please see the preamble and Compendium 6.**

12.653 DEP currently exempts storage ponds from requiring a NPDES permit so long as the pond itself is not a water of the state. *See* Rule 62-610.830, Florida Administrative Code. However, if these storage ponds are now considered WOTUS, the Florida exemption by rule will be superseded by the Proposed Rule and any future attempts to exempt these storage ponds would require EPA involvement. SEFLUC recommends EPA adopt existing exemptions under state delegated NPDES programs. (p. 3)

Agency Response: **The final rule defines "waters of the United States" to include eight categories of jurisdictional waters, maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The final rule includes a new categorical exclusion for stormwater control features as waters constructed to convey, treat, or store stormwater that are created in dry land. The rule also includes a new exclusion for certain artificial waters. Please see Compendium 7 – Features and Waters Not Jurisdictional. "Storage ponds" that do not qualify for exclusion under paragraph (b) of the final rule may be jurisdictional as waters that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, or jurisdictional as waters subject to case-specific analysis.**

12.654 A large area of the groundwater system in South Florida experiences limited confinement between shallow aquifers and surface waters. As written, the Proposed Rule's definition of other waters could also include groundwater in the surficial aquifer, which may have a connection to category 1-3 navigable waters. As a result, SEFLUC is concerned the NPDES permitting requirements would apply to direct or indirect discharges to shallow

aquifers and require water to be treated to such levels so as to no longer make underground injection a feasible alternative for water disposal. (p. 4)

Agency Response: **See summary essay at 12.3 with respect the NPDES program. In regards to whether the Clean Water Rule regulates groundwater, the agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. The agencies have clarified that subsurface connections can serve as a hydrologic, nonjurisdictional connection that agencies would consider when making case-specific significant nexus determinations. Additional details can be found in the summary response of 7.3.6 Groundwater, Including Groundwater Drained through Subsurface Drainage Systems above, which discusses the rationale for that connection.**

Duke Energy (Doc. #13029)

12.655 For all of the states in which Duke Energy operates, the NPDES permit program is administered by the authorized States. As the number of NPDES permits that must be issued increases, the cost of issuing, monitoring, and enforcing these permits will fall predominantly on the States at a time when most State budgets are under severe strain. This expansion of the program will inevitably lead to delays in the issuance of these important permits or reissuance of existing permits. Again, these delays and cost increases will not increase environmental quality. (p. 52-53)

Agency Response: **Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

More dischargers will be required to obtain permits under § 402 and 404 of the Act, and entities engaged in previously upland discharges will be required to obtain state water quality certifications. This will greatly increase the administrative burden borne by the States. For each potential discharge for which a federal permit is sought, the State will have to assess the impact of that activity on navigable waters in the state, determine whether there is a reasonable assurance that the activity will not violate applicable effluent limitations or water quality standards, and develop any conditions that must be placed on the activity in order to achieve such reasonable assurance.[154] The State must also provide public notice of applications for certifications and, in some circumstances, hold "public hearings in connection with specific applications."[155] The additional administrative burden placed on the States by an increased number of certification requests could frustrate the States' ability to effectively maintain the quality of waters within their boundaries by spreading thin the limited resources that each State is able to devote to evaluating certification requests. Moreover, the influx of new applications could lead to additional backlog and costly delays that will impact much needed critical infrastructure projects, such as transmission or gas pipeline construction. This additional administrative burden placed on the state will not result in improved environmental quality. (p. 54-55)

[154] 40 CFR § 121.2(a).
[155] 33 USC § 1341(a)(1).

Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402. See also essay 12.2.

Murray Energy Corporation (Doc. #13954)

12.656 At the same time, the Proposal's broad definitions of the terms "tributary," "neighboring" and "significant nexus" would multiply the number of regulated outfalls under CWA section 402 at large mine sites like Murray's. This would significantly increase 402 compliance costs, particularly when viewed in light of the additional requirements under EPA's currently proposed 2013 Multi-Sector General Permit for stormwater discharges (which serves as a model for corresponding permits in delegated states). (p. 14)

Agency Response: EPA does not agree that the final rule result in significantly more permits needed under the § 402 program for the reasons explained in the preamble. Please see Economic Analysis Section 8 for an explanation of the final rule's effects on the Section 402 program.

Southern Company (Doc. #14134)

12.657 The expansion of jurisdiction affected by the current proposal also has the potential to significantly impact regulatory efficiency outside of CWA Section 404 permitting. For instance, a broader definition of waters of the U.S. would mean expanded regulation and increased National Pollutant Discharge Elimination System (NPDES) permitting load under CWA Section 402. Under EPA's 402 permitting program, the proposal would lead not only to additional discharges being subject to NPDES permits (i.e., discharges to newly jurisdictional waters), but also more compliance obligations associated with those permits (e.g., water quality-based effluent limits for discharges to newly jurisdictional waters). Other CWA regulatory programs that would be similarly impacted include the Oil Pollution Prevention regulations under 40 CFR § 112 (where more sources could become subject to spill pollution control and countermeasure (SPCC) requirements due to their proximity to newly deemed jurisdictional waters) and EPA's 316(b) rules governing cooling intake water structures (where applicability is based in large part on whether structures are drawing from waters of the U.S.). (p. 18-19)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402. See also essay 12.5 regarding SPCC.

American Public Power Association (Doc. #15008)

12.658 Electric Utility Facilities Could Require Expanded Spill Prevention Control. Facilities with oil storage capacity that, due to their location, have a potential to discharge to waters of the U.S. must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) plan. With the proposed rule's increased scope of WOTUS to cover ditches and manmade impoundments, as well as all features in floodplain and riparian areas, many facilities, particularly in the arid West, would need SPCC plans that did not need them before. Facilities that already have SPCC plans also would be affected because many have plans that rely on the use of on-site ditches or impoundments to

collect spilled oil (e.g., as secondary or tertiary containment) and prevent it from reaching a WOTUS. A rule that classifies those ditches and impoundments as a WOTUS could eliminate current spill control plans using that approach and vastly expand planning, compliance, and cleanup costs. (p. 11-12)

Agency Response: **See essays 12.3 and 12.5.**

Eagle River Water & Sanitation District (Doc. #15116)

12.659 We do support the protections that the proposed definition would provide regarding NPDES discharges to ephemeral streams, however, such discharges are already regulated under the Colorado Water Quality Control Act (25-8-101 et seq., C.R.S.). There is a clear difference between the types of pollutants that Section 402 and 404 programs are intended to control. Therefore, it is recommended that the final notice recognize appropriate differences in the application of the proposed waters of the United States definition, and clarify that any waivers or similar provisions that are unique to the 404 program, including NWPs, continue to apply. This would be similar to the language in the preamble:

> "The rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions in the CWA would continue to preclude application of CWA permitting requirements." (Federal Register, Vol. 79, No. 76,AprIl 21, 2014, p.222189) (p. 5)

Agency Response: **See section 12.4 for an explanation of the continued availability of CWA Section 404 nationwide permits and 404(f) permitting exemptions. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

Southern IL Power Cooperative (Doc. #15214)

12.660 No nationwide permit exists for new fossil fuel generation capacity. Rather than planning for CWA permit compliance at the boundary (such as the cooling water intake or the NPDES outfall) a proposed plant would be confronted with internal permitting for stormwater management, spill control, and all other water movement. The situation could be even more challenging with respect to natural gas plants that require pipelines to transport gas to any new gas-fired plants. As we look to bring new sources of generation on line, we are concerned that the siting and permitting of new natural gas pipelines will be further delayed. (p. 8)

Agency Response: **. See essay 12.3.**

Automotive Recyclers Association (Doc. #15343)

12.661 ARA respectfully requests that EPA and the Army Corps of Engineers withdraw this rule for the following reasons: (…) the NPDES works now as it is intended and professional automotive recycler facilities need no additional regulatory burden to do their part to protect our nation's waters. (p. 2)

Agency Response: **Please see essays 12.3 and 12.4. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

Washington County Water Conservancy District (Doc. #15536)

12.662 The need for clarity regarding the regulatory status of "impoundments" is heightened by the uncertain legal status of the EPA's 2008 Water Transfers Rule.[156] Under the Water Transfers Rule, any activity that "conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" is defined as a "water transfer" that is exempt from National Pollutant Discharge Elimination System (NPDES) permitting requirements.[157] As the Agencies are aware, a federal district court vacated the Water Transfers Rule in March 2014.[158] If this decision is upheld and the Agencies adopt their current definition for "tributary," the problems caused by the Agencies' overly-broad definition will be compounded. Water users would not only be facing the potential regulation of off-river storage facilities as jurisdictional "impoundments," but would also be subject to potential NPDES permitting requirements for routine waters transfers associated with such facilities. The uncertainty surrounding these types of permitting exemptions underscores the need for agency caution and restraint to avoid unduly burdening the regulated public.[159] (p. 17)

Agency Response: Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See essay 12.3.

Yazoo Valley EPA (Doc. #15838)

12.663 The expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe. (p. 1)

Agency Response: Please see essay 12.3.

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

12.664 There is much uncertainty on the effects the proposed definition change would have on county governments, given the definition would apply to all CWA programs (e.g., National Pollutant Discharge Elimination System; Water Quality Standards; stormwater, green infrastructure, pesticide permits, and TMDL standards, etc.), not just the 404 program. These programs could potentially subject Lake County to increasingly complex and costly federal regulatory requirements under the proposed rule, particularly with

[156] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. §§ 122.1-122.64 (2014)) [hereinafter, Water Transfers Rule].
[157] *Id.* at 33,697; 40 C.F.R. § 122.3(i).
[158] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014). We are aware that EPA has appealed this decision to the U.S. Court of Appeals for the Second Circuit.
[159] The WWG notes that, within the Preamble, the Agencies have stated that they are not intending the revised definition of "waters of the United States" to change to the regulatory status of water transfers under EPA's Water Transfers Rule. Proposed Rule, 79 Fed. Reg. at 22,189, 22193, 22,199, 22,218. The WWG agrees with and supports this conclusion. Further, we urge the Agencies to expressly include text within the Code of Federal Regulations confirming that the definition of "waters of the United States" does not change the regulatory status of water transfers.

respect to the County' s stormwater management program and green infrastructure (including best management practices, or BMPs). (p. 1)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features, including green infrastructure, as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.

Florida Stormwater Association, Inc. (Doc. #7965)

12.665 Since the regulations are jointly issued by EPA and the Corps, there are at least two significant consequences of which Florida local governments should be aware:

- Municipal Separate Storm Sewer System permit requirements and water quality standards must be met in stormwater conveyances and retention structures that are determined to be WOTUS, including numeric nutrient criteria applicable to Class III ("recreational") water bodies, anti-degradation requirements and other permit conditions.
- Dredge and fill permitting of the Corps will be applicable to stormwater attenuation ponds, drainage ditches and other conveyances that are determined to be WOTUS – even during routine maintenance activities. (p. 9)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

12.666 Numerous segments of Pasco County's MS4 system would also likely be considered WOTUS under the proposed regulations. For example, the stormwater facilities for the Gulf View Mall include ditch and stormwater retention ponds that have a direct discharge into Salt Spring Run. Salt Spring Run is located behind the Gulf View Mall just north of Port Richey on the west coast of Pasco County (see below). Under the proposed regulations, these discharges would likely be required to meet in stream water quality criteria prior to discharge into Salt Spring Run, and routine maintenance activities would be subject to federal permitting policy. Retrofit of this stormwater facility to meet in stream water quality criteria in this highly urbanized environment would likely be cost-prohibitive for the County and provide little overall environmental benefit. (p. 21)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Water Environment Federation Member Association Governmental Affairs Committees Representing EPA Region 7 (Doc. #15185)

12.667 Intent for Direct EPA NPDES Permitting Authority for Non-Point Pollution Sources? Since the definitions for "Waters of the U.S." are being added to 40 CFR, Part 122 under the NPDES program, would the Proposed Rule conceivably provide EPA with direct NPDES permitting authority over certain qualifying non-point pollution sources for the first time? It is suggested that EPA clearly state its intent on this issue to avoid unnecessary confusion over the basis for program control, especially under the more difficult case-specific instances involving "Other Waters" and ephemeral areas. (p. 1)

Agency Response: **Nothing in the final rule changes the definition of "point source" or provides additional authority to regulate non-point sources under the NPDES program. See essay 12.3.**

United States Senate, Senator David Vitter, et al. (Doc. #3536)

12.668 Although we understand individual cases [referring to stormwater flow limit-related issues at certain Air Force bases mentioned in previous two paragraphs] may soon be settled, we wish to express our strong opposition to EPA's regulation of newly developed and redeveloped property at military bases as well as the agency's stormwater agenda at-large. Members of Congress have repeatedly reminded EPA of the statutory limits placed on the agency's authority to regulate stormwater flow apart from pollutant discharges. As Members of the Senate Environment and Public Works Committee have previously warned, if EPA wishes to establish new stormwater discharge regulations – including discharge standards for developed and redeveloped property at military bases and elsewhere-it must first report to Congress on the necessity of such regulations.[160] Until such time, EPA may not impose stormwater restrictions upon newly developed and redeveloped property, whether directly on sites otherwise exempted from permitting under CWA Section 402(p)(l), or indirectly through the MS4 permitting program. Moreover, EPA has no authority under the stormwater or other CWA programs to regulate the mere flow of water on public and private property.[161] (p. 1-2)

Agency Response: **Regulation of stormwater under the NPDES program is beyond the scope of this rulemaking.**

12.669 How will storm water drains be addressed in the proposed rule, especially those that feed into ephemeral rivers and streams? (p. 4)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.3.1 Stormwater and MS4s

Summary Response

Please see Compendium 7, summary response at 7.4.4, and summary response 12.3.

Specific Comments

District Department of the Environment, Government of the District of Columbia (Doc. #12716)

12.670 In many urban areas, small creeks and storm sewer systems are sometimes interconnected, some to the point where it is difficult to distinguish one from the other. This is often the result of many years of development, addressing flood control issues and

[160] *See* Letter from Senator David Vitter, et al., to Nancy K. Stoner, Acting Assistant Administrator, Environmental Protection Agency Office of Water (May 30, 2013) (attached).

[161] In addition, Section 438 of the Energy Independence and Security Act (EISA) does not change or expand EPA's CWA authority, nor does it sanction the CWA's National Pollutant Discharge Elimination System (NPDES) as a means to achieve EISA standards. *See* 42 U.S.C. § 17094.

piping and paving over streams to facilitate development. Those small piped streams are, subsequently, used for storm conveyance as well as stream flow. DDOE's stormwater documentation and mapping information indicates that this is the situation within the District. Many parts of the District's Municipal Separate Storm Sewer System (MS4) enclose what were once running streams. Two common examples are:

- Perennial streams that flow into a pipe and are conveyed through MS4 conveyance system and eventually discharged to larger waters, such as the Anacostia river (examples: Fort Chaplin Run, Fort Davis Tributary); and
- Perennial streams, whose headwaters have been piped and incorporated into the storm sewer system (to address flood control issues and facilitate development) that eventually become day-lighted streams and flow into other surface water streams (example: Piney Branch, for which approximately ¾ of its main stem has been piped prior to its confluence with Rock Creek).

The proposed rule's definition of the term "tributary" could have implications for streams that fit these categories. Depending on interpretation, this definition could result in a number of consequences for urban jurisdictions, including for how and where jurisdictions monitor and assess MS4 discharges, and stream health, and for subjecting storm sewer maintenance to CWA permitting requirements. In one section of the preamble to the proposed rule (79 FR 22199; 3nl column), tributaries are described to include:

The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(l) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(l) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges. culverts. pipes. or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream. debris piles. boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary including wetlands, can be a natural, man-altered. or manmade water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).

At present, DDOE's ambient monitoring program (which assesses the health of District waters and supports development of the District's 305(b) report) collects samples from above-ground sections of waterbodies. Sections of streams that flow through pipes are not considered "surface waters" and therefore are not included in the reported length of the water body. A separate MS4 monitoring program has historically monitored outfalls that often have "dry weather discharge" present with the intent to characterize MS4 discharges and pollutant concentrations.

In both of the stream examples above, it is clear that observed discharges from outfall examples during "dry" periods (without recent (72-96 hours) precipitation) are not stormwater flows. However, it is not clear whether these waters would be considered

"groundwater infiltration to the MS4" or whether these qualify as "man-altered tributaries" and therefore waters of the US.

Section 1.2 of the District's permit identifies that "diverted stream flows" and "uncontaminated ground water infiltration" are authorized non-stormwater discharges to the MS4. Given the proposed rule's "tributary" definition, it may be necessary for the District to assess all of its urban waterways to verify which portions should be considered part of the storm sewer system and which are creeks or streams (or were historically creeks and streams and defined as "tributaries" under the proposed rule).

The results of this assessment could necessitate changes to both the District's ambient monitoring and MS4 permit-related monitoring efforts and associated reporting if pipes once considered part of the MS4 system are now tributaries that are "waters of the US" that aren't appropriate for outfall discharge monitoring, but may require other water quality assessments. At this time, DDOE is in the process of developing a "Revised Monitoring Framework," as required by the District's MS4 Permit. Timely resolution of these issues is critical to the development of a quality monitoring framework document.

Finally, if pipes once considered part of the MS4 are now considered "waters of the US," it is possible that projects to repair, maintain, or improve that MS4 system would be subject permitting requirements under Section 404 of the Clean Water Act. Such an outcome would add considerable cost, complexity, and delay to urban jurisdictions' efforts to maintain and improve their storm sewer systems. Furthermore, in the case of the District, this would add considerable administrative burden to review and certify such projects for consistency with District water quality standards. (p. 1-3)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

State of Washington Department of Ecology (Doc. #13957)

12.671 It is not clear how Section 402 permitted facilities will be treated under the proposed rule. The proposed language could be interpreted to mean that any ditch system that discharges to a "water of the US" would be jurisdictional. Many roadside ditches and municipal separate storm sewer systems (MS4s) discharge to jurisdictional wetlands and streams. These systems are permitted and regulated under Section 402 and require periodic maintenance. Where they do not contain streams, they should be able to be maintained without the need for permitting. Washington recommends that ditches in uplands and draining only uplands as part of an MS4 management system should be non-jurisdictional upstream of the discharge point to a wetland or tributary.

The proposed rule should also clarify that those constructed parts of stormwater management systems that often look and act like natural systems (for example, treatment swales and ponds, infiltration ponds, treatment wetlands, rain gardens, and compost filters) are exempt similar to the wastewater treatment exemption. Some of these treatment systems, permitted pursuant to Section 402, meet wetland criteria, especially if they were thoughtfully designed and implemented. However, when they are specifically constructed for storm water conveyance and treatment those features should be excluded from the definition of "waters of the US". This clarification could be in the preamble or regulatory guidance letters for implementing the rule. (p. 5-6)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Georgia Municipal Association (Doc. #14527.1)

12.672 The proposed rule affects all Section 402 National Pollutant Discharge Elimination System (NPDES) programs, which include municipal separate storm sewer systems (MS4s) and pesticide application permits (EPA Program). Section 303 Water Quality Standards (WQS) program will be affected as well as stormwater, green infrastructure, and total maximum daily load (TMDL) standards. Examples of programs which could be affected by the proposed rule include but not limited to are redefining local floodplain management programs, the process and management of stormwater in regard s to runoff control and the treatment to process runoff for water quality, redefining land use plans and ordinances, routine maintenance of dirt roads and watershed delineation are just to name a few. (p. 6)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs.

12.673 Many local jurisdictions are required to be permitted under the Clean Water Action for nonpoint-source discharges. As part of the permit and also TMDL pollutant mitigation, the reduction of the discharge and the mitigation of the pollutant through best management practices (BMP's) are required to the maximum extent possible. If the proposed rule is adopted, many stormwater ditch issues will require additional time for the permitting processes which in most cases would contribute additional pollutants to the Waters of the United States due to the continuation of the illicit discharge to the system.

An even bigger issue that I have argued for two decades is that under current rules an in - stream BMP's are not allowed through regulation by the COE under the CWA. Local MS4's through permit basically become a point source discharge. In the wastewater permitting process the influent is directly transported to a treatment plant, treated and released. In the stormwater world local stormwater management system are not afforded that luxury. The conveyance systems in streams are not permitted to treat the pollutant in stream. Hundreds of Millions of dollars across the nation have been spent at the local level attempting to mitigate the pollution before it reach the stream. In some cases there has been some success but stormwater runoff in general comes from multiple sources which cannot be control at the source. Allowing the expansion of the proposed rule will make it even more difficult to treat stormwater runoff.

If this proposed rule is adopted and moves forward, construction site issues could become cumbersome if the ditch is considered a Water of the United States. Staffs of local governments have a hard enough time currently achieving compliance with erosion and sediment control requirements from contractors and developers. It is very difficult educating and convincing local governing boards to accept the fact. (p. 8)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please note that nothing in the final rule changes the definition of "point source" or provides additional authority to regulate non-point sources under the NPDES program.

Waters of the United States Coalition (Doc. #14589)

12.674 Federal regulations prohibit states from adopting "waste transport or waste assimilation as a designated use" for waters of the United States. (40 C.F.R. § 131.10(a).) As a result, States, including California, will not allow water bodies classified as waters of the United States to be used as treatment systems if the basic fishable swimmable standard is not attained in all parts of the water body.

Waters of the US Coalition members are very concerned that the Proposed Rule will convert off-stream treatment, water supply and flood control projects into waters of the United States and thereby prevent or hinder their use.

For example, if the Proposed Rule converts existing portions of municipal separate storm sewer system ("MS4") or other manmade drains into waters of the United States, those portions of the MS4 will no longer be available for implementation of best management practices ("BMPs") or treatment controls that will benefit downstream traditional navigable waters. The Proposed Rule will thereby force dischargers who operate MS4s or other non-jurisdictional conveyances to attain Water Quality Standards within their operating systems. Such compliance is in many cases infeasible and will force dischargers into non-compliance. Moreover, dischargers will not be able use treatment controls within the system, and will have far fewer tools to implement clean water goals. That was not the intent of the Clean Water Act. (p. 10-11)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please note that as explained in the preamble, under the CWA, states may protect more waters than those that are considered jurisdictional under the CWA.

12.675 Under the Proposed Rule, Western's percolation ponds could be considered waters of the United States because they are very similar to wetlands and they will have a hydrologic connection to the Santa Ana River. As such, a Clean Water Act section 404 or other NPDES permit could be required for maintaining the ponds once they are constructed. Moreover, the percolation basins will be located adjacent to (and will be connected to) natural drainage ditches and/or manmade channels that convey storm water and urban runoff. These ditches and channels could be considered waters of the United States under the Proposed Rule, and could make Western's proposed percolation ponds waters of the United States by virtue of their connection and proximity to both the ditches and the Santa Ana River.

The cost to construct recharge basins is significant and must be factored into the cost to produce and deliver the water. In the case of the Arlington Recharge Project the budget is $10 million. The project was made economically feasible by the contribution of local and State grants amounting to $2 million. If the project is reclassified as waters of the United States it will be subject to a range of permitting requirements. Limitations could also be imposed on the quality of the source water used for the project. The additional burden of obtaining federally required permits, and potential limitations imposed based on the quality of source water could make the project infeasible. (p. 13)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Please also see Compendium 7, summary response at 7.4.4.**

12.676 MS4s could be reclassified as tributaries. While portions of many storm drain systems are constructed out of natural drainage, there are a host of manmade drains that were constructed in uplands that would be considered tributaries under the Proposed Rule. This is because they are open ditches with perennial flow that ultimately drain to a traditional navigable water. Perennial flow can come from rain water, urban runoff, or rising groundwater entering road cut drains and other portions of the system. Changing the legal character of these channels will conflict with the plain text of the Clean Water Act which classifies them as point sources. The change will significantly hinder the ability of MS4 operators to develop projects that would normally be constructed within the MS4. (p. 23)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please see the Technical Support Document Section I with respect to the legal issues raised by this comment.**

Arizona Department of Transportation (Doc. #15215)

12.677 Lastly, ADOT has had the opportunity to review the comments prepared by the American Association OF State Highway and Transportation Officials (AASHTO) and the National Association of Flood & Stormwater Management Agencies (NAFSMA) and agrees with the points laid out in their letters. Specifically worth noting are AASHTO's comments regarding "roadside ditches, which must be regularly cleared so that they do not become overgrown with vegetation, clogged with silt, or otherwise unable to function as part of the road's stormwater management system. Ditch maintenance is a major challenge because of the sheer number of miles that each State department of transportation is required to maintain." When it becomes necessary to address Section 404 permits for these types of routine MS4 maintenance projects, delays can compromise infrastructure and may result in wetland formation in some cases (which then, leads to additional delays and costs to permit). Therefore, ADOT fully support the AASHTO recommendations for exclusions by rule. (p. 3)

Agency Response: **The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial.**

The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also see Compendium 6 – Ditches.

Florida Department of Transportation (Doc. #18824)

12.678 If under the proposed rule portions of currently regulated stormwater management systems could be deemed WOTUS, the very stormwater management systems designed to collect, convey, treat and discharge stormwater may be subject to the establishment of Total Maximum Daily Loads (TMDLs) pursuant to Section 303(d) of the CWA. Thus, the water entering into the stormwater management system may be subject to pollutant load reduction requirements to meet TMDL allocations. This could drastically curtail the States' ability to focus restoration efforts on currently impaired natural water bodies and would likely increase restoration costs to an economically unsustainable level. In most cases, it would be technically infeasible to treat stormwater flowing into a stormwater management system to meet TMDL allocations prior to treatment. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Director of Public Works, City of Goose Creek, South Carolina (Doc. #18827)

12.679 Since the regulations are jointly issued by EPA and the Corps, there are at least two significant consequences which will affect the City of Goose Creek:

MS4 permit requirements and water quality standards must be met in stormwater conveyances and retention structures that are determined to be Waters of the U.S., including applicable water quality criteria and other permit conditions.

Dredge and fill permitting policies of the Corps will be applicable to stormwater attenuation ponds, drainage ditches and other conveyances that are determined to be Waters of the U.S., even during routine maintenance activities. (p. 2)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Permitting policies for discharges to jurisdictional waters are beyond the scope of this rule.

State of Alaska (Doc. #19465)

12.680 EPA and the Corps failed to consider the consequences of a proposed rule that seeks to impose a broad array of CWA requirements.

[EPA and the Corps have promulgated a rule that applies not only to Section 404 permitting, but to other aspects of the CWA, including 402 permitting and regulatory requirements under Section 303.] (An) example is how this proposed rulemaking will affect stormwater management, because under the rule, multi-sector (MS4) stormwater conveyances, including ditches, will likely be jurisdictional under the proposed rule, and

also subject to state water quality standards. Would activities to maintain those conveyances also be subject to 404 permitting? (p. 16)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Skamania County Board of Commissioners (Doc. #2469)

12.681 Since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the US." Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. There is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so through CWA citizen suits, unlessMS4s are explicitly exempted from the requirements.

Further, stormwater management is often not funded as a water utility, but rather through a county general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc. Skamania County cannot assume additional unnecessary or unintended costs.

By shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts.

Please consider the following:

- Skamania County is comprised of open ditches, some underground storm lines and none of them are regulated.
- Staff time alone would be an estimate of $15,000 annually plus any damage from not being able to repair an emergent condition to prevent further damage during a flooding event.
- Any increase in regulation of our drainage system could cripple small counties like ours. This could require a hydraulics engineer to stay on top of this, so add another $115,000 to our personnel expense. (p. 5)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Please also see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

Wayne County (Ohio) Commissioners (Doc. #4226)

12.682 This proposal would apply not only to Section 404 permits, but also to other Clean Water Act programs, such as:

- Section 402 National Pollution Discharge Elimination System (NPDES) program;
- Section 303 Water Quality Standards (WQS) program; and,
- Other programs including storm water, green infrastructure pesticide permits and total maximum daily load (IMDL) standards. There is concern of a potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their storm water ditches are considered a "Water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "Water of the U.S.", they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (p. 2)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. With respect to the rule's relationship to NPDES implementation, including NPDES permitting, please see summary response at 12.3 in this Compendium. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs.

Board of County Commissioners, St. Mary's County, Maryland (Doc. #4279)

12.683 In addition to the above, it appears that the proposed regulation will impact the implementation of proposed projects that have been mandated through Watershed Implementation Plan (WIP) and NPDES MS-4 permits by further restricting areas suitable for retrofit and restoration. Local jurisdictions have already spent significant operating and capital resources on either programming and designing efforts that will most likely need to be modified, be rendered difficult to implement, result in additional expenditures, or result in the imposition of additional water quality standards. (p. 2)

Agency Response: With respect to the rule's relationship to NPDES implementation, including NPDES permitting, please see summary response at 12.3 in this Compendium. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.

Pennington County Board of Commissioners (Doc. #4384)

12.684 There is a significant impact to our County as our MS4 consists of ditches, swales and underground pipes. There are some curb and gutter systems however, the storm sewer system predominately consists of vegetated swales. The MS4 area comprises of approximately 20 square miles of the total area of the County. The MS4 area would be subject to additional water quality standards (including total maximum daily loads) if our stormwater ditches were to be considered a "water of the U.S.". Not only would the discharge leaving the systems be regulated, but all flows entering the MS4 would be

regulated as well. In 2013, Pennington County spent approximately $450,000 to $500,000 in expenses relating to items needed to meet the current Clean Water Act mandated on MS4s. This includes, street sweeping, debris removal, maintenance and replacement of stormwater culverts, etc. Our stormwater programs are funded thru the County General Fund. If stormwater costs significantly increased due to this proposed rule, not only will it impact our ability to focus our available resources on real, priority water quality issues, but it may also require funds be diverted from other government services that we are required to provide such as law enforcement, fire protection services, etc. With the Federal Government continually reducing their obligations such as PILT, we cannot afford to have any such increases due to unnecessary mandates from the expansion of the Clean Water Act. (p. 2)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

City of San Diego, Transportation & Storm Water Department (Doc. #7950.1)

12.685 Our primary concern with the proposed rule is that the City 'S MS4 infrastructure, including green infrastructure, could be considered a "Water of the United States" (WOTUS) and reduce our ability to effectively manage urban runoff to improve water quality and water resources. (p. 1)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.686 The Proposed Rule identifies human-altered channels and human-made structures, including potentially storm water (MS4) infrastructure, as a WOTUS. The consequence is that water quality standards (including total maximum daily loads) would have to be met within the MS4 and would undermine how the system is operated; the potential for beneficial capture, treatment and reuse of dry and wet weather flows would be diminished; and it would be more difficult for the City to comply with the requirement to reduce pollutants discharged from the MS4 to the "maximum extent practicable". (p. 2)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.**

12.687 If promulgated as proposed, much of the MS4 maintenance activities required by NDPES permit under CWA Section 402, could require a Section 404 permit as well as Section 401 certification. (p. 2)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

City of Chesapeake Department of Public Works (Doc. #9615)

12.688 The Rule proposes changing the category "adjacent wetlands" to "adjacent waters" so that water bodies such as ponds adjacent to jurisdictional waters are WOUS by Rule. The unintended consequence of this strategy will create duplicative and conflicting federal authority over stormwater management facilities. For example, Section 402 of the CWA currently regulates the City of Chesapeake's stormwater management facilities under the NPDES permit program (MS4). If EPA expands regulatory oversight of the CWA into *adjacent waters* to include, but limited to stormwater management ponds, the City of Chesapeake will be required to comply with duplicative and conflicting regulatory programs. The City's MS4 permit requires that they maintain their stormwater drainage

facilities and retrofit facilities to meet new TMDL allocations; however, the Corps will also require permits, in addition to avoidance/minimization measures and compensatory mitigation for work within these regulated features. These duplicative and antagonistic programs may require more documentation, time and resources, while reducing clarity and predictability for the regulated community. (p. 4)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to address jurisdictional issues or make jurisdictional determinations on a case-specific basis.

Board of Supervisors, Imperial County (Doc. #10259)

12.689 The proposed rule does not discuss the interrelationship of WOTUS and municipal separate storm sewer systems (MS4). The interconnected nature of storm drain systems regulated under MS4 permits and the broad nature of the definitions in the proposed rule could lead to legal uncertainty and regulatory confusion. It is especially important for the Agencies to provide clear guidance on where an MS4 ends and WOTUS begins for counties in the Southwest, where engineered drainage systems have mostly replaced the natural drainage patterns in urbanized watersheds.

The current definition of tributary states that "a water that otherwise qualifies as a tributary…does not lose its status if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams)…so long as a bed and bank with an ordinary high water mark can be identified upstream of the break." (79 Fed. Reg. at 22263). The proposed rule would render a number of open channels per se jurisdictional under the broad definition of tributary and subject local agencies to further regulation. In addition, due to the proximity of WOTUS channels, it is possible that MS4 channels could be considered "adjacent" waters and therefore jurisdictional. (p. 5-6)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Maryland Association of Counties (Doc. #11120)

12.690 The proposed definition could expand the scope of Section 402 municipal separate storm sewer system (MS4) permits and Section 303 Water Quality Standards programs. Expansion of these programs will place additional stress and uncertainty on county

TMDL and clean water efforts, particularly for stormwater and environmental site design (ESD) structures. (p. 2)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features, including green infrastructure, as waters of the U.S., please see Compendium 7, summary response at 7.4.4. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Association of California Water Agencies (Doc. #12978)

12.691 Municipal separate storm sewers are permitted under Section 402(p) of CWA and most operate with an NPDES permit, yet the proposed rule would sweep entire systems, or elements thereof, into definition of "waters of the U.S." This would fundamentally limit their ability to function as part of the storm sewer system because waters of the U.S. cannot be used to treat water. Those elements that are deemed WOTUS would have to be replaced with another feature that would replicate its function. (p. 6)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.**

City of Artesia (Doc. #13043.2)

12.692 Municipal separate storm sewer systems (MS4s) can range from the very large and complex, which utilize natural or man-made water features to the relatively simple depending on the size topography, climate, and budget of the community and are currently regulated under the CWA as a point source discharge under Sec. 402(p). In parts of the western United States, and in California especially, MS4s often use water features that meet the proposed definition of a tributary. Canals, ditches, and other conveyance structures built for the purpose of ushering storm water to retention ponds or other bodies of water would see their regulatory structures fundamentally change if they were to be considered a "waters of the U.S." By naming these features, "waters of the U.S." the runoff into these facilities as well as the eventual discharge from them would have to be regulated. The degree of regulation would increase from "maximum extent practicable" under Section 402(p) to numeric effluent limits required to attain water quality standards specified for the particular water of the U.S. and routine maintenance work within one of these features would require a Section 404 permit from the Corps. (p. 2)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Please note that permitting and the meaning of "maximum extent practicable" are beyond the scope of this rulemaking.**

Village of Palm Springs (Doc. #13217)

12.693 Change in the definition will also affect our section 402 National Pollution Discharge Elimination System (NPDES) permit program consisting of multiple structures such as curbs, gutters, catch basins, storm drains, culverts and piping that interconnect and are

needed for the permit requirements. MS4 has no "waters of the United States" as part of this permit. If the definition changes it would complicate the permit process even further because of the additional new terms and many other integrated categories. Many parts of the definition are open to interpretation because they are undefined. (p. 1)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.

North Palm Beach County Improvement District (Doc. #13218)

12.694 Currently, maintenance of the stormwater management system is a requirement in both the State Environmental Resource Permit and the MS4 Permit. Delays in obtaining Dredge & Fill permits may negatively impact the permitted stormwater systems' flood protection and water quality benefits. If the maintenance of the system is delayed, the MS4 permittees run the risk of third-party lawsuits. (p. 1)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

12.695 Typically the stormwater treatment system is throughout the stormwater system and ultimately discharges through a control structure into the receiving water body at the downstream end of the system. By definition, the components of an MS4 system do not include Waters of the State or Waters of the United States. Accordingly, the MS4 permit authorizes point discharges into Waters of the State. If stormwater treatment systems become WOTUS, then the MS4 points of discharge move upstream of the stormwater treatment system water body, resulting in a reduction in the MS4 area. The MS4 area then becomes strictly a roadway conveyance system and any contributing area to that roadway system. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Pinellas County Board of County Commissioners (Doc. #14426)

12.696 The extension of the definition will also broaden the applicability of the definition of Major Outfalls under the NPDES MS4 permit to include nearly every outfall in minor channels or wetlands not currently considered as qualified. The effort to inventory these newly considered outfalls and to perform the additional maintenance and inspection requirements will present a significant financial burden to permitted MS4s. Additional permitting for maintenance of these systems may also impair the timely completion of NPDES permit required maintenance. In addition, many wetlands, lakes, and ponds that will be included in the proposed definition are on private property which presents a conflict in permitting, maintenance, and enforcement requirements as MS4 permitted entities have no jurisdiction over privately owned lands for these purposes. (p. 3)

Agency Response: Please see Compendium 7, summary response at 7.4.4. Please note that permitting requirements and the definition of "Major Outfall" in the NPDES regulations are outside the scope of this rulemaking.

Riverside County Flood Control and Water Conservation District (Doc. #14581)

12.697 Both the CWA and its implementing regulations establish a distinction between MS4 and WOTUS. MS4 permits contain specific requirements regarding the operation and maintenance of the MS4, including the control of non-stormwater discharges into the

MS4 (which are required to be "effectively prohibit[ed]" pursuant to 33 U.S.C. § 1342(p)(3)(B)(ii)) as well as monitoring requirements. The regulation of MS4s is accomplished by these permits, which are extensive and, complex in scope.

In public statements, EPA and Corps representatives have indicated that the Proposed Rule is not intended to expand the reach of jurisdictional waters. However, the definition of "tributary" in the Proposed Rule could arguably transform water bodies that have been considered and regulated as MS4 into jurisdictional WOTUS. Under the "tributary" definition, any water body which includes a channel with a bed, bank and OHWM "does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams).... so long as a bed and bank and an [OHWM] can be identified upstream of the break. Moreover, a tributary.... can be natural, man-altered, or man-made water...." 79 Fed. Reg. at 22199.

The complexity of MS4 systems in the urban environment makes these determinations difficult. Western Riverside County is dominated by major up-thrust mountain ranges that bound our watersheds, including the San Bernardino, San Jacinto and Santa Ana Mountains. These features create a substantial grade differential, and the urbanized areas are peppered with hills, plateaus and other vertical features that, in turn, contain small, ephemeral water courses with indications of bed and bank. The majority of our storm drains collect runoff from these upland areas and convey them through urbanized communities to stream segments lower in the valley. There is thus a robust mix of natural waterbodies and man-made flood control channels and storm sewers. The need for a clear boundary between what is considered an MS4 and what is considered a jurisdictional water is thus very important.

The regulatory definitions of both an"MS4" and an "outfall" plainly distinguish between an MS4, which is not a WOTUS, and the water into which the MS4 discharges, which is, by definition, an MS4 discharges "to" a WOTUS. 40 CFR 122.26(b)(8) through an "outfall". 40 C.F.R. § 122.26(b)(9). There is no "outfall" and no discharge where one portion of an MS4 connects to another or where a WOTUS discharges or flows into another WOTUS. In litigation involving Los Angeles County, the United States Court of Appeals for the Ninth Circuit has held that "[a]s a matter of fact and law, the MS4 is distinct from the two navigable rivers [the Los Angeles and San Gabriel Rivers]". *Natural Resources Defense Council, Inc. v. County of Los Angeles,* 673 F.3d 880, 899 (9t" Cir. 2011), *reversed on other grounds, Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.,* 568 U.S., 133 S.Ct. 710 (2013). Such a view is correct with respect to the waters already designated as WOTUS in Riverside County.

This distinction has been recognized both by the EPA and the United States Supreme Court. In the Preamble to the original version of the MS4 regulations, the EPA drew a clear distinction between waters in an MS4 and a WOTUS: "[W]aters of the United States are not storm sewers for purposes of this rule." 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988). This distinction was affirmed by the United States Supreme Court in the *Los Angeles County Flood Control Dist.* case, in which the Court unanimously reversed the Ninth Circuit, which had erroneously held that the "discharge" from an MS4 had occurred when waters flowed from an engineered portion of the Los Angeles River into another portion of that same river. 133 S. Ct. at 712.

Applying WOTUS status to miscellaneous MS4 lines because they fell within the proposed definition of "tributaries" would create regulatory chaos without any benefits to water quality or the quality of' the receiving waters into which the line discharges. The District and other municipalities in the county could be faced with operating an interconnected, but distinct, storm drain system, some of which was considered MS4 and some of which was considered WOTUS. The District and other MS4 operators in Riverside County might be required to obtain CWA Section 404 Permits and Section 401 Certifications if permit-required work was being done in these isolated open channels or other conveyances, even though those channels are part of the storm drain system. Similarly, water quality standards (and potentially TMDLs) would apply to these isolated jurisdictional waters.

The purpose of the MS4 permit program is to reduce pollutants collected by the MS4 from the urban watershed and discharged to WOTUS. MS4 operators are, therefore, required to address such pollutants within the framework of the MS4 permit and to evaluate their performance through monitoring of the outfalls to a WOTUS. If the Proposed Rule's "tributary" definition causes lines currently deemed to be MS4 to instead be designated WOTUS (a designation that cannot apply to MS4 catch basins, pipes and culverts since they are not "navigable" and do not fall under any WOTUS definition in the Proposed Rule), MS4 operators might have to address each storm drain pipe discharging into a channel as a separate "outfall" and point of compliance for discharges regulated by the MS4 permit. MS4 operators might be liable for multiple violations of their MS4 permit for MS4 discharges into isolated jurisdictional waters if the permit prohibited MS4 discharges that exceeded water quality standards, as is typical in many California MS4 permits. Though EPA representatives have indicated that "well-crafted" MS4 permits may reduce this risk, this assumes that permitting agencies are willing to limit liability to only certain discharges into WOTUS. Also, it is unclear whether a permitting agency could, by permit, immunize MS4 operators from the threat of citizen suits brought for discharges into a WOTUS. In any event, MS4 operators should not be forced to depend on permitting agencies to address such core jurisdictional issues.

The designation of portions of MS4s as jurisdictional waters also could harm the ability of operators to address contaminated stormwater and urban runoff in regional treatment facilities. The District has determined that such regional solutions are generally preferable to structural best management practices (BMPs) maintained at individual private properties. Such individual BMPs may not be adequately maintained over time, especially if the property is occupied by numerous tenants or resold. Regional treatment systems, which may be operated and maintained by MS4 operators, are more efficient as well. However, MS4 operators in Southern California have been informed that a WOTUS cannot be used to transport such stormwater to a regional treatment because, pursuant to 40 CFR 131.10(a), such use would violate the prohibition against a state adopting waste transport or waste assimilation as a designated use for any waters of the United States. The District does not agree with this interpretation, but the designation of WOTUS in what had been considered MS4 would exacerbate this issue. It is thus important that the final WOTUS rule leave no confusion as to where the MS4 ends and a WOTUS begins. At minimum, the Agencies should include language making clear the distinction between the MS4 and WOTUS in the Preamble to the final WOTUS rule. (p. 9-11)

Agency Response: **The agencies' longstanding practice is to view stormwater water control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. EPA notes the final rule does not change the definition of "outfall." The commenter may be confusing the question of "what is a discharge" with what is a waters of the U.S. If there is no discharge, a § 402 permit would not be required even where the flow enters a waters of the U.S. Please see the Technical Support Document Section 1 for the Agencies' legal rationale.**

City of Buckeye, Arizona (Doc. #14591)

12.698 There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTs, counties, nontraditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). Taken together, all these MS4s own, operate, and maintain millions of Stormwater Control Measures (SCMs) and Best Management Practices (BMPs). These SCMs and BMPs include both structural and non-structural practices, programs, and features. In order for these MS4s to operate and maintain their systems in an efficient and cost-effective manner, the WOTUS jurisdictional status of the vast majority of these constructed SCMs and BMPs must be clear. Determining the WOTUS jurisdictional status of most of these constructed SCMs and BMPs on a case-by-case basis is not manageable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs, including roadside ditches.

There is a price paid for lack of clarity. If MS4 owners and operators are unclear or unsure about the WOTUS jurisdictional status of their constructed SCMs and BMPs, their work will be more difficult and less efficient. Staff resources and time will be diverted to this status issue. MS4s' work and performance to protect, restore, and improve water quality will be diminished.

If a significant number of urban SCMs are determined to be WOTUS, the operation and maintenance of those SCMs will become much more complicated, difficult, and expensive for the public entities responsible for these MS4s, without any corresponding positive environmental outcomes. In fact, the MS4s' work and performance to protect, restore, and improve water quality will be diminished. Such determinations may be the result of agency judgment or the outcome of third party lawsuits, based on interpretations of rule language. (p. 2-3)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Harris County Flood Control District (Doc. #15049)

12.699 Since stormwater management activities are not explicitly exempt under the proposed rule, concerns have been raised that man-made conveyances and facilities for stormwater management could now be classified as a Water of the U.S. Municipal separate storm sewer systems (MS4) infrastructure including ditches, channels, pipes and gutters that are now deemed non-jurisdictional, but that under the new definitions of the proposed rule, could be deemed a Water of the U.S. This would potentially change the locations of outfalls for MS4s, and therefore the point of regulation, as defined in the CWA's Section 402 (NPDES Program). Alternatively, the proposed rule could result in double regulation of waters under Section 402 and Section 404 of the CWA, which is not a workable solution. Even if the agencies do not initially plan to treat an MS4 as a Water of the U.S., they may be forced to do so as a result of CWA legal challenges that attempt to address lack of clarity in the proposed rule.

This is a significant potential impact for the District and other MS4 permittees that own MS4 infrastructure because these newly jurisdictional facilities would trigger requirements for the state to expend resources to designate beneficial uses pursuant to CWA Section 131.10 requirements. Further, MS4 permittees will face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new Waters of the U.S. meet designated water quality standards. It is also unclear how the proposed definitional changes may impact the Pesticide General Permit program. (p. 4)

Agency Response: **Please see Compendium 7, summary response at 7.4.4. Please see essay 12.3. The final rule does not change or impose any new requirements for the pesticides general permit (PGP).**

Carroll County Board of Commissioners (Doc. #15190)

12.700 Since stormwater activities are not explicitly exempt under the proposed rule, we are concerned that MS4 ditches could be classified as "Waters of the U.S." If these facilities flow into a "Water of the U.S.," they are already regulated through the Section 402 NPDES MS4 permit process. Doubling up on the permit coverage and requirements will just create a more cumbersome, expensive, and lengthy process for local jurisdictions, with greater cost to taxpayers and slower progress toward Bay clean-up.

This will create enforcement conflicts and overlapping responsibilities for Federal agencies. Even if this is not the current intention of the agencies, they may be forced to do so through citizen and interest group lawsuits. These additional requirements in the process will also create a need for additional staff for the Federal agencies. (p. 2)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. In addition, the rule adds an exclusion for certain ditches. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a**

traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial.

Sacramento County, California (Doc. #15518)

12.701 Stormwater management activities are not explicitly exempt under the proposed rule. We are concerned that man-made conveyances and facilities for stormwater management and pollutant removal could now be considered a water of the U.S. *By shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems.* Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. (p. 5)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

City of Oceanside (California) Water Utilities Department (Doc. #16509)

12.702 If promulgated as proposed, much of the MS4 maintenance activities required by NDPES Permit under CWA Section 402, could require a Section 404 permit as well as Section 401 water quality certifications. This could infer that water quality standards would apply in features such as open channels rather than after the discharge into "traditional" navigable waters. With respect to M54 facilities, the significant nexus test is inapplicable because MS4 facilities are already regulated under CWA section 402. Specifically, to the extent that MS4 facilities may significantly affect traditional navigable waters, they are regulated like other point source discharges to a WOTUS, and are subject to extensive NPDES permit requirements. Since they are so regulated, it is not necessary to capture such facilities under the definition of WOTUS because their physical, chemical, and biological impacts to traditional navigable waters are addressed through the terms of the applicable NPDES permit. (p. 3)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Department of Public Works, County of San Diego (Doc. #17920)

12.703 A broader definition of Waters of the U.S. will make it more difficult for jurisdictions to maintain compliance with Total Maximum Daily Load (TMDL) limits and identify stormwater treatment options. (p. 1)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

12.704 Because the Clean Water Act prohibits placement of best management practices (BMPs) in Waters of the U.S., expanding the definition of Waters of the U.S. can significantly limit future options for compliance.

EXAMPLE: The MS4 Permit identifies points of compliance for the Bacteria TMDL. For the San Diego River, a compliance point occurs in the lower portion of Forrester Creek. Measurements in Forrester Creek will determine if jurisdictions are meeting the required bacteria limits. Expanding the definition of Waters of the U.S. to include ditches and other "offline" MS4 conveyances with connectivity to the Creek would significantly limit opportunities to treat stormwater before it reaches the receiving water. (p. 2)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.705 The proposed definition change would have an adverse impact to the Agricultural Water Quality (AWQ) and Integrated Pest Control (IPC) programs within the County's Department of Agriculture, Weights, and Measures (AWM).

Currently, the AWQ program regulates 457 agricultural facilities in the unincorporated areas of the County. AWQ inspects nurseries, golf courses, cemeteries, and pest control businesses in order to ensure potential pollutants like sediment, pesticides, fertilizers, and trash do not enter the County's storm drains, creeks, rivers, and beaches. This program is an integral component for the County to comply with the MS4 permit. The proposed changes to the definition of Waters of the U.S. could increase the level of regulation on water bodies located in the County's current inventory of regulated agricultural facilities and could add new federal permitting requirements to current facilities or require the implementation of additional BMPs. Under the proposed definition change, agricultural facilities currently posing a low threat to water quality could require the same level of County regulatory resources as facilities with high threats to water quality. The increased allocation of resources would not likely yield a significant improvement in water quality. It is imperative that the County's resources continue to be deployed as efficiently as possible. (p. 4)

Agency Response: **Nothing in the final rule affects local regulation of "regulated agricultural facilities." With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. See essay 12.3. Also please note that requirements in or implementation of any applicable general permit under the NPDES pesticide general permit program is beyond the scope of this rulemaking.**

City of St. Petersburg, Florida (Doc. #18897)

12.706 The proposed rule adds to the regulatory cacophony governing the protection of the City's water bodies and exposes it to greater liability. The City, like many other jurisdictions, is seeking greater predictability as to the scope of the CWA. The difficulty in applying a consistent analysis to jurisdictional delineations of ditches is evidenced by the new definitions addressed, *supra*, in this letter. Adding a new layer of waters of the U.S. to the City's compliance responsibilities is burdensome and exposes it to greater liability under the CWA's TMDL program, especially given the role of many of the potential new water bodies in stormwater retention and attenuation. Ditches, impoundments, and other manmade stormwater features have been installed as innovative solutions to addressing urban pollution. They should be subject to best management practices under the CWA and other regulatory frameworks, but not the water quality criteria developed to protect our natural and traditionally navigable waters. Furthermore, the current permitting time frame does not allow proper maintenance scheduling. Adding more agencies and more complex, overbroad rules will only make this process more time-consuming. (p. 3)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.707 The proposed rule raises some additional concerns over the increased reporting and monitoring of some activities, including ditch maintenance and existing pesticide permit

programs used to control weeds and vegetation around ditches. It is not clear within the proposed rule the extent that these environmental management programs are affected by the permitting conditions, as there is no current exception for these practices under current permitting procedures. In low-lying areas, wetland plants, including mangroves, encroach into the floodway when maintenance is not performed routinely. In a city with over 50 miles of ditches, priorities need to be established for maintenance. Mangroves often become an issue during permitting and may require mitigation to offset their removal in the City's manmade ditches. Mitigation is expensive and the City does not have the land available for such vast mitigation. (p. 4-5)

Agency Response: **Permit requirements are beyond the scope of this rule. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.**

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

12.708 The broad definitions in the proposed rulemaking, especially the definition of Tributary in conjunction with Adjacent, can lead to the conclusion that MS4s would be deemed Waters of the US. The distinction between MS4s and WOTUS is critical and begs the question of how CWA Sections 303 and 402 will be applied to historic MS4s deemed to be WOTUS. NAFSMA requests that the EPA clearly define what is considered to be an MS4 and what is determined to be a WOTUS, and reaffirm that an MS4 cannot be WOTUS. (p. 1)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Iowa League of Cities (Doc. #18823)

12.709 Utilization of only the data analyzed in the *Economic Analysis* would lead to unintended consequences of what the Agency has determined to be "indirect costs," which are impacts to the CWA programs and not just from jurisdictional changes. While this is viewed as indirect to the EPA, these costs will be directly borne by the local jurisdictions for new waters identified because of this rulemaking. Municipal Separate Storm-water Sewer Systems (MS4) and other storm-water systems including drains, roads, pipes, ditches and other components that channel runoff will have significant direct and indirect costs associated because of permit costs, wetlands and stream mitigation costs and project delay. Important matters such as delay and additional permitting do not get calculated into a simplistic understanding of affordability of two percent of median household income (MHI), which the Agency utilizes to make determinations on significant cost impacts to local communities.

The Agency would likely respond that this uncertainty could be easily taken care of through a Preliminary Jurisdictional Determination (PJD). The League is concerned that this is an insufficient answer because an increased amount of PJD's would lead to longer delays for simple routine maintenance or other projects. Member cities have also raised concern about allowing flexibility for determinations from the Army Corps of Engineers (ACE). It's important to also note that once the PJD is complete, a new water determined to be under the jurisdiction of the EPA and ACE would be subject to other federal legislation such as the National Environmental Protection Act (NEPA), the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA).

The delays caused by these statutory requirements are not fully analyzed by the *Economic Analysis of Proposed Revised Definition of Waters of the US.*

City Example: A city in Iowa over the past few years attempted to redevelop a storm-water ditch that connected to a small river. A short time before the public bid process, the ACE ordered them the halt the project as the small river was a WOTUS which was connected to the Mississippi River. The city had to completely redesign the project and was delayed by 12 months to perform a wetland study with completion of the other federal statutory requirements at a significant cost. This small city was completely caught off guard by jurisdiction over this small river and has expressed concern over expansion of jurisdiction to further small water bodies by the ambiguity of the rules language.

Request for EPA Response: We would ask that the EPA more clearly identify how PJDs would be processed to avoid unnecessary delays and to provide a better analysis of new waters that would be impacted because of the rule. (p. 2-3)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies also intend to retain the concept of preliminary JDs. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.**

The rule by itself imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule is a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, subject to the provisions of these programs. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific provisions.

12.710 The proposed rule language is not clear on the impact to (…) storm-water collection systems. The language is broad and inclusive, which is evident by the need to exclude

swimming pools from the application of the rule. The language provides broad inclusions and cities are concerned with being dependent upon agency judgments and discretion for exclusions: rules need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule that creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exclusions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies response given the uncertainty of the proposed regulation. Cities cannot be faced with significant delays to address critical storm-water infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. (p. 3)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.711 (…) uncertainty is centered on whether (stormwater) collection systems, or portions of the systems, will be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a water of the United States. WQS and TMDL were not designed for this application so application within a collection system seems improper. WQS define goals for a waterbody by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default required designated use is as "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as storm-water conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption). The Agency has stated that that the federal agency does not set WQS/TMDL standards for Iowa. Thus, our triennial review and revision of Iowa WQS could be slowed down through a discussion over setting standards within storm-water collection systems.

Request for EPA Response: Clearly identify new waters within MS4 systems and whether these will be subject to Section 303(d) WQS. (p. 4)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Nothing in the final rule changes how water quality standards are implemented and comments about a pending proposed rule on water quality standards is beyond the scope of this rulemaking.**

12.712 Large communities in Iowa have been working diligently to control storm-water flow as the regulation of storm-water by EPA has increased. This has included separating storm systems and developing new storm-water projects that would include canals, ditches, tunnels, etc. These major municipal systems want to understand how their systems will be impacted internally and if there is the possibility that portions of their systems will now be included as a water of the United States. (p. 5)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.713 Also, small communities in Iowa have utilized roadside ditches extensively to move storm-water through their communities. These communities want to better understand if it is the intention of the Agency to include their ditches now a point source thus subject to WQS and potentially require permitting under Section 404. These communities have raised concern that routine maintenance or weed removal could trigger additional requirements that were never contemplated by the city. These ditches are used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences. Ultimately, local governments are liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. Many local governments who are subject to Section 404 permitting requirements report the process can be extremely time-consuming, cumbersome and expensive. (p. 5)

Agency Response: **The agencies for the first time establish by rule that certain ditches are excluded from jurisdiction. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also see Compendium 6 - Ditches.**

Georgia Municipal Association (Doc. #14527.1)

12.714 Many local jurisdictions are required to be permitted under the Clean Water Action for nonpoint-source discharges. As part of the permit and also TMDL pollutant mitigation, the reduction of the discharge and the mitigation of the pollutant through best management practices (BMP's) are required to the maximum extent possible. If the proposed rule is adopted, many stormwater ditch issues will require additional time for the permitting processes which in most cases would contribute additional pollutants to the Waters of the United States due to the continuation of the illicit discharge to the system.

An even bigger issue that I have argued for two decades is that under current rules an in-stream BMP's are not allowed through regulation by the COE under the CWA. Local MS4's through permit basically become a point source discharge. In the wastewater permitting process the influent is directly transported to a treatment plant, treated and released. In the stormwater world local stormwater management system are not afforded that luxury. The conveyance systems in streams are not permitted to treat the pollutant in stream. Hundreds of millions of dollars across the nation have been spent at the local level attempting to mitigate the pollution before it reach the stream. In some cases there has been some success, but stormwater runoff in general comes from multiple sources, which cannot be controlled at the source. Allowing the expansion of the proposed rule will make it even more difficult to treat stormwater runoff.

If this proposed rule is adopted and moves forward, construction site issues could become cumbersome if the ditch is considered a Water of the United States. Staffs of local governments have a hard enough time currently achieving compliance with erosion and sediment control requirements from contractors and developers. It is very difficult educating and convincing local governing boards to accept the fact that environmental compliance of the CWA and the costs associated with them must be passed on to the development community. They are perceived as unnecessary and prohibiting growth and economic development. (p. 8-9)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please note that the final rule does not increase regulation of non-point sources. Regulation under the CWA is focused on point source discharges, including storm water point sources discharges to waters of the U.S. Comments about nonpoint source regulation are beyond the scope of this rulemaking.**

Massachusetts Water Resources Authority (Doc. #15546)

12.715 Further, stormwater management is often not funded as a water utility, but rather through our member counties' general funds. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact their ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other vital government services such as police, fire, and emergency medical services. South Carolina's counties cannot assume additional unnecessary or unintended costs without a proportional reduction in other county services without violating state laws. Many of our member counties have begun preparing contingency plans to remove natural and man-made systems from the County's public works inventory. South Carolina counties may have to consider seeking authority from the South Carolina General Assembly to assess new targeted taxes similar to the "rainfall" taxes enacted by several counties in Maryland to address the expected cost increases for stormwater control. Additionally, some counties have reported plans to delay beneficial green infrastructure projects until such time as they are assured by the EPA or Corp that such projects can be constructed without unnecessary and burdensome financial costs to their taxpayers.

By shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. (p. 5-6)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.**

California Building Industry Association et al. (Doc. #14523)

12.716 The inevitable designation of component parts of Section 402 permitted MS4 systems as waters of the United States, rendering their operation illegal under federal regulations. (p. 4)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.717 CWA 402 Program: Many permitted MS4 features would be rendered waters of the United States, making operation of the MS4, as permitted, illegal. Perhaps nowhere is the conflict and consequence – intended or otherwise – of the Proposed Rule more dramatically illustrated than in the context of the nation's innumerable multiple separate storm sewer or "MS4" systems. Regulated and permitted under Section 402 of the CWA,

MS4s exist for the purpose of channelizing (as opposed to surface sheet flows) and transporting storm water runoff and the various pollutants and waste that inevitably get swept up into such flows.

MS4s are composed of everything from highly engineered treatment facilities to pipes to concrete-lined channels to ditches. It is indisputable that with the broad and inclusive definitions of "tributary" and "adjacent waters" in the Proposed Rule, component features of MS4s nationwide will be deemed jurisdictional waters of the United States.

This is not a mere labeling exercise or circumstance without consequence. Quite to the contrary, the Code of Federal Regulations expressly prohibits utilization of a water of the United States as a conveyance feature for an MS4 system: "[I]n no case shall a state adopt waste transport . . . as a designated use for any water of the United States." 40 C.F.R. § 131.3(i).

As discussed in greater detail below, in California, the water quality control program is carried out by the State Water Resources Control Board and nine Regional Water Quality Control Boards. They implement both federal and state water quality control statutes and regulations primarily via adoption and enforcement of regional Basin Plans. It is in the Basin Plans that beneficial uses, water quality standards, and total maximum daily loads (TMDLs) are specified. The noted regulation, 40 C.F.R. § 131.3(i), prohibits Basin Plans from acknowledging waste transport as an appropriate use for designated waters of the United States.

But the very purpose of an MS4 is the capture and transportation of waste in storm water so that it is directed to appropriate treatment points and not allowed to sheet flow directly into receiving waters. Designating a component feature of a permitted MS4 system as a jurisdictional tributary renders operation of the MS4 illegal. In such an instance, you would have a system permitted under one provision of the CWA, Section 402, and at the same time its operation would violate CWA Section 404 and section 131.3(i) of the regulations. (p. 28-29)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Greater Houston Partnership (Doc. #14726)

12.718 We don't believe that EPA and USACE intended to make municipal separate storm sewer systems (MS4s) jurisdictional, but a straightforward reading of the proposal suggests that large portions of Houston area MS4s, which include drainage channels and ditches, would be considered jurisdictional if the rule were finalized as proposed. GHP strongly suggests that the proposed rule be modified to include an explicit exemption for all facilities that are developed or operated for drainage and detention purposes, including those that are part of an MS4. (p. 2)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

American Society of Civil Engineers (Doc. #19572)

12.719 (…) the agencies must address the absence of MS4 impacts in the proposed rule and consider the unintended consequences of the rule on promoting green infrastructure. (p. 11)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

National Stone, Sand and Gravel Association (Doc. #14412)

12.720 Administrator and the State determines appropriate for the control of such pollutants." EPA regulations set forth detailed requirements for MS4 permits covering the full range of controls for the MS4 system defined broadly as "a conveyance of system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches man-made channels or storm drains" 40 CFR 122.26.

Under EPA' regulations, MS4 permits have become increasingly more stringent. A recent EPA study notes that NPDES permitting authorities are employing a variety of different requirements in their MS4 permits to address urban storm water pollution. These include, for example, numeric performance and/or design standards in MS4 permits to control discharges from new development and redevelopment. That study also notes that some MS4 permits include numeric effluent limitations expressed as water quality based effluent limits (WQBELs) for specific pollutant parameters based on applicable waste load allocations or other water quality objectives."[162] This has become especially true under the Chesapeake Bay TMDL where many permits now require retrofitting 20% of impervious surfaces within the permit time frames.[163]

The practical effect of not expressly exempting MS4 systems would be to impose an additional and redundant set of requirements over a system that is already obligated to meet the CWA's "fishable and swimmable" goals. Specifically, under the proposed rule, any component of an MS4 system, whether natural drainage ditch or man-made cement flow way, functioning as intended by treating and conveying storm water to discharge point, would arguably be a WOTUS subject to water quality standards, use designations and anti-degradation requirements beyond the conditions of the MS4 permit itself. Discharges into any component of the system would themselves be subject to permitting under either section 402 or 404 and perhaps even TMDL requirements under section 303. Even normal maintenance such as clearing vegetation and removing silt might require a section 404 permit.

Such duplicative regulation would especially impact aggregate operators. Many aggregate sites are also regulated by the local municipal SW system and must meet performance standards under the applicable MS4 permit. Many operators institute controls to capture and manage the impacts of storm water from their sites and often implement green infrastructure projects such as rain gardens and bio-swales. Unless the agencies explicitly exempt MS4s as part of a waste treatment system, operators face onerous conditions for any discharges of storm water where such additional regulation would not provide any greater water quality benefits. (p. 46-47)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.

[162] EPA "Post-construction Performance Standards & Water Quality Based Requirements." A compendium of permitting approaches. (June 2014).

[163] Maryland Department of the Environment's recently issued MS4 permits to Phase I jurisdictions define the permit area as "the entire geographic area within the political boundaries of a Phase I NPDES municipal stormwater jurisdiction" (e.g. MDE Fact Sheet for Prince Georges County, Md., MS4 permit, May 28, 2013.)

Montana Mining Association (Doc. #14763)

12.721 In addition to the implications for Section 404 permitting, the proposed rule is also likely to trigger increased Section 402 permitting obligations for mining-related activities as additional waters within mine sites that were previously non-jurisdictional become jurisdictional. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches ' conveying waters to ponds and impoundments, could likely be considered jurisdictional waters subject to water quality standards, total maximum daily loads, and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges to those very same ditches. Additionally, by way of another example, under the proposed rule mining companies could be put in the impossible situation of having features designed to either store or treat mining-related materials to improve water quality be themselves required to meet water quality standards. (p. 4)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

American Gas Association (Doc. #16173)

12.722 AGA urges the Agencies to categorically exclude Municipal Separate Storm Sewer Systems (MS4s) from the definition of WOTUS. MS4s include ditches and/or road-side stormwater conveyances within a town. It is unclear under Proposed Rule whether an MS4 feature on a natural gas utility project site, not meeting the exclusions proposed by the agencies, could be a WOTUS. If so, any such determination would have major implications for local government entities that have to comply as permittees under the §404 program to perform any modifications, repairs, or maintenance. (p. 10)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Coon Run Levee and Drainage District (Doc. #8366)

12.723 It is unclear how the proposed definitional changes would impact application of pesticides used to control weeds and vegetation around ditches, settling basins, levees, water transfer, reuse, and reclamation efforts and other water delivery systems. (p. 2)

Agency Response: See essay 12.3. The final rule neither changes nor establishes new requirements for complying with the pesticides general permit (PGP). Permitting requirements are beyond the scope of this rule.

New York Farm Bureau (Doc. #15616)

12.724 We are concerned about the classification of agricultural stormwater runoff. If EPA classifies a wet spot in a corn field as a water of the U.S., then manure application in that area is immediately a point source discharge that requires a NPDES permit. Previously, depending on the size of the farm, the manure application was dictated by the farm's nutrient management plan approved as part of its CAFO permit. Any runoff from the field after a rain event was treated as agricultural stormwater and regulated by the state as a non-point source of pollution. However, under the new definitions, these exemptions are effectively removed and the state loses much of its non-point source oversight. (p. 4)

Agency Response: See essay 12.3. The definition of point source and the exemption for agricultural stormwater are beyond the scope of this rule. Issues relating to permitting requirements for the application of fertilizer (including

manure), pesticides, herbicides, and any other substances are also beyond the scope of the rule.

County Engineers Association of Ohio (Doc. #1997)

12.725 Under these changes, we also believe that Municipal Separate Storm Sewer Systems (MS4s) including roadside ditches would be considered Waters of the United States. Not only would discharges from these systems be subject to new regulations, but so would drainage entering these systems. Costs of accommodating these increases is not only potentially burdensome, but the right-of-way needs to accommodate increased regulations would be subject to criticism and opposition from adjoining property owners. (p. 2)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Comments about the implications of possibly needing to change rights-of-way are beyond the scope of this rulemaking.

North Carolina Water Quality Association (Doc. #12361)

12.726 Any final rule must clarify that stormwater treatment and conveyance systems are not jurisdictional waters of the United States. A local government should not, for example, have to be concerned that a regulator or citizen suit plaintiff may assert that an NPDES permit is required to discharge stormwater into its MS4 system. Likewise, it must be clear that a Clean Water Act§ 404 permit is not required to perform maintenance work on an MS4 BMP. (p. 1)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Minnesota Cities Stormwater Coalition (Doc. #14647)

12.727 There is a price paid for lack of clarity. If MS4 owners and operators are unclear or unsure about the WOTUS jurisdictional status of their constructed SCMs and BMPs, their work will be more difficult and less efficient. Staff resources and time will be diverted to this status issue. MS4s will be less confident about their operations and maintenance programs. MS4s' work and performance to protect, restore, and improve water quality will be diminished. (p. 3)

Agency Response: The Agencies' final rule provides clarity and includes an exclusion for stormwater control features that are built in dry land. Please see Compendium 7, summary response at 7.4.4.

Southeast Metro Stormwater Authority (Doc. #14935)

12.728 SEMSWA is troubled that the proposed tributary definition will likely expand what is considered jurisdictional Waters of the US. Many remote ephemeral drainages that were not considered Waters of the US, based on an individual determination made by the local USACE office, would be brought into the scope of jurisdictional Waters of the US under the proposed rule. SEMSWA is especially concerned because the proposed Rule could result in increased permitting for routine maintenance activities for our stormwater system, which translates to more resources to prepare for, and less time for actual implementation, of that critical maintenance. Additionally, the definition impacts the wetlands associated with designed treatment of stormwater runoff under our MS4 permit.

As we commented on with other proposed federal regulations, please allow local and regional agency personnel, including the USACE, the ability to manage their regulatory responsibilities using individual determinations based on site specific conditions. Let those regulators that value the regional watersheds, apply their knowledge, effectively and efficiently, to protect them. Please do not eliminate needed flexibility in permitting, and consider excluding wetlands designed for treatment as part of our MS4 permit efforts. (p. 1-2)

Agency Response: With respect to MS4s the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Also please see summary response at 7.1 regarding the waste treatment system exclusion.

Department of Public Works, City of Northglenn, Colorado (Doc. #14990)

12.729 Simply stated, the Proposed Rule impacts the City of Northglenn by redefining the meaning of the Waters of the U.S., and creating jurisdictional uncertainty. The Proposed Rule does not clearly distinguish between jurisdictional and non-jurisdictional; ditches, water quality ponds, constructed wetlands, detention/retention ponds and green infrastructure, resulting in significant economic impacts to public and private infrastructure owners. Language defining and excluding all man-made stormwater facilities (and their required maintenance) must be added to the Proposed Rule. Complying with the Proposed Rule is projected to result in double regulation (from NPDES and WOTUS), and significantly higher costs with unknown environmental benefit for our community.

Additionally, any change to the definition of "Waters of the U.S." directly affects existing CWA programs such as the Water Quality Standards (WQS) program and the National Pollution Discharge Elimination System (NPDES) program, adding complexity to a large number of new water features (e.g. permanent Best Management Practices) that are maintained as part of our permitted Municipal Separate Storm Sewer System. Much of the new language in the Proposed Rule would suggest that large portions of our already permitted MS4 will now be included as WOTUS. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Orange County Public Works, Orange County, California (Doc. #14994)

12.730 The Proposed Rule as to MS4s should undergo a new comment period. The Proposed Rule is silent as to whether certain MS4s can constitute jurisdictional waters and what types of MS4s would be become jurisdictional. There is also no analysis as to the Proposed Rule's impact on the water supply and flood control functions of MS4 operators such as the County. The Proposed Rule is not only silent on its application and analysis, but EPA has acknowledged in public meetings that application to the MS4 was not contemplated. Thus, any formal rule adopted by the Agencies would be arbitrary and capricious as all relevant factors have not been examined. Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983). (p. 2)

Agency Response: The agencies proposed a rule clarifying the scope of waters of the United States in April, 2014, and solicited comments for over 200 days. This final rule reflects the over 1 million public comments on the proposal, the

substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others. Also, please see Compendium 7, summary response at 7.4.4.

12.731 Although the Agencies will receive comments on how to regulate MS4s, the Agencies cannot adopt a final rule because the Proposed Rule did not allow notice and a fair opportunity to comment due to its silence and lack of analysis on its application to MS4s. Chocolate Manufacturers Association *v.* Block, 755 F.2d 1098 (4th Cir. 1985). Without any discussion as to whether and how the Proposed Rule applies to MS4s, notice is inadequate. (p. 2)

Agency Response: The Agencies are not changing their approaches to regulating MS4s. As a result of public comment and to provide greater clarity, the final rule now includes an exclusion for stormwater control features built in dry land. Please see Compendium 7, summary response at 7.4.4.

12.732 If certain MS4s will be defined as waters of U.S., additional consideration should be given as to when a "discharge" occurs necessitating a NPDES permit. Currently, the discharge point for a MS4 into a jurisdictional water is the point of outfall. Without this definitional separation, however, there would be no "discharge" under the Supreme Court's decisions in South Fla. Water Management Dist v. Miccosukee Tribe, 541 U.S. 95, 105 (2004), and Los Angeles County Flood Control District v. Natural Resources Defense Council, inc., 133 S.Ct. 710 ***(2013),*** as a MS4 and water of the U.S. would be one and the same. (p. 2)

Agency Response: The rule does not change the point of outfall as the discharge point for an MS4. It also does not change any determination of whether a discharge has occurred. It simply provides a definition for the term "waters of the United States." Please see the Technical Support Document Section I. To provide more clarity, the final rule includes a new exclusion for stormwater control features built in dry land. Please see Compendium 7, summary response at 7.4.4.

12.733 If certain MS4s will be defined as waters of the U.S., the Proposed Rule is unclear as to how man-made and man-altered channels will be regulated under Sections 401, 402 and 404 of the CWA. A local Orange County example of this is Peters Canyon Channel, an agricultural drainage channel built on upland that now serves as a flood control channel. If this channel was classified as waters of the U.S., any construction or maintenance work would require permit approval under Section 401 and 404 of the CWA, and beneficial uses and water quality standards would need to be established. If it was not, as seems appropriate, the channel would be considered part of the MS4 and be subject to discharge limitations of municipal MS4 permits as well as waste load allocations under applicable Total Maximum Daily Loads ("TMDL"). However, the lack of clarity in the current regulations casts confusion as to the status of this and similar channels under the CWA. The Proposed Rule fails to introduce any clarity on this issue. (p. 2-3)

Agency Response: Implementation of CWA programs remain unchanged and the responsibility of determining the jurisdictional status of various features in the first

instances is with the relevant permitting authority (e.g., local USACE District office, a state with an approved permitting program, or a U.S. EPA Regional office). Regarding MS4s and the jurisdictional status of stormwater control features, please see Compendium 7, summary response at 7.4.4.

SD1 (Doc. #15140)

12.734 SD1, which manages storm water in 29 cities, and portions of unincorporated Boone, Campbell, and Kenton Counties are required to comply with the Commonwealth of Kentucky's Phase II Municipal Separate Storm Sewer System (MS4) general permit. This permit currently contains requirements for storm water discharges into Waters of the Commonwealth. In that permit, the state responded to a commenter that:

> "Connections to subsurface drainage, such as Class V injection wells, sinkholes, drywells, karst windows, sinking streams, or other karst features are regulated by the Safe Drinking Water Act (Underground Injection Control program). This program is directly implemented in the Commonwealth of Kentucky by the U.S. Environmental Protection Agency, Region IV. As such, these conveyances are not considered outfalls under the Kentucky Municipal Separate Storm Sewer Program."

It is not clear that this response would remain accurate under the expanded definition of WOTUS. This interpretation is now open to question with the inclusion of the term "shallow subsurface hydrologic connection" in the definition of "neighboring" or "adjacent" waters in the definition of WOTUS (USACE and EPA 2014). It is also not clear how "wet weather conveyances" would be treated under the expanded definition, or who would have the burden of proof that a MS4 feature was not jurisdictional. With an expanded definition of WOTUS, some states may have to designate uses and adopt federal criteria (or equally protective criteria) for water bodies that were previously considered Waters of the State but not WOTUS. This would result in increased costs to the state as well as MS4 permittees.

Despite EPA's numerous presentations to help people understand how the rule will or will not impact MS4 permits and their implementation, there remain significant confusion and different interpretations of these potential impacts. For example, the Utah Association of Counties expressed significant concerns about lack of clarity of these potential impacts during a July 11, 2014 presentation at the National Association of Counties in New Orleans (Ward 2014).

This confusion is manifested in the Kentucky MS4 General Permit. For example, Part(1)(E) of the general permit contains definitions for the MS4 (which includes ditches, man-made channels, and storm drains); point source (which includes ditches, channels, and conduits); and outfalls (which include other conveyances).

The potential impact on regional storm water management facilities has also not been adequately addressed. For example, there are numerous headwater streams and other water features within MS4s that are not currently considered to be WOTUS. Regional storm water facilities are typically cost effective ways to control the impact of storm water discharges on existing WOTUS. If the point of water quality standards compliance is shifted further upstream, it is possible that regional facilities would no longer be viable.

These examples point out the wide-ranging potential for unforeseen consequences of moving forward with the proposed rule as currently written. This further supports our contention that the rule will very likely increase workload, reduce certainty and predictability, and increase the number of case-specific determinations in the administration of the CWA. (p. 6-7)

Agency Response: **With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402. Comments on the UIC program are beyond the scope of this rule.**

County of San Diego (Doc. #15172)

12.735 The proposed definition change would have an adverse impact to the Agricultural Water Quality (AWQ) and Integrated Pest Control (IPC) programs within the County's Department of Agriculture. Weights, and Measures (AWM).

Currently, the AWQ program regulates 457 agricultural facilities in the unincorporated area s of the County. AWQ inspects nurseries, golf courses, cemeteries, and pest control businesses in order to ensure potential pollutants like sediment, pesticides, fertilizers, and trash do not enter the County's storm drains, creeks, rivers, and beaches. This program is an integral component for the County to comply with the MS4 perm it. The proposed changes to the definition of Waters of the U.S. could increase the level of regulation on water bodies located in the County's current inventory of regulated agricultural facilities and could add new federal permitting requirements to current facilities or require the implementation of additional BMPs. Under the proposed definition change, agricultural facilities currently posing a low threat to water quality could require the same level of County regulatory resources as facilities with high threats to water quality. The increased allocation of resources would not likely yield a significant improvement in water quality. It is imperative that the County's resources continue to be deployed as efficiently as possible.

The IPC program conducts weed control in County-owned and operated ditches and flood control channels. Currently, IPC is able to effectively and efficiently eradicate weeds as needed. The proposed change may be interpreted in a way that county-operated ditches and flood control channels would be directly regulated under the CWA as Waters of the U.S. The change could delay the County's ability to efficiently control weeds due to increased regulation and oversight caused by the revised definition and expanded permitting requirements. Failure to control invasive and exotic weeds could trigger state and federal quarantines resulting in financial and ecological burdens for the County and its residents. At stake is the County's $1.7 billion agricultural industry, heavily dependent on its ability to export products. Without swift mitigation of quarantined weeds, our interstate and international trading partners could impose import restrictions and prohibitions, limiting market access for local farmers, far removed from weeds in a flood channel. Additionally, overgrown weeds significantly restrict water flow and could cause floods. (p. 3)

Agency Response: **Local regulation of "regulated agricultural facilities" is beyond the scope of this rule Please see Compendium 7, summary response at 7.4.4 regarding MS4s and stormwater control features. The requirements in or implementation of any general permit issued pursuant to the NPDES pesticide general permit program is also beyond the scope of this rule.**

Minnesota Cities Stormwater Coalition (Doc. #16929)

12.736 EPA has publicly stated that a water can be both part of an MS4 conveyance system and Water of the Unites States. This is a very confusing concept, from the perspective of regulated MS4 permittees. It is particularly confusing in light of another public statement from EPA presentations on this rulemaking: "Remember: Clean Water Act permitting requirements apply ONLY when there is a .discharge of a pollutant from a point source into a Water of the U.S.". How does an MS4 system discharge to a WOTUS if the WOTUS is a component of the MS4 conveyance system? If there is no discharge, do the CWA permitting requirements apply? How does an MS4 permittee meet its permit requirements for the operation and maintenance of its system when a·component of its system is also WOTUS?

We request that an alternative approach be considered. A water should only be WOTUS or part of an MS4, never both simultaneously. If a water is WOTUS, the discharge points from the MS4 to the water would be clearly viewed as outfalls under the MS4 permit. The water leaving the WOTUS could reenter the MS4. This approach may be much more clear and "cleaner" than the current concept of waters being both WOTUS and MS4 components simultaneously. (p. 6)

Agency Response: **The Agencies regard both approaches to effectively be the same. Please see Compendium 7, summary response at 7.4.4.**

Sacramento Stormwater Quality Partnership (Doc. #17005)

12.737 The Proposed Rule claims the appropriateness of including tributaries "by rule" is because tributaries have a significant nexus to a traditional navigable water, and that they affect the physical, chemical, and biological integrity, of a traditional navigable water. With respect to MS4 facilities, the significant nexus test is inappropriate because MS4 facilities are already regulated under CWA section 402. Specifically, to the extent that MS4 facilities may significantly affect traditional navigable waters, they are regulated like other point source discharges to a WOTUS, and are subject to extensive NPDES permit requirements. Since MS4s are regulated under a parallel provision (CWA section 402), it is inappropriate to be providing potential exclusions instead of specifically excluding MS4 facilities. (p. 4)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Ventura Countrywide Stormwater Quality Management Program (Doc. #18762)

12.738 The Proposed Rule creates new and significant uncertainty with respect to how it would be applied to storm water related facilities. Under the newly proposed definitions, groundwater recharge facilities, storm water conveyance channels, and other storm water related facilities could now be found to be a WOTUS. The exclusions in the Proposed Rule do not adequately cover or incorporate these types of facilities. Unless the Proposed Rule is further revised to address this uncertainty by clearly excluding the types of

facilities discussed herein, significant confusion will result with respect to what constitutes a WOTUS. Moreover, if such facilities are found to be WOTUS, the regulatory burden associated with establishing, maintaining, and operating these facilities will increase, and result in significant costs to municipal ratepayers. However, considering that these facilities are highly regulated for the protection of water quality, these increased burdens and costs will not result in better environmental protection. Storm water managers will also be left guessing as to their legal responsibilities, and storm water agencies could be open to legal liability from third parties. The Program recommends that the Proposed Rule be revised to avoid these results. (p. 2)

Agency Response: With respect to MS4 and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. Specifically, the Agencies specifically excluded constructed detention and retention basins created in dry land that are used for wastewater recycling, including groundwater recharge basins and percolation ponds built for wastewater recycling. The new exclusion also covers water distributary structures that are built in dry land for water recycling. The Agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." The exclusion in paragraph (b)(7) codifies the long-standing agency practice that water reuse and recycling structures are important and beneficial in protecting the chemical, physical, and biological integrity of the nation's water under CWA.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

12.739 … [T]he jurisdictional classification of ditches and MS4 systems to waters of the U.S. contradicts the 1987 CWA amendments when Congress created §402(p), authorizing the agency to issue CWA permits to MS4 system operators. If the agencies proceed in designating all MS4's as tributaries, there is no need for the MS4 program, as every facility discharging stormwater to a MS4 will need a CWA permit. (p. 13)

Agency Response: Comments about the effect of § 402 (p) are beyond the scope of this rulemaking. The Agencies agree that further clarity about separate storm sewer systems is appropriate. Please see Compendium 7, summary response at 7.4.4. Please see the Technical Support Document Section I. concerning the Agencies' legal rationale

Kentucky Stormwater Association (Doc. #18912)

12.740 KSA requests clarification on how the regulated MS4 programs will be impacted and the additional regulatory burden expected upon our local government membership. The KSA is concerned that the extension of the WOTUS definition will require regulatory oversight and direction that is already being provided by the state. In essence, KSA is concerned that the new rule will add regulatory burden to our local tax payers without additional benefit. (p. 1)

Agency Response: With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4. . See also Compendium 11 and Economic Analysis

section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.

Association of State Floodplain Managers (Doc. #19452)

12.741 It should be noted that a regulatory system that works for dredge and fill activities may not be efficient for 402 permitting, and vice versa. Therefore it is likely that other regulatory tools – including exemptions (e.g. for maintenance), general permits, and so on - may be needed to effectively accommodate both program areas.

Urban agencies are concerned with MS4 stormwater collection systems, and the extent to which these systems may become subject to §404 permitting. (p. 9)

Agency Response: Permitting requirements and exemptions from permitting are beyond the scope of this rule. With respect to MS4s and the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.

12.742 ASFPM recognizes that the §402 and §404 programs have distinctly different goals and requirements as applied to stormwater management. Therefore, we urge that EPA recognize these distinctions in the final rule and in guidance. (p. 9)

Agency Response: Please see response to previous comment.

United States House of Representatives (Doc. #17458)

12.743 MS4 permittees are currently responsible for direct discharges from their stormwater management systems into Waters of the United States (WOTUS). MS4 stormwater systems include canals, ditches, structures, pump stations, lakes, ponds, wetlands, pipes, swales, and roadways that provide retention, treatment and conveyance of stormwater. Under the proposed rule these facilities will arguably become WOTUS, resulting in the broadening of the number of county maintained facilities that would subject to federal permitting. Under this scenario, MS4 permittees will have their jurisdictional facilities reduced to only the pipe system associated with road drainage. As a result, the number of MS4 permittees, the number of applicable storm water management programs and the size of the MS4 contributing drainage area will be reduced, along with the ability to implement effective restoration programs associated with traditional MS4 programs. The treatment systems constructed to meet NPDES permit requirements will effectively be eliminated. Was it the intent of the EPA and the US Army Corps of Engineers to shrink the size of the MS4 program and, if not, do the agencies intend to propose revisions to the rule to exempt MS4 permitted stormwater systems and associated facilities from the definition of WOTUS? If the agencies do intend storm/surface water management systems to fall under the scope of the rule, where do the federal agencies propose local governments construct treatment systems, particularly in a region such as South Florida where the population is wholly dependent on surface water management and flood control? (p. 2)

Agency Response: The Agencies did not intend change the size of the MS4 program. The MS4 regulatory program is beyond the scope of this rule. To provide additional clarity, the final rule contains a new exclusion for stormwater control features. Please see Compendium 7, summary response at 7.4.4.

12.744 A majority of wastewater utilities in Florida have implemented water reuse (recycling) as part of a broader statewide water policy to reduce the impacts on traditional water resources and to "expand" the water pie. Many of those utilities implement their water reuse programs through the construction of infrastructure that directly discharges reclaimed water into the existing permitted storm water management systems of golf courses or residential developments. The reclaimed water supplements the existing surface water that is then utilized for irrigation of the golf courses and common areas. The Florida Department of Environmental Protection regulates the reclaimed water network and the utilities are responsible for monitoring intermittent wet weather discharges from the onsite storm water management systems during wet weather events. The continued beneficial expansion of water reuse programs would be significantly curtailed were the receiving storm water management systems to be considered Waters of the United States. How do the agencies intend to revise the proposed rule to exempt water reuse projects? (p. 3)

Agency Response: **The Agencies specifically excluded constructed detention and retention basins created in dry land that are used for wastewater recycling, including groundwater recharge basins and percolation ponds built for wastewater recycling. The new exclusion also covers water distributary structures that are built in dry land for water recycling. The Agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." The exclusion in paragraph (b)(7) codifies the long-standing agency practice that water reuse and recycling structures are important and beneficial in protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

12.3.1 Green Infrastructure

Summary Response

Many commenters expressed concern that the proposed rule could mean that "green infrastructure" facilities would become jurisdictional waters and as a result would require a 404 permit for maintenance activities. Use of "green infrastructure" for stormwater management is on the increase and is actively promoted by EPA. To provide additional clarity about whether stormwater control features such as bioretention basins, rain gardens and other green infrastructure are jurisdictional, the Agencies included in the final rule a new exclusion for stormwater control features built in dry land. Please see Compendium 7, summary response at 7.4.4.

Specific Comments

Allen Boone Humphries Robinson LLP (Doc. #19614)

12.745 (…) municipal utilities and water providers are interested in assisting EPA in pursuing "green' infrastructure" options for stormwater control. 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 itself became, waters of the U. S. (p. 6-7)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Skamania County Board of Commissioners (Doc. #2469)

12.746 Green infrastructure is often utilized as a stormwater management tool to lessen flooding and protect water quality. Green infrastructure is not explicitly exempt under the proposed rule. The proposed rule could inadvertently impact a number of these county maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. (p. 5)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

City of San Diego, Transportation & Storm Water Department (Doc. #7950.1)

12.747 If a swale or a non-jurisdictional ditch connects an upstream water body to a downstream WOTUS, the upstream water body can be considered an adjacent water to the WOTUS, thereby potentially discouraging the use of green infrastructure. (p. 2)

Agency Response: **It is unclear how the facts presented would discourage green infrastructure or change existing policy Please see Compendium 7, summary response at 7.4.4.**

City of San Diego, Transportation & Storm Water Department (Doc. #7950.2)

12.748 It is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. Green infrastructure development could be delayed due to the increased burden of permitting regulations which would also increase operational costs. This will limit the application of green infrastructure.

Recommendation: In the proposed rule, clearly distinguish between landscape features that are not waters or wetlands and those that are jurisdictional. (p. 2)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., including green infrastructure, please see Compendium 7, summary response at 7.4.4.**

Board of Commissioners of Carbon County, Utah (Doc. #12738

12.749 Other infrastructure projects, including construction and maintenance activities associated with storm water management, could also be federally regulated. Local governments use green infrastructure – storm water detention ponds, bio-swales, vegetative buffers, and constructed wetlands – to address storm water runoff problems and protect water quality. (p. 5)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

City of Artesia (Doc. #13043.2)

12.750 Many communities, including ours, have already planned and constructed projects to replace concrete with green infrastructure. Green infrastructure is particularly helpful

within MS4s. Storm water detention ponds are now a common feature that replace grey infrastructure and storm flow channels are planted and hard-scaped to slow storm flows, allowing more water to percolate into the soil and reduce the velocity of storm flow. Detention ponds keep storm water on site, but they must be maintained to maximize their storage and percolation capacity. They often have overflow features to prevent them from flooding. These features could be characterized as wetlands, tributaries or wetlands swales, or ‘‘other waters’’ under the proposed rule. As such, the degree of regulation and the associated cost would increase from being an element of an M54 to being a “waters of the U.S.” Green infrastructure features that meet the definition of a tributary, wetland, or “other water” would become too costly to implement due to stringent water quality standards and costly and time-consuming Corps permitting. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Carson Water Subconservancy District (Doc. #13573)

12.751 CWSD is currently working with the counties in the watershed to develop green infrastructure to address stormwater pollution concerns. It has been brought to our attention by some of our partners that the proposed rule could inadvertently impact a number of these county-maintained sites by requiring Section 404 permits for non-Municipal Separate Storm Sewer Systems (MS4) green infrastructure construction projects. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Waters of the United States Coalition (Doc. #14589)

12.752 [G]reen infrastructure including but not limited to constructed wetlands, swales and other low impact development BMPs could be classified as waters of the United States under a strict reading of the Proposed Rule. These BMPs are often intentionally built to mimic natural wetlands and either hold water on a perennial basis or provide typical wetland habitat and drain to downstream traditional navigable waters. If green infrastructure BMPs are classified as waters of the United States, cities (and private property owners) who construct and operate them will be required to obtain federal permits to maintain them. Discharges into the BMPs may also require an NPDES permit. This is an outcome that EPA has stated that it does not intend, but under a strict reading of the Proposed Rule, could occur. For that reason, the Proposed Rule needs to be revised. (p. 17)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Harris County Flood Control District (Doc. #15049)

12.753 Green infrastructure, which includes existing regional stormwater treatment systems and low-impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to hold and treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for

maintenance activities on green infrastructure areas once the area is established. A specific exemption is needed for this type of facility. (p. 4)

Agency Response: Please see Compendium 7, summary response at 7.4.4

Sacramento County, California (Doc. #15518)

12.754 Green infrastructure is often utilized as a stormwater management tool to lessen flooding and protect water quality. Green infrastructure is not explicitly exempt under the proposed rule. *The proposed rule could inadvertently impact a number of these county maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it* is *unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.* (p. 5)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Navajo County Board of Supervisors (Doc. #19569)

12.755 Green infrastructure is often utilized as a storm water management tool to lessen flooding and protect water quality. Green infrastructure is not explicitly exempt under the proposed rule. The proposed rule could inadvertently impact a number of these county-maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects.

Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. (p. 4)

Agency Response: Please see the response to the previous comment.

Washington State Water Resources Association (Doc. #16543)

12.756 Though EPA demands the use of BMPs to control stormwater flows, promotes the construction of stormwater retention/detention facilities, and encourages the use of "green infrastructure," most such activities occur in locations where run-off naturally occurs, i.e., swales, depressions, normally dry arroyos or washes, ephemeral streambeds, etc. In order to construct, maintain, repair and replace such facilities, additional regulatory hurdles, and the attendant costs, will have to be overcome, as there is no stormwater control exemption. (p. 9)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Iowa League of Cities (Doc. #18823)

12.757 Another area within storm-water systems that has raised concerns is the utilization of green infrastructure for the management of storm-water runoff. This includes projects that include permeable paving, dike systems, vegetation, soils and natural processes. Some cities within the Iowa have been lauded by the EPA for their usage of this type infrastructure to control storm-water and gaining additional benefits important to the EPA of nutrient reduction and flood mitigation. These cities now have to question whether these projects will need to meet WQS or if maintenance of the systems will require a Section 404 permitting process. Neither, the proposed rule language nor the preamble guidance address these systems for storm-water management.

City Example: After the 2008 flooding, some cities in Iowa have been utilizing green infrastructure, such as newly constructed wetlands, to control flooding and act as a part of their storm water system. They are concerned that these efforts that have been praised could now be brought under further regulation.

Request for EPA Response: We request that the EPA specifically exclude green infrastructure and outline the Agency's understanding of what is included within green infrastructure similar to what was done for agricultural practices under the joint interpretive rule with the Department of Agriculture. (p. 4-5)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

U.S. Chamber of Commerce (Doc. #14115)

12.758 *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." (p. 17)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Katy Area Economic Development Council, Inc. (Doc. #15182)

12.759 The new rule appears to expand the current reach of federal jurisdiction, potentially making large areas of the Katy Area and Houston MSA subject to land use restrictions and management, as imposed by federal agencies. The cities, counties and drainage districts, with authority over development in this region, have begun to embrace a wide variety of low impact and green infrastructure construction as the best method to accommodate drainage. Activities pertaining to land development often produce storm water releases from developed property that are better from a chemical and physical effect on the watershed than from a vacant or undeveloped property condition. CWA's goals are to protect the chemical, physical, and biological integrity of the navigable waters. An overbroad assertion of the federal reach actually undermines the goals of the CWA and progress made in active water quality projects in the Houston region. (…) This will further discourage the move to develop green infrastructure construction and act as a drain on the economy of the Katy Area and Houston Region. (p. 1-2)

Agency Response: **The agencies have included a new exclusion for stormwater control features built in dry land. Please see compendium 7, summary response at 7.4.4.**

American Society of Civil Engineers (Doc. #19572)

12.760 Potential Impacts of the Rule on Encouraging Green Infrastructure

Civil engineers build both traditional hard or "grey" infrastructure such as dams and levees, but also actively work to incorporate natural systems into designs. Often times, nature is the best engineer. For the reason, the Society supports the development of

"green infrastructure". Many municipalities are now looking to manage stormwater with the use of bio-swales, artificial wetlands, low impact development stormwater treatment systems, green alleys and streets and rain gardens. Green infrastructure uses vegetation, soils and natural processes to manage water and create healthier urban environments. Often these systems are often designed to hold water as it permeates into the soil. There are significant concerns that this holding function could trigger jurisdiction under the proposed rule. It's also unclear whether a §404 permit will be required for maintenance activities on green infrastructure projects. (p. 10)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

North Houston Assoc., West Houston Assoc., Woodlands Development Co. (Doc. #12259)

12.761 Certainly, throughout the Houston region this would be the result of the proposed rule. This must not be ignored, the steps – even for the simplest Nationwide Permit – are numerous, and the total time required must be counted in months in the best cases. Much of the drainage system is the responsibility of the public entities that must operate efficiently on the public resources. The continuing move to natural floodplains, with created tributaries utilizing techniques such as bio filter and bioswales, would then create – under the proposed rule – "navigable waters" for all future purposes, including maintenance or modifications. As a result of this proposed jurisdiction expansion, the green initiatives will come to a screeching halt. This is inherent given the realistic resources available to local governments. (p. 2)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

North American Meat Association (Doc. #13071)

12.762 The proposed rule may also reach green infrastructure. EPA has pushed permittees to develop and implement green infrastructure in recent years.[164] Because green infrastructure is not exempt under the proposed rule, a section 404 permit, and other monitoring and regulatory requirements, could now be required for green infrastructure construction and maintenance where the green infrastructure is developed in areas considered to be "waters of the U.S." under the proposed rule. The potential for additional regulation will discourage the development of green infrastructure. (p. 13)

Agency Response: Please see Compendium 7, summary response at 7.4.4.

Airports Council International – North America (Doc. #16370)

12.763 In an effort to further understand the jurisdictional reach and related impacts of the Proposed Rule the following questions need to be answered:

- Could agencies interpret the rule to mean Green Infrastructure Best Management Practices (BMPs) (vegetated swales, amended filter strips, etc.) are WOTUS? How would this affect ongoing maintenance of these installations? Specifically, the Proposed Rule describes physical, chemical, and biological integrity as part of

[164] *See, e.g.*, EPA, Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow Control (March 2014).

determining a significant nexus. Could a green roof on a building be considered WOTUS, as it could qualify as a wetland? (p. 6)

- With the Proposed Rule's expanded status of WOTUS upstream of National Pollution Discharge Elimination System (NPDES)-regulated points of discharge, is there a regulatory conflict created with NPDES/MS-4 regulations in Section 402? (p. 6)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

12.764 Under the terms of MSD's Consent Decree, in order to minimize the occurrence of CSO's and to improve the overall water quality, MSD has been implementing, subsidizing and requiring the use green infrastructure with the use of bioswales, low-impact development stormwater treatment systems, green alleys, streets, and rain gardens. Green infrastructure uses vegetation, soils and natural processes to manage and slow the flow of stormwater into the collection system by holding water. MSD is concerned that this holding function could trigger jurisdiction under the proposed rule. Accordingly, MSD requests clarification. (p. 3)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

Lake County Stormwater Management Commission (Doc. #16893)

12.765 There is much uncertainty on the effects the proposed definition change would have on county governments, given the definition would apply to all CWA programs (e.g., National Pollutant Discharge Elimination System; Water Quality Standards; stormwater, green infrastructure, pesticide permits, and TMDL standards, etc.), not just the 404 program. These programs could potentially subject Lake County to increasingly complex and costly federal regulatory requirements under the proposed rule, particularly with respect to the County's stormwater management program and green infrastructure (including best management practices, or BMPs). (p. 1)

Agency Response: **Please see Compendium 7, summary response at 7.4.4.**

12.4. 404 – DREDGED AND FILL MATERIAL

Summary Response

The final rule does not establish any regulatory requirements, and questions about implementation of the Section 404 program are beyond the scope of the rulemaking. Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, including the section 404 permit program for discharge of dredged or fill material, all rely on the definition of "waters of the United States." Entities that currently are regulated under these CWA programs that protect "waters of the United States" will continue to be.

Because the scope of regulatory jurisdiction in the final rule is narrower than under the existing regulation, the rule does not expand the number of dischargers who need Section 404 permits. The rule does not change requirements in existing Section 404 permits, and does not change

requirements for future Section 404 permits. The rule does not change the Clean Water Act's definition of "point source" or "discharge of a pollutant" and does not establish new categories of point sources or discharges. The rule was not changed to address comments to this effect. As is current law and practice, entities discharging certain pollutants into waters of the United States must obtain and comply with a section 404 permit, including implementing of any requirements identified in the permit.

Specific Comments

Rural County Representatives of California (Doc. #5537)

12.766 The expansion of the definition of Waters of the U.S., as drafted, will also force counties to seek Section 404 permits for the now-routine maintenance of such "waterways" as roadside ditches and storm water drains. Public infrastructure ditch systems can stretch for hundreds of miles across local jurisdictions, and it is unclear how these systems will be classified under the rule. This is particularly onerous for rural counties, as many are already struggling with tough budgeting decisions in the face of diminishing funding from the state and decreased public appetite for approving new taxes to cover such costs. It also could dramatically interfere with the ability of counties to properly maintain roadways to keep them safe and accessible to rural residents, particularly since the U.S. Army Corps of Engineers is already significantly backlogged in evaluating and processing of 404 permits. (p. 3)

Agency Response: The rule reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, thereby appropriately reducing regulatory burdens. In the final rule EPA and the Corps have maintained exclusions for ditch maintenance and other currently excluded activities and also added exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent. This includes stormwater control features created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

Arizona Department of Transportation (Doc. #15215)

12.767 (…) [W]ithout clarification of the upper extent of a tributary, if more small drainages are considered jurisdictional or "potentially jurisdictional" per the Corps' current preliminary jurisdictional determination process, this could increase permitting costs, compliance costs and risk, and could influence the regulation of ditches that would become jurisdictional due to the direct or indirect connection of flow to a jurisdictional water. ADOT also requests that the EPA and Corps provide some insight regarding the procedure by which the rule would be implemented and jurisdictional determinations be made. Will the current Preliminary and Approved Jurisdictional Determinations approach continue with the proposed new definition? (p. 2)

Agency Response: Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators

of flow – bed and banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries" as defined are jurisdictional by rule.

12.768 From this, stems compliance with Clean Water Act Section 402 stormwater regulations. Specifically, for ADOT, a large increase in labor and costs would occur in order to implement and comply with the requirements of the MS4 permit (e.g., outfall mapping requirements). ADOT supports the general concept of clearly identifying a point of definition where MS4 infrastructure stops and where stormwater management features begin and end. It is important that the EPA and Corps clarify what is a MS4 and what are Waters (i.e., uphold that a MS4 are not Waters). (p. 2-3)

Agency Response: The rule does not change current mapping requirements for MS4s as described in their NPDES permits. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see Compendium 7, summary response at 7.4.4.

Skamania County Board of Commissioners (Doc. #2469)

12.769 In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined. (p.4)

Agency Response: The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. It does not alter those activities identified as exempt from regulation under CWA section 404(f)(1) including ditch maintenance. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, counties and municipalities charged with maintaining the nation's roads.

Lincoln County Conservation District, State of Washington (Doc. #4236)

12.770 Redefining Crab Creek and its tributaries as "Waters of the United States" in the current proposal automatically involves and reinforces the role of the Army Corps of Engineers for any work done in and along these streams, and this adds additional 404 permits to the permitting workload. (p. 5)

Agency Response: Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to

downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries" as defined are jurisdictional by rule. The rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. Features not meeting this legal and scientific test are not jurisdictional under this rule.

Murray County (Minnesota) Board of Commissioners (Doc. #7528)

12.771 For example, under Section 404(e) of the Act, the Army Corps may issue general permits to authorize activities that have a minimal individual and cumulative adverse environmental effect on the integrity of navigable waters. One such permit, Nation Wide Permit 39, authorizes filling of one-half acre of wetlands for residential, commercial, or institutional development purposes. Unfortunately, Nation Wide Permits can be eliminated within any Army Corps District by the adoption of Regional General Permits – which can be more restrictive than Nation Wide Permits based on the unique nature of waters within the District. The current threshold to authorize District level regulation is extremely low. We encourage and support heightened scrutiny on the regulatory procedure that permits Anny Corps Districts to depart from the Nation Wide Permitting rules. (p. 3)

Agency Response: As you point out, even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. This final rule does not affect existing general permits or the development of future general permits consistent with CWA section 404(e). The agencies will continue to utilize general permits and other simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Dayton Valley Conservation District (Doc. #10198)

12.772 Furthermore, we have concerns that Section 404, the "dredge and fill" permit program, could cause other enforcement issues involving activities such as weed control, fertilizer applications, and construction of fences or ditches. This additional oversight will provide very minimal benefits to the overall water quality in the Carson River watershed, while enforcement would most likely increase expenses for producers as well as resource Managers. (p. 2)

Agency Response: The final rule focuses on identifying waters that are clearly covered by the CWA and those that are clearly not covered, making the rule easier to understand, consistent, and environmentally more protective. It is important to note that the final rule does not alter the definition of "discharge of dredged material," "discharge of "fill material," or types of activities requiring CWA section 404 permits.

Kansas Independent Oil & Gas Association (Doc. #12249)

12.773 With 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), it is anticipated that the 404 permitting program will expand and this has been confirmed by the U.S. Army Corps of Engineers *Economic Analysis,* p. 29. Assessment of whether such "other waters" and any related discharges would significantly affect the chemical, physical, or biological integrity of a jurisdictional water is required under the new proposed definition.

- Eastern Kansas. Under the current regulations (bed to bank) a typical operator does not need to obtain a permit from the Army Corps of Engineers when building an access road to the new drill site when the road crosses a stream if the disturbance is less than one-tenth of an acre per crossing. The roads have historically been built following "best management practices". The changes proposed by the agencies to Section 404 of the Clean Water Act could significantly impact 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 beyond the "high water" mark to include the drainage area of a tributary – from ridge top to ridge top on either side of a stream. Even if the definition of Riparian Area is physically limited, the definition of "Other Waters" is so vague, that "case specific" analysis of ephemeral streams could consider the entire watershed to be "nexus" to a navigable river, or the entire upland around a wetland to be "nexus", and, therefore, require permits. The result of these changes likely mean every stream crossing and well pad will require a nationwide 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.
- Central Kansas. Upon assessment of the Mississippian Lime in south central Kansas there is an approximate five-fold increase in infrastructure intersections with streams when transitioning from the National Hydrography Dataset (more representative of maps used currently by the Corps) to the lidar (high-resolution) map where a synthetic streams network was generated that includes many ephemeral streams that aren't delineated in the NHD dataset. If all ephemeral streams are considered tributaries, then the result would be a five-fold increase in the number of jurisdictional waters to consider. Based upon current law and interpretation, using the National Hydrology Dataset - Pipelines intersected mapped streams (NHD dataset) at 418 locations and were subject to nationwide permits. Using the High Resolution Mapping, pipelines intersected lidar (high-resolution mapping data inclusive of all the ephemeral streams not often depicted on existing USGS quadrangles and which would all likely become WOTUS under the proposed rule) at 2,043 locations (five-fold increase compared to the intersections assessed from using NHD).
    - Summary: Using the lidar data that includes again the ephemeral streams, a significant emphasis on understanding of EPA's implementation of OHWM, bed and bank, or presence of a 100-year floodplain is essential to determine whether the operations would have an impact on WOTUS. From an industry viewpoint of

assessing impacts, it is very difficult to read the agencies' proposal and determine the extent of the "floodplain", "OHWM", "bed and bank" where there is little if any definition of that in the rule. For example, on the floodplain issue, the words of "inundated during periods of moderate to high flows" could mean 100-year and 500-year frequency and mapping. But if it said "frequency" that might entail maybe a 2-year or such floodplain. On page 62 of the rule, EPA says "when determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine the flood interval to use (for example, 10 to 20 year flood interval zone)". (p. 4-5)

Agency Response: **In response to requests from commenters and to provide greater clarity and consistency, in the final rule the agencies establish a definition of neighboring which provides additional specificity, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As recommended by the public and based on science, the defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain. The agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Further, should the riparian area on occasion extend beyond the 100-year floodplain, the agencies have the ability to perform a case-specific significant nexus analysis on a water out 4,000 feet from the ordinary high water mark or high tide line of a traditional navigable water, interstate water, the territorial sea, impoundment, or tributary. The agencies have drawn these lines based on their technical expertise and experience in order to provide a rule that is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas. Because science indicates that connectivity is on a gradient, the agencies have also identified limited circumstances in which waters that do not meet the definition of "neighboring" may be determined on a case-specific basis to have a significant nexus.**

CONSOL Energy, Inc. (Doc. #14614)

12.774 CONSOL is concerned with activities that would fall under Section 404 permitting requirements. Section 404 permitting is a lengthy and involved process that requires Section 401 state water quality certification. If on-site mining water management features are included in the definition of "waters of the US" it will further complicate the permitting process, increase costs, and impede maintenance of these features; while providing little to no environmental protection. (p. 3)

Agency Response: **The final rule reflects input from many commenters urging EPA and the Corps to improve upon the April 2014 proposal to help in minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for regulated entities. Specifically, the final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. This exclusion responds to numerous stakeholders' concerns that the proposed rule would adversely affect their ability to operate and maintain their stormwater systems, and also to address**

confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed. Please see Compendium 7, summary response at 7.4.4.

12.775 CONSOL supports the efforts of the EPA to protect "waters of the US" from damage, but does not believe this proposal serves its intended purpose. In addition to considerable permitting delays, these changes would lead to additional costs for mitigation and delineation efforts, and severely limit our ability to avoid currently regulated jurisdictional waters, while extending waters of the US coverage into areas that have no significant hydrologic connection to jurisdictional waters. Additionally, CONSOL feels the proposed change is unwarranted due to existing federal regulations being sufficient. (p. 4)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in *Rapanos* underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Association County Commissioners of Georgia (Doc. #5912)

12.776 Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen lawsuits if the federal permit process is not significantly streamlined. Furthermore, the Corps does not have the resources to handle what will likely be a greatly expanded permitting program. This is a recipe for bureaucratic morass and a dysfunctional permitting process. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. That being said, the final rule does not affect the existing permitting process or streamlined regulatory tools that are available to simplify and expedite compliance such as general permits developed at the national, regional or state level, consistent with CWA section 404(e).

Nebraska Cattlemen (Doc. #13018)

12.777 Any change to the interpretation of "waters of the United States" should focus only on §404 where many problems currently exist. The other sections of the Act are largely administered by the states and no business case has been made for a need to change this area of the Act. In addition, without any limit to federal jurisdiction under the proposed rule EPA has also illegally usurped the federalism principles laid out in the CWA and should withdraw the proposed rule and re-propose a rule that takes in to account states' rights. (p. 16)

Agency Response: As you point out, there are a number of CWA programs that utilize the definition of "waters of the United States." States and tribes may be

authorized by the EPA to administer the permitting programs of CWA sections 402 and 404. Additional CWA programs that are of importance to states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load (TMDL) programs under section 303, and the section 401 state water quality certification process. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

County Engineers Association of Ohio (Doc. #1997)

12.778 The primary concerns of definition changes are those of a cumbersome review process that further slows down our ability to construct infrastructure improvements and potentially impede maintenance of ditches that affect roadway safety and welfare of adjoining property owners. The system is already backlogged with various construction / water quality permits. Once these drainage facilities are deemed jurisdictional, we would expect more time-consuming and expensive requirements to ensue. (p. 1)

Agency Response: The rule reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, thereby appropriately reducing regulatory burdens. In the final rule EPA and the Corps have also added exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent. This includes stormwater control features created in dry land. Please see Compendium 7, summary response at 7.4.4. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

Minnesota County Engineers Association (Doc. #6996.2)

12.779 We are very concerned with the proposed new rules defining WOUS and the efficiency of the Section 404 Clean Water Act permit process. The proposed rules at 88 pages as published in the Federal Register are so complex and confusing; we are concerned our County members, especially in smaller and mid-size Counties without environmental resource specialists, will be able to identify which waters require permits and which do not. We are concerned the regulators will also have difficulty with this question. The ambiguity will result in additional costs and delays as we attempt to make this determination. It will also inevitably result in inadvertent violations and court challenges. We very much need a clear, concise, unambiguous and workable definition.

The current permit process for local transportation projects requiring LOP or individual permits can be very slow. We understand the Corps is working very hard to process the permits in a timely manner, but because of a complex process including Section 106 historic review, USFWS endangered species review, written environmental documents, compounded by sequestration staff cuts, we see permit delays of months and even years

in isolated cases. This is extremely costly in terms of project costs, delays and continued risk to public safety.

We suggest the Corps develop a general permit for local transportation projects with an accelerated review schedule. In addition, the Corps needs sufficient staff to process permits in a timely manner. Thank you for the opportunity to review and comment. If you have any questions or would like to discuss, please contact us. We want to assist in developing a Federal permit process which protects all the Waters of the United States. However, it needs to be a clear, unambiguous and efficient process to avoid unacceptable costs to public health, safety and welfare related to extensive delays in moving projects forward. (p. 1-2)

Agency Response: **Please see summary response 12.4. The final rule reflects comments received from stakeholders during the agencies' extensive public outreach efforts urging us to improve upon the April 2014 proposal. Specifically, the final rule provides more bright lines and simplifies definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities. However, the final rule does not affect requirements relating to other statutes such as the National Historic Preservation Act or Endangered Species Act. This final rule also does not affect existing general permits or the development of future general permits consistent with CWA section 404(e).**

Division of Transportation, Kane County, Illinois (Doc. #9831)

12.780 We are concerned that more county-owned ditches would likely fall under federal oversight. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined. Previously, ditches were never considered to be jurisdictional by the Corps. Whether or not a ditch is regulated under Section 404 has significant financial implications for our organization. Additionally, the Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, thereby appropriately reducing regulatory burdens. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.**

NW Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

12.781 The proposed rule does create some confusion over how the current assessments for Nationwide Permits (NWPs) for some dredge and fill activities may change with the new definition of "adjacent." Currently, NWPs are available for the dredging and filling of material if the activity does not impact more than 300 linear feet of the streambed. As

discussed above in comment b. 3. NWPs are essential to local government functions. As proposed, the definition of "adjacent" waters would include riparian areas and floodplains, which creates ambiguity as to how agencies will calculate whether 300 linear feet is calculated. QQ recommends clarifying that current practice of assessing 300 feet of the *streambed*, not waters in the neighboring riparian area or floodplain, remains in place. (p. 5)

Agency Response: As you point out, even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as nationwide general permits (NWP). This final rule does not affect the terms and conditions of existing NWPs, environmental thresholds established in current NWPs or definitions (including the definition of "stream bed") used in the implementation of the NWP program. See also summary response 12.4.

Professional Landcare Network (Doc. #11831)

12.782 Under the proposed rule, Clean Water Act Section 404 (wetlands dredge and fill) permits could be required to install trees, plants, and other landscape features on private property that includes Waters of the United States or is deemed to be in a floodplain. The installation of turf, trees, and plants protects water quality and provides other environmental benefits. The EPA and the Corps should encourage these activities, rather than subject them to permits. (p. 2)

Agency Response: The agencies have been, and will continue to be supportive of vegetative planting activities for purposes of water quality improvement and other benefits. The final rule does not alter the definition of "discharge of dredged material," "discharge of "fill material," or types of activities requiring CWA section 404 permits. To the extent that the commenter is referring to stormwater management practices that may resemble landscape features, please see Compendium 7, summary response at 7.4.4.

United States Congress, Kildee et al. (Doc. #6846)

12.783 As you prepare to finalize the rule Docket ID No. EPA-HQ-OW-2011-0880, regarding the definition of "waters of the U.S." in the Clean Water Act, we encourage you to work with the state of Michigan as it continues the process to maintain its delegated authority in accordance with Sec. 404(g) of the CWA to operate its Sec. 404 permitting program for dredged and fill material that is currently run by the Michigan Department of Environmental Quality. (p. 1)

Agency Response: It is important to note that the final rule does not affect the scope of waters subject to assumption under CWA section 404(g). That being said, EPA and the Corps will continue to work closely with the Michigan Department of Environmental Quality as the State carries out its CWA responsibilities.

12.4.1 Transition Process for Final Rule

Specific Comments

State of Oregon (Doc. #15218)

12.784 (…) [W]e recommend that the agencies add provisions to the final rule to clarify whether and, if so, to what extent the rule is intended to apply to actions that have already occurred. This includes its application to existing and pending permits and jurisdictional determinations. (p. 2)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. The final rule does not change how jurisdictional issues are dealt with in other CWA programs. The final rule does not change existing permits or other actions taken to implement the CWA. Existing permits will remain effective for the life of that permit unless the permit is withdrawn. Since pending permits are based on the approved JD that accompanies the permit application, those determinations will not change unless the applicant asks.

State of Oregon (Doc. #15218)

12.785 With regard to the administration of the proposed rule, we recommend that the rule contain a specific timeframe for the agencies to make their "waters of the United States" jurisdictional call. This timeframe should apply whenever a permit application is submitted to the Corps, and anytime a jurisdictional call is otherwise needed or requested. (p. 2)

Agency Response: The rulemaking does not change the existing regulatory process including timelines.

Association of State Drinking Water Administrators (Doc. #15530)

12.786 Implementation Guidance: Finally, we recommend that EPA and the Corps develop all needed implementation guidance associated with a final rule in a timely manner. States believe that, even with the clarity provided by a final rule, there will be many site-specific challenges in its implementation borne of regional differences and case-specific scenarios. ASDWA recommends that EPA and the Corps work with states in the development of such guidance and publish any such regional implementation guidance for this rule shortly after final rule issuance. Timely issuance of implementation guidance will, we believe, enhance the ability of states to work with EPA and the Corps to successfully implement this rule. (p. 2)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will

continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships and to ensure successful implementation of this rule.

City of San Diego, Transportation & Storm Water Department (Doc. #7950.2)

12.787 There should be heightened concern that regional Corps offices "sometimes" require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for some channels exists on paper, in practice it is based on the "best professional judgment" of each individual reviewing the applications.

Recommendation: Supply a standard operating procedure so inconsistencies are not presented by a subjective "best professional judgment" that can vary with each individual. (p. 2)

Agency Response: The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. It does not alter those activities identified as exempt from regulation under CWA section 404(f)(1), including maintenance activities. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, counties and municipalities charged with maintaining the nation's roads.

Maricopa County Board of Supervisors (Doc. #14132)

12.788 Countless projects around the United States have formal and informal Jurisdictional Determinations (JD) by the COE on which the private and public developers rely. The rule must specifically express in rule language and in the Preamble that the rule will not overturn or modify such determinations. From our review, the rule does not explain how existing WUS delineations will be treated when the new rule becomes final (i.e. ongoing projects or expiring 5-year permits). Further and in order to bring certainty to those who hold determinations, the rule should expressly state that developers have a refreshed 5-year period to commence construction on their project based on the JD they are holding when the rule becomes final. These transition provisions will bring certainty to those who hold JDs. This certainty for JDs is even more important after recent changes to EPA's public position on JDs. As late as July 2, 2014, EPA's "Questions and Answers About Waters of the US" recounted on the EPA webpage that, "the proposed rule does NOT mean that previous decisions about jurisdiction have to be revisited." (Copy Enclosed as it is no longer on-line.) However, that same document is now on the EPA webpage entitled, "Facts About the Waters of the U.S. Proposal," and that definitive language protecting previous JDs has been removed.[165]. It appears that EPA now believes that JDs must be revisited when the rule is passed. The rule must be amended to state that the rule does not overturn or modify these determinations. (p. 3)

[165] http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf (page 4) (last visited on October 2, 2014)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Lee County, Florida (Doc. #15241)

12.789 Under existing rules and case law, a waterbody is considered a water of the U.S. if it is a wetland adjacent to a water of the U.S. In contrast, under the proposed rule, all water bodies adjacent to a water of the U.S. could be considered themselves waters of the U.S., regardless of type and whether any sort of nexus or hydraulic connection has been shown and without any consideration of whether a berm or levee separates them. While the agencies have been adamant that the proposed rule does not "protect any new types of waters that have not historically been covered", the language of the proposed rule can clearly be read to expand the agencies' jurisdiction. Therefore, it is unclear how waters that were previously found to be non-jurisdictional, but that are re-evaluated and found to be jurisdictional, would be addressed. The agencies should address this retroactivity problem by including a "grandfather" provision in the proposed rule. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Snowmass Water and Sanitation District (Doc. #16529)

12.790 Effect on Previously Issued Jurisdictional Determinations. The proposed rule does not address the effect of the proposed changes on previously issued jurisdictional determinations (JDs) confirming non-jurisdiction. The rule should make clear that the new criteria will not apply to any JDs (preliminary or approved) issued prior to finalization of the rule. It should also clarify that activities already constructed in areas that are subsequently defined as jurisdictional are "grandfathered" and will not require after-the-fact or other permitting. (p. 9)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Western Urban Water Coalition (Doc. #15178)

12.791 The Proposed Rule does not indicate whether it applies to approved jurisdictional determinations under existing rules and agency guidance. The Final Rule should grandfather existing jurisdictional determinations and state that the new regulation applies only to permit applications received after the effective date of the Proposed Rule.

There is a strong reliance interest in the water industry on existing determinations that should not be upset by the Final Rule. (p. 8)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Association of State Drinking Water Administrators (Doc. #15530)

12.792 …we recommend that EPA and the Corps develop all needed implementation guidance associated with a final rule in a timely manner. States believe that, even with the clarity provided by a final rule, there will be many site-specific challenges in its implementation borne of regional differences and case-specific scenarios. ASDWA recommends that EPA and the Corps work with states in the development of such guidance and publish any such regional implementation guidance for this rule shortly after final rule issuance. Timely issuance of implementation guidance will, we believe, enhance the ability of states to work with EPA and the Corps to successfully implement this rule. (p. 2)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships and to ensure successful implementation of this rule.**

Minnesota Chamber of Commerce (Doc. #16473)

12.793 Grandfathering Issues Need to Be Addressed. The Proposed Rule needs to address its effect upon existing or pending jurisdictional determinations (JDs). Minnesota has numerous JDs and CWA permit applications pending. The agencies should clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based upon the new rule. (p. 2)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. The final rule does not change how jurisdictional issues are dealt with in other CWA programs. The final rule does not change existing permits or other actions taken to implement the CWA.**

Water Advocacy Coalition (Doc. #17921.1)

12.794 The proposed rule does not address grandfathering issues or how the rule's changes would affect existing or pending JDs. We recommend that the agencies clarify that

previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule.

A federal agency may not enact a regulation with a retroactive effect unless Congress conveys that authority in express terms.[166] Some courts have held that an administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[167] The proposed rule would adopt new standards for defining jurisdiction. To avoid unlawful retroactive application, the agencies must clarify that previously issued JDs and CWA permits will not be reopened to reconsider jurisdiction under the new standards.

In addition, new requirements should not be applied retroactively to JD and permit applicants who have invested substantial efforts under the previous standards. In previous instances, the Corps and EPA have limited application of new regulations to new permit applications. With the 2008 Mitigation Rule, for example, the Corps and EPA provided that the final rule would apply only to permit applications received *after* the effective date of the rule and provided the district engineer discretion to make determinations under the previous standards where applying the new rules to a particular project would "result in substantial hardship to a permit applicant."[168] The same standard should apply here.

In outreach meetings, the agencies have stated that existing JDs issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determinations.[169] But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the agencies' intent. In fact, in a June 30 Q&A document published by EPA with a blog post by Nancy Stoner, the agencies stated, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations."[170] Now, without any indication or notice that the June 30 Q&A document has been revised, the Stoner blog post links to a different Q&A document that no longer contains this statement. Have the agencies changed their position on revising previous determinations?

The agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. In addition, the agencies' statements fail to address JDs and permit applications that are already pending (and may be close to being issued). It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule.

[166] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[167] *National Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1 (D.C. Cir. 1999); *Ass'n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992).
[168] 73 Fed. Reg. 19,594, 19,608 (Apr. 10, 2008).
[169] For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed waters of the United States Rule, EPA stated, "The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits." ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014).
[170] Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014) http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ (June 30, 2014) (attached hereto as Exhibit 21)

Accordingly, the agencies should clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule. (p. 90-91)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

El Dorado Holdings, Inc. (Doc. #14285)

12.795 It is essential that the agencies develop a comprehensive grandfathering clause that allows existing approved or preliminary jurisdictional determinations to remain effective, and that it allows those determinations to be extended without applying the new rule. Moreover, pending applications for determinations should also be completed under the current *Rapanos* guidance. Jurisdictional determinations are the first step in very lengthy permitting processes and once made, form the basis of critical investment and design considerations that if disturbed would have substantial adverse economic consequences. (p. 7)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.796 *Existing AJDs and PJDs should not be disturbed*: The proposal is strangely silent on whether or how it might affect approved jurisdictional determinations ("*AJDs*") or preliminary jurisdictional determinations ("*PJDs*") that are in existence on the date the revised rule becomes effective.[171] At least in Arizona, in order to avoid the lengthy delay often associated with performing an AJD in the wake of *Rapanos*, applicants often have felt it necessary to utilize the PJD process rather than completing a formal AJD, with the result that there are far more PJDs being issued than AJDs.[172]

[171] An approved JD is an official determination by the Corps regarding the presence or absence of waters of the U.S. at a site, and one that EPA has had a chance to review, consistent with the process outlined in the agencies' December 2008 jurisdictional guidance. A preliminary jurisdictional determination is a nonbinding written indication from the Corps that essentially identifies all waters on a site as regulated (i.e., no significant nexus analysis is conducted). AJDs and PJDs are described in Corps Regulatory Guidance Letter 08-02, Jurisdictional Determinations (June 26, 2008). Despite their less formal nature, significant work often goes into the preparation of a proposed PJD for Corps review, and in some cases negotiation may be required before the Corps is comfortable approving a PJD (e.g., over the question of which washes exhibit an ordinary high water mark).

[172] In a recent article appearing in E&E's *Greenwire* publication and entitled "Bed, bank and beyond: EPA rule proposal stumps arid Ariz.", the chief of the Corps' Arizona office was quoted as follows: "We do hundreds of preliminary JDs and maybe a handful of approved JDs in a year." Available at http://www.eenews.net/stories/1060007241 She also indicated that the office had handled "fewer than 50" requests for AJDs with a significant nexus analysis since 2008, when the Corps issued the RGL that put PJDs front and center as an option for an entity seeking a quicker path to a permit.

For regulated entities, there may be little or no practical distinction between PJDs and AJDs: both are approved by the Corps and both are used in project planning and financing. Many projects (such as mines and housing developments) have long term planning horizons, with the CWA determination typically being secured relatively early in the process. The delineation is the used in project planning, either to avoid the need for a permit or to minimize impacts to waters if they cannot be completely avoided. The Section 404 permit (or the determination that one is not needed) also is required to secure project financing, where such financing is needed (which is typical with large development projects). If the final rule allows for the reopening of AJDs and PJDs to reevaluate jurisdiction based on the new rules, it will significantly disturb existing expectations and investments. Therefore, the final rule should clarify that any PJD or AJD in existence on the date the new rule becomes effective will remain valid.

The joint commenters are particularly concerned about the treatment of existing AJDs and PJDs because of inconsistent information provided by the agencies during the public comment period. As of July 2, EPA had on its website a document entitled *Questions and Answers About Waters of the U.S.*[173] On page three of that document, EPA stated "the proposed rule does NOT mean that previous decisions about jurisdiction will have to be revisited" (capitalization in original). The document went on to state: "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations." Corps and agency representatives made similar statements at a meeting with representatives of the National Mining Association on July 9, 2014.

As of October 1, however, the July 2 version of the question and answer document is no longer available on the EPA website. Instead, a different version is available (now also bearing the Corps' logo) that says nothing about the status of existing jurisdictional determinations.[174] The joint commenters are concerned that by removing the assurance that existing AJDs and PJDs would not be disturbed, the agencies are signaling that they do wish to have the authority to reopen and potentially modify existing jurisdictional determinations. For the reasons discussed above, this would create significant uncertainty and would greatly burden parties who have already gone through the often time-consuming and expensive process of securing a determination from the Corps. In some cases, construction may have begun or be imminent, or financing could have been secured based on a proposed project design that is in turn based on the existing AJD or PJD. It would be fundamentally unfair for the agencies to reopen existing AJDs or PJDs that are in place on the effective date of any new rules. (The joint commenters also question whether the agencies could lawfully reopen AJDs or PJDs without having made clear their intent to be able to do so in the proposed rule).

Recommendation: The agencies should state unequivocally in the final rule that AJDs and PJDs in effect on the date the final rule becomes effective should not be disturbed or reopened. (p. 45-47)

[173] A copy of the version of the question and answer document accessed on July 2 is attached to these comments as Attachment 1.

[174] The current version of the document is available at http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (accessed October 1, 2014).

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.797 *Extensions of existing AJDs and PJDs should be allowed without need for a revised determination*: The final rules also should not be applied to requests to extend existing AJDs or PJDs. Delineations are typically approved for 5 year periods. The recent economic downturn resulted in delays of some projects, with the result that they have not commenced but have AJDs or PJDs that will expire shortly after the likely effective date of any new rules. Significant planning has occurred on those projects based on the existing AJD or PJD, and numerous other federal, state and local approvals will have been obtained based on the existing project design. Those projects should not be required to seek new delineations that might require re-opening these other permits or approvals or making significant revisions to already planned projects.

Even more recent determinations could be at risk if the agencies do not provide assurances that existing AJDs or PJDs will remain valid. For example, one of the joint commenters secured an AJD from the Corps in September 2013 (which is therefore valid until September 2018). Securing the AJD was the first step in planning a complicated project. A Section 404 permit application has been filed, and an Environmental Impact Statement ("EIS") is being prepared. Those processes, especially the EIS process, are likely to take several years. It is hoped that a final Section 404 permit and EIS will be completed prior to expiration of the AJD, but there is no guarantee that this will be the case. Even if it is, construction may not have started by the time the AJD expires, and it certainly will not be completed by that date. In such a scenario, it would be incredibly disruptive, as well as unfair, for the agencies to require a re-evaluation of jurisdiction at the proposed site.

Recommendation: Assuming there have been no changes on the ground, the agencies should commit to extending without change any existing AJDs or PJDs that are in effect on the date any final rule becomes effective. (p. 47-48)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.798 Pending requests for AJDs or PJDs that have been in process for a substantial period should be processed under the guidance in place when they were submitted: Finally, requests for jurisdictional determination that have been in process for a significant period of time (e.g., nine months) at the time the new rule goes into effect should be processed under the previous agency guidance (i.e., that issued in December 2008). In these cases, applicants will have invested significant time and money in preparing analysis consistent with the governing guidance, and it is unfair to change the rules of the game in the middle of the agency review process.

Recommendation: Requests for delineation that have been in process for a significant period of time (e.g., nine months) as of the date the new rule goes into effect should be processed under the existing guidance and not the terms of the new rule. (p. 48)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Associated General Contractors of America (Doc. #14602)

12.799 The proposed rule does not address grandfathering issues or how the rule's changes would affect existing or pending jurisdictional determinations (JDs). AGC recommends that the agencies clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule.

In outreach meetings, the agencies have stated that existing JDs issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determinations. But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the agencies' intent. In addition, the agencies' statements fail to address JDs and permit applications that are already pending (and may be close to being issued).

The agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule. Accordingly, the agencies should clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule. (p. 18-19)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

12.800 Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical infrastructure and private projects. (p. 19)

Agency Response: The final rule is intended to provide greater clarity and consistency regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities need to make jurisdictional determinations on a case-specific basis. In order to accomplish this aim, the final rule includes a number of key improvements including, but not limited to, the following. In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a

floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. In order to add clarity to the definition of significant nexus, the agencies have listed in the definition the functions that will be considered in a significant nexus analysis. The preamble also includes a definition of bed and banks adapted largely from longstanding agencies' practice as well as input from commenters. To provide additional clarity and for ease of use for the public, the agencies are including the Corps' existing definitions of ordinary high water mark and high tide line in EPA's regulations as well.

Vulcan Materials Company (Doc. #14642)

12.801 The proposed rule does not include any provisions for 'grandfathering' activities and authorizations in effect at the time the rule is finalized. Grandfathering provisions are warranted as activities and authorizations are based on jurisdictional determinations using the criteria applicable when the evaluation and decisions regarding permitting were reached by the agencies. The objectives of the process have not changed and retroactive application of new jurisdictional determinations would be overly burdensome and difficult to implement. (p. 3)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. Preliminary jurisdictional determinations are not definitive determinations of the presence or absence of areas within regulatory jurisdiction and do not have expiration dates. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

O'Neil LLP (Doc. #14651)

12.802 Need to Grandfather the Effect of the New Rule. Should the Agencies decide to adopt a new rule to define the scope of waters regulated under the CWA, it is imperative that the Agencies clearly provide for a grandfathering system whereby: (1) all development associated with an application for a Section 404 permit filed prior to the effective date of the final Rule is exempt from the new definition of "waters" and the new Rule, and (2) all development associated with a Preliminary JD or an approved JD issued prior to the effective date of the final Rule is exempt from the new definition of "waters" and the new Rule.

Project applicants expend substantial time and financial resources on environmental consultant work, biological studies, project planning and design, project land-use entitlement, and the like prior to submitting an application to the ACOE for a Section 404 permit. It is common for applicants to spend years and many tens of thousands (and even hundreds of thousands or millions) of dollars conducting such work leading up to the permit application. Furthermore, once filed, additional substantial time and financial resources are expended by a project applicant in conducting further environmental review connected with the Section 404 application, such as NEPA analysis and compliance, the analysis of project alternatives under Section 404(b)(1), responding to public comments and agency comments on the ACOE's public notice of the application, Section 401 water

quality certification, compliance with the National Historic Preservation Act, the federal Endangered Species Act, etc.

It would be extremely unfair and would produce an unjustifiable economic hardship to Applicants for a Section 404 permit to have to revise (or re-do or even start over on) studies, plans, analyses, designs, prior approvals, prior entitlements, and the like, because the new Rule was being applied to such a project after the Section 404 permit application had already been filed. Moreover, similar considerations of fairness and avoidance of undue economic hardship should compel the Agencies to make clear to the public in the final Rule, that the final Rule will not be applied retroactively to any project which has already obtained a Preliminary JD or an approved JD prior to the effective date of the final Rule. (p. 5-6)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Business Alliance for a Sound Economy (Doc. #14898)

12.803 Grandfathering: The Proposed Rule does not address grandfathering issues or how the rule's changes would affect existing or pending jurisdictional determinations (JDs). In the interest of fairness, the agencies should explicitly state that previously issued JDs and permits, as well as pending JDs and permit applications, will not be reopened or changed based on the new rule. Some BASE members have invested a significant amount of time and energy in applying for JDs and permits, and grandfathering is the appropriate way of preserving the value of those efforts. (p. 3)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

CEMEX (Doc. #19470)

12.804 The proposed rule lacks any "grandfathering" provision. Our mine plans often call for long-term, phased mining which depend on regulatory certainty to make sound business decisions. Without clear grandfathering language, our mine plans are now at risk of being subject to new and expansive jurisdictional determinations. (p. 3)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

National Association of Home Builders (Doc. #19540)

12.805 The Proposed Rule does not address what to do with Existing Clean Water Act Permits (i.e. "Grandfathering").

The proposed rule does not address grandfathering issues or how the rule's changes would affect existing or pending jurisdictional determinations (JDs). The Agencies must clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule.

Importantly, a federal agency may not enact a regulation with a retroactive effect unless Congress conveys that authority in express terms.[175] Some courts have held that an administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[176] The proposed rule would adopt new standards for defining jurisdiction. To avoid unlawful retroactive application, the Agencies must clarify that previously issued JDs and CWA permits will not be reopened to reconsider jurisdiction under the new standards.

In addition, new requirements should not be applied retroactively to JD and permit applicants who have invested substantial efforts under the previous standards. The Corps and EPA have done this in the past. With the 2008 Mitigation Rule, for example, the Agencies provided that the final rule would apply only to permit applications received *after* the effective date of the rule and provided the district engineer discretion to make determinations under the previous standards where applying the new rules to a particular project would "result in substantial hardship to a permit applicant."[177] The same standard should apply here.

In outreach meetings, the Agencies have stated that existing JDs issued by the Corps will continue to be valid and that the Agencies will not be re-reviewing existing, valid determinations.[178] But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the Agencies' intent. In fact, in a June 30, 2014 EPA blog post by Nancy Stoner, the Agencies stated, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations."[179] Now, without any indication or notice that the June 30 post has been revised, the Stoner blog post no longer contains this statement. Have the Agencies changed their position on revising previous determinations?

The Agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. In addition, the Agencies' statements fail to address JDs and permit applications that are already pending (and may be close to being issued). It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule.

[175] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[176] *National Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1 (D.C. Cir. 1999); *Assoc. of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992).
[177] 73 Fed. Reg. 19,594, 19,608 (Apr. 10, 2008).
[178] For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed "waters of the United States" rule, EPA stated, "The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits." ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014).
[179] Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014), *available at* http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ (Note: the original text of the blog entry is *available at* http://www.bayjournal.com/article/setting_the_record_straight_on_waters_of_the_us).

Accordingly, the Agencies must clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule. (p. 130-131)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. Preliminary jurisdictional determinations are not definitive determinations of the presence or absence of areas within regulatory jurisdiction and do not have expiration dates. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Wyoming Mining Association (Doc. #14460)

12.806 The rule does not address how the Corps will handle existing determinations or applications that have not completed the review process at the time the rule is promulgated. The rule must clearly outline how these situations are to be handled. Applications that are currently under review at the time the rule is promulgated should be reviewed within the regulatory framework that was in place at the time of the submittal. This has been accepted practice by the Corps and EPA. For example, with the implementation of the 2008 Mitigation Rule, the Corps and EPA provided that the final rule would apply only to permit application received after the effective date of the rule. Further new requirements should not be applied retroactively to existing jurisdictional determinations. In outreach meetings, the agencies have stated that existing jurisdictional determinations issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determinations. [180] WMA strongly recommends that clarification be added to the rule to address the grandfathering issue. (p. 7)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

The Mosaic Company (Doc. #14640)

12.807 The Proposed Rule Needs to Address Grandfathering Issues. The proposed rule does not address grandfathering issues or how the rule changes would affect existing or pending jurisdictional determinations (JDs) and permits. Any rulemaking effort should include a provision to ensure all previous jurisdictional determinations, existing permits, and permit applications currently under review would not be revoked, reopened, or otherwise subject to additional review based on the proposed new rule. (p. 4)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps**

[180] For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed water of the U.S. Rule, EPA stated, "The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits." ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014.)

must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

12.808 In outreach meetings, the agencies have stated that existing JDs issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determination.[181] But there is not any statement in the preamble or the affected sections of the Code of Federal Regulations confirming this is the agencies' intent. The agencies should make it clear that the rule will not be applied to or have any effect on previously issued JDs or CWA permits. In addition, the agencies' statements do not address JD requests and permit applications that are currently pending (and may be close to being issued) prior to the effective date of the proposed rule. It would be arbitrary and grossly unfair to applicants and regulators who have already invested a great deal of time and resources into the permit process if they had to start over based on the new rule. Accordingly, the agencies should clarify in the language of the rule itself, that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule. (p. 4)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Ohio Oil & Gas Association (Doc. #15122)

12.809 Noticeably the proposed rule does not include any grandfathering provisions or timing for implementation. It is easy to envision the absolute havoc and confusion this could cause. For example, will the agencies reopen jurisdictional decisions? Will the paperwork that has already been submitted for jurisdictional determinations, and which has been waiting for a determination, be reviewed under the new rule or the existing rule? These timing issues must be addressed.

Industry, developers, etc. are wary of the long delays these new rules would cause. Jurisdiction determinations will likely take longer; and with more waters qualifying as jurisdictional there will be less ability to rely on Nationwide Permits; and all of this will put heavier workloads on those who process individual permits – which will cause further delays in what can already be an 18 to 24-month long permit process. Further permitting backlogs will stifle business. Moreover, we understand some USACE districts have even eliminated presumptive jurisdictional determinations and still require the submission of data – further lengthening decision time frames. Timing issues must be contemplated and addressed in the proposed rule. (p. 3)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps

[181] For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed waters of the U.S. Rule, EPA stated, "The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits." ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014).

must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Vulcan Materials Company (Doc. #16566)

12.810 The proposed rule does not include any provisions for 'grandfathering' activities and authorizations in effect at the time the rule is finalized. Grandfathering provisions are warranted as activities and authorizations are based on jurisdictional determinations using the criteria applicable when the evaluation and decisions regarding permitting were reached by the agencies. The objectives of the process have not changed and retroactive application of new jurisdictional determinations would be overly burdensome and difficult to implement. (p. 3)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Independent Petroleum Association of America (Doc. #18864)

12.811 The Agencies' Failure To Address Grandfathering Of Pending And Existing Clean Water Act Authorizations and Interpretations In The Proposal Is Unlawful.

The Associations have significant concerns with the resulting operational changes that this proposal represents. If the agencies conclude this proposal is the program they are going to implement, they must include a grandfathering provision that would acknowledge the validity of:

- past permitting decisions and currently pending applications for authorization to include, but not limited to, jurisdictional determinations, individual permits, letters of permission , and general permits issued pursuant to Section 404 of the CWA;
- issued NPDES permits pursuant to Section 402 of the CWA; and,
- current SPCC Plans and implicit or direct approvals, pursuant to Section 311 of the CWA, and that but for major modifications to such facilities, their regulatory status will remain compliant.

Existing authorizations must be deemed precedent for future assessments for facilities that continue to reflect operations as initially authorized.

The agencies must address grandfathering in an additional proposal that will be subject to an extensive opportunity for public review and comment. Failure to address this important issue that will have a significant impact on many is improper. Those adversely impacted include the regulated community and state and federal regulatory authorities whose increased administrative burdens within this proposal are significant. The result of this proposal is inappropriate and not supported by the CWA, the regulations or the federal Administrative Procedure Act. (p. 32)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps

must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

The final rule does not change how jurisdictional issues are dealt with in other CWA programs. The final rule does not change existing permits or other actions taken to implement the CWA. The final rule does not affect existing permits during the life of those permits. See Summary Response.

Transportation Corridor Agencies (Doc. #16897)

12.812 The TCAs are (…) concerned that the Rule fails to address how the Agencies' proposed change in the definition of the term "Waters of the United States" will apply to projects that already have secured Clean Water Act ("CWA") section 404 permits ("404 permits") and/or jurisdictional determinations ("JD") prior to the effective date of the Rule. Nancy Stoner, EPA's Acting Assistant Administrator for Water, recently wrote in an article that "the proposed rule does NOT mean that previous decisions about jurisdiction will have to be revisited." Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations.[182] While EPA's current fact sheet on the Rule,[183] largely mirrors the points Nancy Stoner made in her article, it noticeably omits a statement clarifying that the Proposed Rule will not be applied retroactively.

Because the Proposed Rule also is silent on this issue, TCA urges the Agencies to confirm that the Rule will not be applied retroactively. The Corps has approved 404 permits for all of the TCAs projects constructed to date. While open to traffic, construction continues on these validly-permitted projects. The TCAs are constructing various improvements to the projects, including additional lanes and interchanges. In November 2012, the Corps approved a JD for an approved five-mile extension of State Route 241. In reliance on the JD, the TCA designed the extension to avoid Waters of the United States.[184] EPA cannot reasonably expect the TCAs to stop work on authorized projects, re-assess potential water resource impacts, secure new JDs, and possibly obtain new or modified Section 404 permits in the face of a new rule.

Revisiting existing permits and JDs also would be unworkable for the Corps. Hundreds, if not thousands, of infrastructure projects across the country that have obtained 404 permits or have been designed to avoid the need for such permits are in various stages of completion. Applying the Proposed Rule retroactively could call each project into question and require Corps action on hundreds (or thousands) of 404 permit applications and JD requests, all at the same time. Coupled with the over 1,600 projects awaiting individual 404 permits, some that have been pending since 2007,[185] it is clear that the Corps lacks the resources to revisit existing permits and JDs.

[182] Bay Journal, Setting the Record Straight on Waters of the US, July 20, 2014, http://www.baylournal.com/article/setting_the_record_straight_on_waters_of_the_us (Emphasis in original)
[183] *See* http://www2.epa.gov/sites/production/files/2014-09/documents/facts about wotus.pdf
[184] Exhibit 2. Letter from Army Corps of Engineers to TCA finding that the proposed Tesoro Extension would not occur within waters of the United States.
[185] http://geo.usace.army.mil/egis/f?p=340:6:0::N0

For project developers, the need to secure a new or modified permit mid-project could trigger new studies, evaluations and approvals under a range of federal (and state) laws, including the National Environmental Policy Act, the Endangered Species Act, Section 106 of the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act. A developer could also find that an approved, designed, funded and partially-constructed project no longer constitutes the least environmentally damaging practicable alternative ("LEDPA"), forcing the developer to start over from scratch or abandon its project. The need for a new or modified permit could also subject projects to new legal challenges, which is especially problematic for transportation projects, where due to shortened statute of limitations, lawsuits otherwise would be time-barred.

Finally, applying the regulatory changes prospectively is consistent with Current Corps practices. For example, projects approved under a nationwide permit are not required to obtain coverage under a new nationwide permit upon its reauthorization.[186] Similarly, projects that have obtained JDs under the existing CWA regulations should be able to continue to rely on those determinations for a period of five years.[187]

In closing, the TCAs urge the Agencies either to withdraw the Proposed Rule because its expanded jurisdiction violates the Clean Water Act, or in the alternative should clarify that 404 permits and JDs issued prior to the effective date of the final rule are governed by the section 404 rules and guidance documents in effect prior to the final rule. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Arizona Public Service Company (Doc. #15162)

12.813 Existing Determinations. The proposed rule fails to address grandfathering issues or how existing or pending JDs would be affected, if at all. This can leave many regulated or potentially regulated entities in the lurch. Since regulated entities and the general public have not had an opportunity to review and comment on the Agencies' handling of grandfathering issues, APS strongly recommends that this proposed rule be withdrawn so that the Agencies, states, tribes, regulated entities, environmental groups, and the public can participate in development of a clear, concise, meaningful, and well-thought out revision to the WOTUS definition. The fact that the WOTUS definition impacts so many programs under the CWA should cause the Agencies to pause and reconsider finalization of this proposal. (p. 7-8)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps**

[186] *77* Fed. Reg. 10,184 (Feb. 21, 2012); 33 CFR § 330.6(b).
[187] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook 47, FN 4(May 30, 2007)

must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

12.814 If, despite the many deficiencies identified in these comments and the comments of UWAG, FWQC, and WAC, the Agencies finalize the rule as proposed, given the overly broad definition of WOTUS ascribed by the Agencies, APS could be required to come into compliance with various regulations on a broad scale and in an unreasonably short period of time. Using the 262 SPPC plans discussed above as an example, it is clear that a phased-in period for compliance is justified. One approach to phasing in compliance would be to provide a compliance schedule for counties within each ecoregion. This would help the regulated community comply given the sheer size of the ecoregions and the large number of facilities encompassed therein. (p. 15)

Agency Response: **This action does not change an owner/operator's ability to determine whether there is a reasonable expectation that an oil discharge from a non-farm facility, such as an electrical substation or switchyard, could reach waters of the U.S. or adjoining shorelines, if the facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. These applicability determinations must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to waters of the U.S. or adjoining shorelines, land contour, drainage, etc.) and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain or otherwise prevent a discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). Once subject to the SPCC rule, an owner/operator must prepare and implement an SPCC plan. EPA provided cost estimates in the most recent ICR renewal for the SPCC rule (2012) for plan preparation and maintenance. See EPA ICR No. 0328.15, OMB Control No. 2050-0021. Plan preparation costs generally range from $4,000 to $7,000 and plan maintenance costs range from around $900 to $1,200 annually for small- to medium-size oil storage facilities.**

Spectra Energy Corp (Doc. #14273)

12.815 Spectra is concerned that the implementation of the new rule could cause problems for these and other projects because the proposed rule fails to address grandfathering issues. Moreover, EPA has issued confusing guidance on this topic during the comment period. For example, EPA has stated that "[t]he agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits."[188] Additionally, EPA has published conflicting reports as to whether existing jurisdictional determinations will continue to be valid.[189] These ambiguous statements and conflicting reports raise the concern that EPA may reopen pending or existing permits and jurisdictional determinations.

[188] Association of Clean Water Administrators, State-EPA Coregulator Call #2 on Waters of the U.S. at 4 (June 12, 2014), *available at* http://www.acwa-us.org/#!__wous.

[189] *See* Nancy Stoner, Acting Assistant Adm'r for Water, *Setting the Record Straight on Waters of the US*, EPA Connect; The Official Blog of EPA's Leadership (June 30, 2014) (originally linking to a document with the assurance that the agency "will not review existing, valid determinations," but inexplicably eliminating that assurance in a subsequent version of the document).

Spectra urges the agencies to adopt a grandfather provision in the final rule that clarifies that previously issued and currently pending jurisdictional determinations and CWA permits will not be reopened or modified based on the new definition of "waters of the United States."

Spectra recommends the following suggested grandfather language:

- Pending and final permit applications and jurisdictional determinations are unaffected by this rule, and such applications and determinations will be evaluated under the prior jurisdictional understanding of "waters of the United States." Additionally, if the district engineer determines that application of this rule would result in substantial hardship, the permit or jurisdictional determination may be given pursuant to prior guidance regarding "waters of the United States." (p. 3-4)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

CropLife America (Doc. #14630.1)

12.816 This proposed rule also fails to address how previously issued permits and pending jurisdictional determinations and permits will be affected. CropLife recommends that the agencies explicitly exempt previously issued permits and pending jurisdictional determinations and permits from new requirements under this proposed rule. Businesses did not have sufficient notice of this proposal when they made business decisions involving previously issued permits and pending determinations potentially affected by this proposed rule. (p. 5-6)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. The final rule does not affect existing valid permits.**

Metropolitan Water District of Southern California (Doc. #14637)

12.817 Lastly, the Agencies should clarify that the new regulations will not be given retroactive effect. One way to do this would be to state that the new regulations will apply only to permit applications received after the effective date of the proposed rule. (p. 6)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

12.818 SRP has … concerns over the agencies treatment of jurisdictional determinations. Nothing in the preamble or proposed rule discusses the status of valid, existing

jurisdictional determinations or draft determinations under agency review. SRP urges the agencies to clarify that existing RGL's and issued agency jurisdictional determinations will remain valid under the final rule, and to clarify how pending determinations will be affected by the rule. (p. 15)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. Existing regulatory guidance letters (RGL) will remain effective until such time as the Corps rescinds or amends that RGL.

Utility Water Act Group (Doc. #15016)

12.819 Not only would the Proposed Rule cause a clear change in status for these streams (from non-jurisdictional to jurisdictional), but it also would impose uncertainty on future project development. Project development has not begun. Under the terms of the jurisdictional determination (finding no jurisdiction), that ruling applies through 2015. Yet it is conceivable that the Agencies might try to assert jurisdiction in this type of situation starting in 2015, if the Proposed Rule is issued as a final rule. If the Agencies tried to assert jurisdiction under a new WOTUS definition over the features in a similar situation, a project developer may argue that such effort would constitute unlawful, retroactive agency action. It is unclear how such a dispute would resolve, however. In the meantime, the developer would be left with the risk that the Agencies could try to bring enforcement action if project development proceeded without obtaining a § 404 permit and other CWA authorizations. (p. 50)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Exxon Mobil Corporation (Doc. #15044)

12.820 The Proposed Rule also fails to provide any procedural clarity regarding its implementation. It provides no opportunity for a landowner to challenge the Agencies' categorical presumption of jurisdiction for a particular tributary or adjacent water when there is qualitative or quantitative evidence that the water in question should not be deemed jurisdictional under the Clean Water Act. It does not indicate how the Agencies intend to treat previous jurisdictional determinations (including determinations of no jurisdiction). The Agencies should confirm that all prior jurisdictional determinations that resulted in a finding of no jurisdiction will be grandfathered. The Proposed Rule does not have an implementation plan or effective date, and does not address how the Agencies intend to address pending or in-process jurisdictional determinations and permit applications. (p. 2)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The

preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Northern Colorado Water Conservancy District, Berthoud, Colorado (Doc. #15114)

12.821 Effect on Previously Issued Jurisdictional Determinations. The proposed rule does not address the effect of the proposed changes on previously issued jurisdictional determinations (JDs) confirming non-jurisdiction. The rule should make clear that its new criteria will not apply to any JDs (preliminary or approved) issued prior to finalization of the rule. It should also clarify that activities already constructed in subsequently defined jurisdictional areas are "grandfathered" and will not require after-the-fact or other permitting. (p. 9-10)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Beaver Water District (Doc. #15405)

12.822 Either the regulation or the guidance document should address the issues of retroactivity and grandfathering under the rule. These issues could arise in a number of development scenarios, including those associated with water infrastructure and mitigation banks. BWD has supported the creation by a non-profit of a mitigation bank in the Beaver Lake watershed. It may be appropriate, for example, that development associated with mitigation banks is exempted from changes in jurisdictional determinations under revised regulations for the period of the banking agreement, unless otherwise agreed to by the banker and the Corps. (p. 2)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Washington County Water Conservancy District (Doc. #15536)

12.823 [Regarding impacts on infrastructure projects] In order for the regulated community to best prepare to comply with any new jurisdictional requirements and ensure continued operations of the various infrastructure projects affected by the Proposed Rule, any final rulemaking should include a "grandfathering" provision that exempts permit applications that have been submitted prior to the finalization of the Proposed Rule, from any new jurisdictional determinations resulting from the redefinition of waters of the United States. (p. 29)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The agencies do not intend to reopen existing approved jurisdictional determinations unless requested to do so by the applicant. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

12.824 The Proposed Rule does not address grandfathering or provide for a smooth transition for pending applications and jurisdictional determinations. Although not unique to Pennsylvania, PIOGA notes that the lack of a grandfathering provision is a concern for its members. PIOGA requests clarity regarding the extent to which the Proposed Rule would be applied to areas that were previously determined to be non-jurisdictional. PIOGA requests that language be inserted into the Proposed Rule to preserve previous non jurisdictional determinations and prevent the expansion of previous jurisdictional determinations. Similar grandfathering provisions have been included in the Nationwide Permit renewals. (p. 15)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Association of State Floodplain Managers (Doc. #19452)

12.825 ASFPM recommends that the final rule include a clear schedule for implementation including provisions for grandfathering of actions approved by federal agencies under the existing jurisdictional regulations. Although EPA has stressed that the proposed regulation does not increase the scope of jurisdiction compared to the pre-Rapanos requirements, it seems clear that in some instances jurisdiction may expand in comparison to the post-Rapanos guidance that is currently in place. We assume that approved jurisdictional determinations will be effective until their normal expiration date, and that an activity previously permitted under the CWA will also be grandfathered. However, confirmation of these positions should be included in the final rule. (p. 9-10)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

The Association of State Wetland Managers (Doc. #14131)

12.826 ASWM recommends that the final rule include a clear schedule for implementation including provisions for grandfathering of actions approved by federal agencies under the existing jurisdictional regulations.

Although EPA has stressed that the proposed regulation does not increase the scope of jurisdiction compared to the pre-Rapanos requirements, it seems clear that in some instances jurisdiction may expand in comparison to the post-Rapanos guidance that is currently in place. We assume that approved jurisdictional determinations will be effective until their normal expiration date, and that an activity previously permitted under the CWA will also be grandfathered. However, confirmation of these positions should be included in the final rule.

We also suggest that review of permit applications that have already been public noticed be completed without the necessity for a new jurisdictional determination out of fairness to the applicant, given that requiring a new JD and potentially new design could be exceptionally costly for the applicant.

Where permit applications have been submitted but not yet public noticed, we suggest that the federal agencies or state co-regulators be given discretion to continue without a new JD where such an action could result in significant cost to the applicant (e.g. where winter field conditions make it impractical to complete a new JD for several months), and where impacts of proceeding under the existing rule is not expected to result in major adverse impacts. (p. 9)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.4.1 Comments on How Proposed Rule would Affect Permit Processes and Evaluation of Impacts/Compensatory Mitigation

Specific Comments

Office of Advocacy, Small Business Administration (Doc. #7958)

12.827 Small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a ½ acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.[190] Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 could no longer be used at all. Under this proposed rule waters in the same riparian area or floodplain all become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area or floodplain are treated as one interconnected water of the U.S. it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual permits. This is a direct cost imposed solely as a result of the changes to the definition of the term "waters of the United States" proposed in this rule. (p. 7-8)

Agency Response: **This rule does not change the implementation of regulations which cover "waters of the United States", including those associated with NWPs, and the implementation of those regulations is outside the scope of this rule. That**

[190] Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.

Tennessee Valley Association (Doc. #17470)

12.828 In our opinion, the proposal is very likely to create not only greater numbers of regulated water features, but also will inordinately increase the number of potentially regulated discharge points within any given parcel associated with an activity or project. TVA is concerned that the increase in assertion of categorical jurisdiction will subject more projects and activities to CWA authority. As a result, some projects that otherwise would have qualified for relatively streamlined permitting processes under Nationwide or regional general permits will be required to undergo lengthier and costlier individual permit procedures. To the extent that more electric utility projects and activities will be subject to CWA authority, these project and activities are likely to face greater mitigation costs. TVA is especially concerned that as a result of the proposed rule electric utilities will continue to experience negative project scheduling impacts at a critical time when we are trying to meet the need to update the generating fleet to lower emission alternatives and upgrade the associated transmission infrastructure to support these ongoing changes and ensure system reliability. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Florida Department of Agriculture and Consumer Services (Doc. #10260)

12.829 A review of the Proposed Rule language, as well as a GIS analysis of specific sites and watershed areas within Florida, indicates a likely expansion of federal wetlands regulatory jurisdiction stemming from the Proposed Rule, which would have far-reaching effects on the regulated community. Under the proposed definition of "waters of the United States," previously determined isolated wetlands, as well as agricultural wetland swales and ditches, would be subject to permitting requirements under Section 404 of the CWA for any proposed activity that would discharge dredged or fill material to them, unless the activity is exempt from regulation (see Section 404 Permitting, U.S. Environmental Protection Agency. Web. 15 Oct. 2014). These waters already are regulated by the State of Florida to address water quality and use of land and water resources within the state. Federal jurisdiction over these areas would subject land owners to additional regulatory requirements that would necessitate increased time and expense to address, with no demonstrated benefit to environmental protection.

The Section 404 permitting process requires the applicant to:

1. Demonstrate through an "alternatives analysis" that the proposed project is the "least environmentally damaging practicable alternative." Section 230.10(a), 40 CFR, states that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."
2. Demonstrate how impacts to waters of the United States have been minimized. Section 230.10(d), 40 CFR, states that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." Subpart H of 40 CFR Part 230 outlines several actions that can be taken by the applicant to meet the minimization criteria.
3. Provide sufficient compensatory mitigation consistent with the criteria outlined in the 2008 Compensatory Mitigation Rule (40 CFR Part 230; 33 CFR Parts 325 and 332). After conducting the alternatives analysis and complying with avoidance/minimization criteria, the applicant may be required to provide compensatory mitigation to "offset environmental losses resulting from unavoidable impacts to waters of the United States…" (Section 230.93(a), 40 CFR, Part 230). The 2008 Compensatory Mitigation Rule, as published in the Federal Register on April 10, 2008 (Vol. 73, No. 70), provides a preference hierarchy for proposed mitigation activities, with the use of mitigation bank credits established as the preferred mitigation alternative. The number of mitigation credits for proposed impacts can be determined using the Uniform Mitigation Assessment Method (UMAM).

The analyses completed for Watershed A and Watershed B in Sections 2.2.1 and 2.2.2 of this report projected an expansion of wetlands jurisdiction to include approximately 813.9 acres and 763.4 acres of potentially isolated wetlands, respectively. The cost of mitigation bank credits in Florida ranges from $100,000 to $180,000 per credit, depending on the region. Based on this assumed range of costs and application of the UMAM using a conservative functional loss delta of 0.5:

> In Watershed A, if 10% (81.39 acres) of the newly captured wetlands were to undergo permitting under Section 404 of the CWA for the placement of dredged or fill material, the estimated number of mitigation credits needed would be 40.695, and the associated cost would range from $4,069,500 to $7,325,100.
>
> In Watershed B, if 10% (76.34 acres) of the newly captured wetlands were to undergo the same permitting process, the estimated number of mitigation credits needed would be 38.17, and the associated cost would range from $3,817,000 to $6,870,600. These potential mitigation costs would be in addition to expenses related to the alternatives analysis and minimization steps of the permitting process. (p. 49-50)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Gila River Indian Community (Doc. #13619)

12.830 The Proposed Rule does not expressly exempt irrigation canals, but instead defines "tributary" to include "canals, and ditches not exempted in paragraphs (b)(3) or (4)" of the proposed definition of "waters of the United States."[191] These sections define ditches but do not define or describe canals. Under this approach, the P-MIP canal system could become jurisdictional under a broad interpretation of the Proposed Rule, even if this is not the Agencies' intent at this point in time. This would have deleterious impacts on the Community in general and P-MIP canals in particular, and runs contrary to Congressional intent underlying the CWA.

Some of these on-Reservation features of the P-MIP system include spillways and storm water drainage channels to discharge storm water and prevent flooding on the Reservation. The Community is concerned that the construction and maintenance of features, which exist to protect the P-MIP system and related infrastructure, could require federal permits under the Proposed Rule. This would require P-MIP and other Community entities to adjust their construction schedules and budgets to account for greater federal permitting and oversight.

The expansive definition that the Proposed Rule advances for "waters of the United States" could also enable the Corps to assert jurisdiction over certain drainage features that P-MIP has constructed, but for which the CWA provides exemptions. While the Proposed Rule does not expressly render previously exempted features jurisdictional, any future maintenance on these drainage and flood protection features or construction of new drainage features, cannot suddenly be allowed to become jurisdictional. For example, P-MIP has constructed a number of flood protection and excess flow features, such as storm water discharges connected to ephemeral desert washes that have qualified for CWA statutory exemptions for irrigation activities in the past. The Agencies cannot now seek to make these tributaries jurisdictional, and thus waters of the United States under the Proposed Rule. Other examples of these flood protection projects include protective levees, emergency spillways, and over chutes designed to discharge storm water. The existing and extensive connections that the P-MIP system currently has with the Gila River and to a lesser extent the downstream Salt River through these features make it possible that future maintenance activities could be viewed as jurisdictional, despite receiving Agency exemptions in the past. It is therefore critical that the Final Rule clarify that previously exempt features remain exempt. Otherwise, this scenario would exacerbate costs necessary to maintain and expand the emergency protection capacity of the P-MIP system and would inhibit longstanding development plans. As has already been stated, the Agencies' lack the legal authority to assert jurisdiction over these types of features, which are expressly exempted from Agency jurisdiction under the CWA.[192]

Beyond P-MIP features designed to protect against flooding and excess flows, the system includes multiple ponds, sumps, and regulating reservoirs. The Proposed Rule would give the Agencies discretion to define these features as "wetlands and open waters" where they are connected to canals that could be encompassed within the expansive

[191] *Id*. at 22202.
[192] S. Rep. 95-370, at 76 (1977); 33 U.S.C. § 1344.

definition of waters of the United States currently under consideration by the Agencies. More importantly, the Community intends to extend these canals to reservoirs located on the Reservation. The Agencies might determine that these reservoirs are "wetlands and open waters" under the Proposed Rule because one could argue that these waters are "adjacent" to or "neighboring" jurisdictional waters and are physically, chemically, and biologically connected with a downstream jurisdictional water.

The Community is extremely concerned that the Proposed Rule could cause future routine maintenance and construction on the P-MIP system to require a federal permit, where none is currently required because some of the system's features described above could be encompassed under the Proposed Rule. This scenario would have a significant impact on the ability of the Community to perform routine maintenance and construction work, develop work schedules and anticipate costs in fulfillment of our established goals for the P-MIP system and our obligations to Community members. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, address jurisdictional issues and make jurisdictional determinations on a case-by-case basis.**

12.831 Current federal policy is also moving toward the streamlining of permitting requirements to reduce costs and time delays. The Proposed Rule, however, would add time and costs by bringing more waterways within the definition of "waters of the United States," and thus trigger the need for additional permits and environmental analyses. In the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), which governs federal transportation funding, Congress included significant provisions to streamline the environmental review process and speed up the completion of transportation projects. The Community is concerned that unlike the HEARTH Act and MAP-21, which make federal permitting and oversight more efficient and less burdensome, the Proposed Rule would add regulatory oversight over wider swaths of Community land and impede development. (p. 7)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, address jurisdictional issues and make jurisdictional determinations on a case-by-case basis.**

State of Washington Department of Ecology (Doc. #13957)

12.832 Washington interprets the draft rule to not affect the way the state regulates its waters. Washington's definition of "waters of the state" in the state water pollution control act (RCW 90.48) protects additional waters not covered under the federal Clean Water Act such as prior converted croplands and isolated wetlands. Washington will continue to regulate all waters of the state regardless of federal jurisdiction. However, Washington appreciates that the rule more clearly identifies what types of waters would be considered jurisdictional under the federal Clean Water Act. This is important when proponents may need Section 404 permits from the Corps and related Section 40 I certifications from the state.

These clarifications regarding "waters of the US" should help streamline permitting since those waters identified in the rule would not require individual jurisdictional determinations. While Washington protects its waters under state law, this uncertainty in federal jurisdiction has resulted in permitting delays when a jurisdictional determination is required. Although this proposed rule may help streamline determination for some waters, such as tributaries, it may take longer to receive a jurisdictional call when using the significant nexus test since these will require case-by-case determinations. (p. 2-3)

Agency Response: **The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

Office of the Governor, State of Kansas (Doc. #14794)

12.833 Mitigation for impacts on ephemeral channels and adjacent waters will escalate the costs of projects intended to improve water supply and conservation. State pesticide programs and regulations will need to be revised as the line between applications to terrestrial and aquatic resources becomes blurred by the proposed rule. Counties will become restrained in routine ditch maintenance or control of noxious weeds for fear of running afoul of the Act. New permitting conditions and limitations for land applications of livestock waste or wastewater sludge that affect minor drainages add operational costs to agricultural and municipal waste water management. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See also essay 12.3. Issues relating to permitting requirements for the application of fertilizer (including manure), pesticides, herbicides, and any other substances are beyond the scope of the rule.**

12.834 Because of the sweeping scope of the proposed rule to all aspects of the Clean Water Act, the quest by the Federal agencies to reduce the burden of their staffs' workload in making jurisdictional determinations will shift other workload burdens to Kansas agency staff.

Application of the Clean Water Act through water quality standards, total maximum daily loads, 305b assessments, or certain permitting, e.g., general NPDES permits for pesticide applications on, over or near waters that see flow only on the occasion of localized rain, will divert and distract State resources away from the more pressing priority of protecting the established surface waters of the State. It cost Kansas over $300,000 annually (in 2004 dollars) to conduct 500 simplified, expedited Use Attainability Analyses (UAAs) on Kansas streams. Should the proposed rule come into force, Kansas can expect to expend significantly greater amounts over a number of years re-doing those UAAs and performing new UAAs as our universe of classified streams expands many times over with the inclusion of ephemeral tributaries. The impetus for the proposed rule was clarification of Clean Water Act jurisdiction after the Supreme Court's *SWANCC* and *Rapanos* decisions, decisions that narrowed the scope of Federal authority when protecting wetlands from impacts of solid waste disposal and commercial development through the Section 404 program. Two tests for jurisdiction arose from the *Rapanos* decision. The first test came from the plurality of the Supreme Court as expressed by Justice Scalia that jurisdiction applied to relatively permanent waters, i.e., not ordinarily dry channels. The second test came from Justice Kennedy's introduction of finding a significant nexus of waters having an ecologic interconnection (but not a speculative or insubstantial connection). The proposed rule overrides the Scalia test and parses the Kennedy test to equate connectivity to significant ecological function, thereby promoting a near boundless view of Federal authority. Furthermore, the sweep of the rule applies all Clean Water Act programs to an expanded population of waters, resulting in extension to agricultural activities that the Act has historically viewed as exempt. The resulting overreach by the Federal agencies complicates matters better suited for State resource management. Proclamations from the Federal agencies that the proposed rule represents no expansion in jurisdiction under the Clean Water Act contradicts recent statements from EPA that 60% of waters in the Nation need Federal protection. And yet, historical positions and documents of the Federal agencies clearly establish that ephemeral channels were not viewed automatically as WOTUS. (p. 5-6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, address jurisdictional issues or make jurisdictional determinations on a case-by-case basis.**

Office of Water Management, Pennsylvania Department of Environmental Protection (Doc. #14845)

12.835 The proposed rule will impose a significant impact on available resources to implement CWA program requirements. If the issues related to the definitions, and uncertainty about how EPA and ACOE administration of the terms described above are not addressed, the number of water bodies needing to be assessed, water quality standards established, and determinations of impairment will significantly increase. For example, a

shallow subsurface aquifer with an established connection to a water body into which septic systems discharge under the proposed rule could now be defined as jurisdictional triggering the need for an NPDES permit to discharge. Would the aquifer itself also have to be assessed, added to the list of water bodies and defined as impaired or not? (p. 6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Groundwater is not a "water of the United States" even though it can serve as a component of a significant nexus. NPDES permits are now and will continue to be needed for discharges that reach a "water of the United States" even if the discharge flows through a shallow subsurface aquifer before reaching a waters of the U.S.**

National Association of State Departments of Agriculture (Doc. #15389)

12.836 The proposed rule will impact all CWA programs and adversely impact states. (…) NASDA is particularly concerned the proposal would impose new policies and responsibilities on state agencies across all CWA delegated state programs, handicapping state budgets and available manpower, and complicating ongoing programs with citizens for agricultural pest control, public health, wildlife, water and natural resource management, and invasive species control programs. (…) Potential effects would include:

§404: Producers and others seeking to make improvements to or develop their properties would face increased §404 wetlands dredge-and-fill permit costs, delays, and likely greatly-increased mitigation costs as they wend their way through the policy morass of Best Professional Judgment (BPJ) determinations of "floodplain" adjacency, "significant nexus" or "aggregated" impacts. These §404 policy changes will further confuse farmers and others; NASDA already has commented on the agencies Interpretive Rule and confusion and likely adverse effects that action is causing.[193] (p. 5-6).

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, address jurisdictional issues or make jurisdictional determinations on a case-by-case basis. Further, the Interpretive Rule has been withdrawn.**

Wyoming Department of Environmental Quality (Doc. #16393)

12.837 (…) regulatory uncertainties will not be limited to ephemeral streams and tributaries. For example, beginning around 1998, Wyoming experienced a rapid growth in coal bed methane production (CBM). Containing the CBM-produced water in reservoirs was and

[193] NASDA comments on the Interpretive Rule are attached as Appendix A.

is the most common water management practice. More than a thousand reservoirs were built in small, headwater ephemeral channels to contain the CBM discharges. The vast majority of reservoirs were built on channels that were determined by the Corps to be non-jurisdictional and therefore did not require 404 permits. These reservoirs are not "treatment" facilities, and the discharges to them were permitted by Wyoming under State WYPDES permits. Since 2010, CBM production has been in decline and many of the containment reservoirs now need to be reclaimed. Reclamation of those reservoirs may be delayed or impeded by the proposed rule, as the jurisdictional status of the stream channels and reservoir ponds is unclear under the proposal. It seems likely that they would be considered "other waters" under the proposed rule, and new jurisdictional evaluations may need to be done to determine if 404 permits are needed to reclaim the sites. That process is sure to increase costs to the State and other private and public interests.

Wyoming raised this CBM reservoir issue during an EPA webinar on the proposed rule on September 5, 2014, and EPA's response was uncertain as to the jurisdictional status of those waters. The response is particularly troubling given EPA's frequent and very public assurances that the proposed rule is simply meant to clarify existing regulation and not expand the scope and jurisdiction of the CWA. The response underscores Wyoming's concern that EPA and the Corps are in fact expanding CWA jurisdiction. (p. 6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Specifically, the agencies have limited the tributaries that are "waters of the United States" to those that have both a bed and banks and another indicator of ordinary high water mark. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. However, current general permits or the future development of general permits consistent with CWA section 404(e) are beyond the scope of the final rule.**

12.838 (…) the expansion of federal authority into upper drainages will result in additional costs and permitting delays for stream restoration projects in intermittent and ephemeral channels and flood plains. The same will be true for the implementation of conservation practices in those areas. In fact, implementation of conservation practices by landowners in drainages that were formerly determined non jurisdictional may now require 404 permits under the proposed rule. This concern is compounded by recent direction from EPA in its "interpretative rule" as to what agricultural conservation practices are exempted under CWA § 404(f)(1)(A) and how those exemptions are to be evaluated in the future. EPA's interpretative rule, together with the significant expansion of federal jurisdiction under the proposed rule will expand federal oversight and regulation of land use and water resources in Wyoming, particularly in areas where minimal to no impact to traditionally navigable waters will ever occur. (p. 6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, address jurisdictional issues or make jurisdictional determinations on a case-by-case basis. Further, the Interpretive Rule has been withdrawn.

Governor's Office – State of Utah (Doc. #16534)

12.839 In Utah, there are numerous washes or gullies which have these characteristic and contribute flow on a seasonal or less-than-seasonal basis. In the west, livestock producers have placed stock-watering ponds along washes and gullies to collect and store water for livestock uses. These areas have not previously fallen under the jurisdiction of the CWA and, therefore, have not required a 404 permit. Because of the nature of these areas, routine maintenances is required. Under the proposed rule these producers would be required to obtain a 404 permit to maintain their stock watering ponds. This will add a substantial burden to livestock producers as it will create additional costs and a significant amount of time as it currently takes at least 4-6 months for a permit to be issued. In addition, this process will provide another avenue for environmental organizations to halt grazing on public lands. (p. 9)

Agency Response: The final rule specifically indicates artificial lakes or ponds created by excavating and/or diking dry land and used primarily for such purposes as stock watering, irrigation, settling basins, or rice growing are not "waters of the United States."

12.840 The state, through the Utah Division of Parks and Recreation, manages large areas of public land in Utah. When building or maintaining facilities that may impact streams, it has participated in Utah Department of Water Rights Stream Alteration Program (Stream Alterations) Project review through Utah' s Stream Alteration process takes approximately 30 days from application to permit. However, if a permit requires Army involvement, the permitting process time increases from 30 days to a minimum of 6 months. The state is concerned that agencies like the Division of Parks and Recreation will be required to go to the Army for any water crossing which will greatly impact construction costs and timelines. The Division of Parks and Recreation current Army permits have taken well over a year to complete and, in some cases, have stretched into two years. Without information on the regulatory processes that will arise from this rule, it is hard to determine the costs and impacts of the rule. The state is also concerned about new mitigation measures and costs that may now be required by the proposed Rule. (p. 12)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting

programs, address jurisdictional issues or make jurisdictional determinations on a case-by-case basis.

12.841 In the State of Utah, agriculture uses 80% of the available water resources.[194] Any changes to the jurisdictional reach of the CWA will have dramatic effect on the agricultural industry. It will create uncertainty in which practices are acceptable. As an example, an agricultural producer using groundwater might believe her practices are exempt under the Proposed Rule, while these waters might be determined as jurisdictional if there is a "shallow subsurface connection" to core waters thus necessitating a CWA permit.

The Proposed Rule would not only create uncertainty, but it will create time delays in obtaining permits which previously were not required. Further, it will lead to an increase in permitting and increase costs to the agricultural producer which will increase food cost to the public. Even if permits are eventually determined not to be necessary, there are still costs associated with Environmental Assessments (EAs) and cultural resource assessments, which would be necessary to make those determinations. With an average wait for 404 permits being 4-6 months, that could be the loss of an entire grazing permit, or crop production. In an industry that is so completely reliant on climate, it is difficult to anticipate and plan for the unforeseen events and variability in climate. Aside from the wait time in permitting and the cost of EAs to determine if there is a need for a permit, there is the cost of a 404 permit. It is estimated that an individual permit to deposit fill material costs $43,687 with an additional $11,797 for each acre of water affected.[195] This would make any permit necessarily cost-prohibitive for most agricultural producers in the state.

The Proposed Rule will increase the cost for certain projects as new permits will be required. While the agencies have given assurances that normal farming practices will be exempted from permitting, the normal farming practices exemption only applies to 404 permitting, not to any of the other permits required by the CWA if the water is determined to be jurisdictional.[196] While most of the east does not rely on irrigation systems of ditches and pumps to spread the water, the arid west utilizes intricate irrigation systems that are essential for production. With those differences in mind, the examples cited in the proposal to demonstrate normal farming practices do not include irrigation practices, but practices related to tillage.[197] It is clear that western states and their farming practices were not considered in the development of these rules. (p. 14)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are**

[194] *Flowing Toward 2050: Utah's Water Outlook,* Utah Foundation, Research Report 723, at 3 (Sept. 20 14), *available at* http://www.utahfoundation.orgluploads/rr723.pdf (accessed 11/ 10/14).
[195] Sunding & Zilberman, *The Economics of Environmental Regulation By Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-75 (2002).
[196] State of Utah Comment Letter on Interpretive Rule, dated July 7, 2014.
[197] *See* 33 C.F .R. I344(f).

subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis. The rule also does not change other farm related exemptions such as the exemption for irrigation return flows or agricultural stormwater discharges. Further, the Interpretive Rule, which is referred to in this comment, has been withdrawn.

Nebraska Department of Roads (Doc. #16896)

12.842 The Corps and EPA indicate that the categorical determinations of jurisdiction in the proposed rule should save time and resources. Because some of the definitions are broad and the rule is somewhat vague, the process to implement the rule will cause NDOR to acquire jurisdictional determinations for any jurisdictionally uncertain area. This will end up increasing the workload for NDOR as well as the Corps, costing more time rather than less. With all of the exemptions proposed in the rule, applicants could spend significant time evaluating whether certain exemptions apply, resulting in additional analysis and evaluation of transportation projects by the Corps and NDOR. Additionally, wetland mitigation resulting from the potential expansion of jurisdiction would result years of obligation by NDOR to maintain and ensure success of mitigation sites, which translates to higher costs and creates an undue burden on NDOR as well as Nebraska landowners. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

Arizona State Land Department (Doc. #16903)

12.843 In addition to the fact that the Proposed Change has the potential to sweep an unknown and seemingly limitless amount of State Trust land within federal jurisdiction, the Department is also concerned because the Proposed Rule is silent regarding existing Clean Water Act (CWA) Section 404 permits and determinations of "No Significant Nexus." The Department holds several CWA Section 404 permits and a determination of "No Significant Nexus" for State Trust land that is host to several multi-year build-out projects demanded by historic and projected population growth. For example, one such permit has been held for nearly fifteen years; to now subject it to the shifting regulatory environment surrounding the CWA will have immeasurable impacts on the value and development potential of the affected State Trust land. To further subject Arizona's State Trust land to continued regulatory uncertainty and vagaries conflicts with the Department's federally-mandated fiduciary responsibilities.

The proposed definitions fail to clarify the meaning of waters of the United States. Rather than provide certainty, these explanations simply add one more layer of confusion to an already muddled understanding. Instead of augmenting the current definition with nebulous language, any additional definitions should be vetted in accordance with the best available scientific standards and informed by stakeholders in the course of a transparent process. To do otherwise simply increases confusion and frustration surrounding the process. (p. 3-4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not change the existing permit process, and existing permits will remain valid for the life of that permit. The definitions included in the final rule were developed using the best available science including a comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence". This science report provides much of the technical basis for the rule. This report is based on a review of more than 1,200 publications from the peer-reviewed literature.**

State of Illinois, State Representative's Office, 94th District (Doc. #16994)

12.844 Your analysis stating the rule would subject an additional three percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least $100 million annually. This calculation is seriously flawed. Expanding CWA jurisdiction would subject communities, property owners, farmers, and businesses to stringent new permitting requirements and use restrictions. The process of obtaining permits and approvals under the CWA is very costly and time-consuming. Historically, obtaining a permit to develop in jurisdictional area can take longer than a year and cost hundreds of thousands of dollars. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the economic analysis has been updated for the final rule. Please see summary response for Topic 11: Costs/Benefits and the Agencies Economic Analysis document for details on the estimated costs and benefits of the rule.**

Coastal Restoration and Protection Authority Board of Louisiana (Doc. #17043)

12.845 The case-by-case analysis of non-adjacent "other waters" and wetlands to determine if a "significant nexus" exists has the potential to go beyond Supreme Court case law and allows for an extreme amount of subjectivity by the individual federal agent or agents conducting this analysis. As each determination yields subjective results on a case-by-case basis then, by definition, that subjectivity creates uncertainty. From a legal sense, that subjectivity has the potential to lead to arbitrary and capricious findings under the Administrative Procedure Act when these determinations are challenged in court, thus creating even more uncertainty. As this subjectivity in the analysis becomes more

pervasive within the framework of the rule as proposed, the potential for more and more litigation over the fine details of the "significant nexus" determinations will threaten to make the rule subjective and uncertain by its very nature, which could undermine the Agencies' intent in clarifying the regulatory status of "other waters." As a result, parishes in Louisiana could be left in the lurch as to how their comprehensive land use plans and stormwater or watershed management plans may be affected by the uncertainty inherent in the subjectivity of the case-by-case desktop review by the Agencies. (p. 2)

Agency Response: **The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The final rule establishes two exclusive circumstances under which case-specific evaluations will be made to determine whether or not a water has a "significant nexus" and is therefore a "water of the United States". Thus, the agencies disagree with the commenter regarding the number and subjectively of such case-specific determinations.**

Wyoming Water Development Commission (Doc. #17059)

12.846 If this rule is implemented it will create the additional burden of obtaining a 404 USCOE permit for all kinds of small projects in the arid uplands of Wyoming. Projects such as road culverts, stock dams, stock water pipelines, and buried power lines will all be required to obtain a 404 permit because they are crossing a dry channel with a defined bed, bank and high water line. Along with the 404 permit comes the required NEPA project analysis which will significantly delay very simple projects with little or no impact to the landscape. Additionally, the current USCOE staff level of two (2) employees in Wyoming will be inadequate to handle the new permit demand. Will the USCOE be adding new staff positions to address the new workload? The Federal Government currently operates at a rather large budget deficit now, and adding new employees does not seem like a viable option. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

Allen Boone Humphries Robinson LLP (Doc. #19614)

12.847 Substantially expanded federal jurisdiction over land areas and activities may trigger section 404 dredge and fill requirements for the first time. These requirements would apply to much more than just work that takes place in wetlands, impacting many other activities. In addition to the cost and delays involved with obtaining permits, firms will also face much higher mitigation costs to offset the impact of work done in newly-defined WOTUS areas. (p. 6)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Skamania County Board of Commissioners (Doc. #2469)

12.848 The Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. This puts our nation's counties, including Skamania County and flood and stormwater management agencies in a precarious position especially those who are balancing small budgets against public health and safety needs. (p. 4)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

Sweetwater County (Wyoming) Board of County Commissioners (Doc. #6863)

12.849 It seems that it would be easy to classify the hundreds of miles of Sweetwater County roadway ditches as waters of the United States since the majority of these county ditches have an ephemeral flow that directly or indirectly empties into the Green and Colorado River systems. If this interpretation is correct, then Sweetwater County may be forced to bear the increased costs and time delays of obtaining Clean Water Act Section 404 permits to complete routine ditch maintenance such as replacing culverts. Any maintenance delays resulting from additional EPA permitting requirements could lead to law suits if property damage occurs because of these additional permitting requirements. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as

tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.

County of Butler (Pennsylvania) Board of Commissioners (Doc. #6918.1)

12.850 The §404 permit process is complex, time consuming and expensive, leaving local governments and public agencies responsible for public safety vulnerable to legal ramifications. Under the proposed language, virtually every roadside ditch could reach navigable waters *(directly* or *indirectly)* subject to federal permitting jurisdiction. Ditches are pervasive in counties across the nation and were never considered to be within federal jurisdiction. *Whether or not a ditch is regulated under §404 has significant financial implications for both State and local governments and public agencies.* If a project is determined as jurisdictional, other federal laws and environmental impact statements would be triggered. While waiting on costly permits and the lengthy regulatory process, the purpose of the CWA I and soil erosion are undermined. Instead of qualifying, quantifying and limiting those waters which have the greatest impact on "waters of the U.S.", almost every water system, natural and man-made, falls within federal jurisdiction pursuant to the proposed rule which substantially broadens the geographic scope of CWA jurisdiction. Encompassing *all waters* under federal jurisdiction was not the legislative purpose twenty-five (25) years ago nor was an overall expansive definition permitted by the Supreme Court. The proposed rule ignores federalism concepts. Direct impact cost and benefit estimates are incomplete and the methodologies utilized are misleading. By simply applying common sense, the R*apanos* decision could be interpreted administratively by the EPA and the Corps to alleviate the permits which have been applied for in a more timely and streamlined manner *without the current proposal which exceeds their authority as noted by the Court*. (p. 12-13)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered**

water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.

White Pine County (Nevada) Board of County Commissioners (Doc, #6936.1)

12.851 The U.S. Army Corps of Engineers will see a mandated increase in workload, and if unplanned for, will cause delays in permit applications being processed. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

Office of the City Manager - City of Westminster (Colorado) (Doc. #7327)

12.852 It is not clear whether the City would need a 404 permit to clean out a ditch segment for maintenance purposes. If so, this would drastically affect the City's ability to resolve these concerns for the betterment of its citizens. (p. 3)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation

ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.

Murray County (Minnesota) Board of Commissioners (Doc. #7528)

12.853 One of the main concerns is the lack of appropriate recognition for wetlands created and enhanced by water quality projects. Current requirements demand that wetlands impacted by a water-resource improvement project be mitigated at a 2:1 ratio, but fail to recognize the creation of new wetlands or the enhancement of degraded wetlands as part of the project, which subsequently become waters of the United States." In addition, environmental enhancement projects, such as the Hay Creek / Norland Impoundment Project, which proposed to create over 200 acres of wetlands, have gone over two years without receiving an Army Corps decision on approvals for the proposed project. Clearly, the current system is broken. (p. 3)

Agency Response: Decisions regarding funding, implementation, and mitigation for water-resource projects are outside the scope of this rule.

Board of Supervisors- Del Norte County, California (Doc. #8376)

12.854 The expansion of the definition of Waters of the .U.S., as drafted, will also force counties to seek Section 404 permits for the now-routine maintenance of such "waterways" as roadside ditches and storm water drains. Public infrastructure ditch systems can stretch for hundreds of miles across local jurisdictions, and it is unclear how these systems will be classified under the rule. This is particularly onerous for rural counties as many are already struggling with tough budgeting decisions in the face of diminishing funding from the state and decreased public appetite for approving new taxes to cover such costs. It also could drastically interfere with the ability of counties to properly maintain roadways to keep them safe and accessible to rural residents, particularly since the Corps is already significantly backlogged in evaluating and processing of 404 permits.

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.

Scott County Soil and Water Conservation District (Doc. #8410)

12.855 Under the rule as written, Section 402 permits would be necessary for common farming activities like applying fertilizer, pesticides, herbicides, or moving livestock, if materials (i.e. manure) would fall into low spots or ditches. Section 404 permits would be required for earthmoving activity, such as plowing, planting or fencing, except as part of "established" farm "ongoing" at the same site since 1977. This 1977 rule, in and of itself, is problematic in that established and ongoing are not defined leading to less clarity and certainty. We are concerned that if more waters are considered jurisdictional, then landowners will have to obtain additional section 404 permits for work they have historically performed for the good of this country's natural resources. The administrative process of applying for permits may slow the application of conservation to the landscape, ultimately leading to less conservation measures applied to the land. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. Also, as you note, the exemptions for ongoing farming and other activities remain in effect and are not affected by this rule.**

Commissioners Office, Dickinson County, Kansas (Doc. #10257.1)

12.856 Under the proposed changes any ditch, gully, or fencerow in a back yard or pasture could be subject to the new regulations which would require a 404 permit for any work, no matter how minor. These changes are very simply an attempt by the federal government to control private properties under the guise of the clean water act, and they are totally unacceptable. The impact that these changes would have in the way of permitting and restrictions would be devastating to Kansans. (p. 1)

Agency Response: **The agencies disagree. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Board of Commissioners of Carbon County, Utah (Doc. #12738)

12.857 The proposed rule would increase the number of drainages counties would have to permit under Section 404 of the CWA in order to maintain for flood control. Adding this burden will affect road construction and ditch maintenance projects, flood control channels, drainage ditches and culverts used to prevent flooding. Once drainage is under federal jurisdiction, the permitting process can be extremely burdensome, time-consuming as

well as expensive. This leaves counties vulnerable to citizen suits under our public health, safety and welfare responsibilities. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.**

Pike County (Illinois) Soil and Water Conservation District (Doc. #12748)

12.858 We are concerned that if more waters are considered jurisdictional, then landowners will have to obtain additional section 404 permits for work they have historically performed for the good of this country's natural resources. The administrative process of applying for permits may slow the application of conservation to the landscape, ultimately leading to less conservation measures applied to the land. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

California Central Valley Flood Control Association (Doc. #12858)

12.859 Changes proposed by the EPA and Army Corps via its "waters of the United States" regulations[198] would draw at least 63 percent to 90 percent of the Delta and Central Valley into the jurisdiction of the federal government. The proposed "floodplain" definition could encompass the entire region. This would result in dramatic slowdown or stoppage of key work needed to protect Californians. In the recent past, the process of obtaining Section 401, 404, or Section 10 permits (hereafter, "permits") from the U.S. Army Corps of Engineers in order to complete these vital projects has become more and more cumbersome. Presently, obtaining a permit *can add between 10 months and three years to project timelines, and can add a million dollars or more to the project costs*.

[198] Docket Nos. EPA-HQ-OW-2011-0880; FRL-9901-47-OW

Legally, local governments still remain liable for flood damages caused during these delays.[199] Because some cases take years to resolve, Corps staff appears to be overwhelmed by the current permit workload. Adding more jurisdictional areas would merely add to this workload and further delay necessary flood control and other development projects.

The expansion of jurisdiction proposed by the regulation would unnecessarily subject even areas that historically have not been governed by the federal government, including the land side of levees and drainage and farm ditches, to this onerous and complex process. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

12.860 Viewed together, these facts and statements tend to indicate that the Corps and EPA intend to assert regulatory jurisdiction over waters comprising between 63 percent and 90 percent of the Delta. This means that reclamation districts and other agencies conducting even routine maintenance, operations, or drainage will find themselves swept up among this vast new assumption of Federal jurisdiction. Delta landowners, farmers irrigating their lands, and even local governments maintaining stormwater and roadside conveyances will also find their activities covered under the Clean Water Act, subjecting them to new permitting requirements and potential litigation or enforcement actions.

Currently, those seeking to obtain Section 401, 404, and/or Section 10 permits already must anticipate adding 10-36 months to their project timelines (and longer in some cases and areas), in order to account for permitting time and efforts. This would no doubt include projects needed to comply with Army Corps Public Law 84-99 flood control criteria, or those necessary to improve areas to Federal Emergency Management Agency standards for floodplains. Based on the time it takes staff to review applications and complete the permitting process, Federal staff workloads appear to already be substantial. An expansion of jurisdiction via an expanded definition of "tributary" would mean a corresponding expansion in completion time, potentially resulting in increased project costs and compromised public safety in the meantime.

While it will not be hard to say farewell to the convoluted and occasionally arbitrary "recapture" regime applied by the Corps, no Delta flood control agency looks forward to the uncertainty and difficulties caused by additional, mandatory permitting requirements

[199] See *Arreola v Monterey* 99 Cal. App. 4th 722 (Local maintaining agency liable for damages caused by flooding even where timely approval of levee maintenance permit by regulatory agency could have prevented flooding).

that would be imposed by these new rules. These rules simply reach too far, and penalize the Delta for accidents of elevation and for necessary economic, public health, and public safety efforts. If these rules are enacted, they should be accompanied by immediate, contemporaneous and practical guidance and put general permitting procedures in place, in order to ensure that public safety projects can continue to advance without delay. Otherwise, the resulting regulatory gridlock will almost certainly lead to loss of PL-84-99 status, if not loss of life or property, for many districts in California's Central Valley. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. Further, the final rule includes expanded provisions describing the types of ditches and stormwater control features that are specifically excluded from regulation.**

12.861 Thus, Delta reclamation districts (and landowners) will be placed into an impossible situation: Either comply with expensive, time-consuming water quality and discharge permits, or face the specter of Clean Water Act enforcement or litigation. Districts in rural Delta areas may have $50,000 or less per year to spend on maintenance[200], and may not be able to afford either the newly necessary permitting or the resulting fines or litigation.

In order to avoid an uneven and potentially costly result for the Central Valley, the Corps and EPA must withdraw the current proposal. The rules should not be advanced unless and until EPA and the Corps collaborate with Central Valley flood control officials on concurrent guidance, general and regional permitting, and permit streamlining efforts that promote public safety interests throughout the Central Valley and Delta. Any such assistance and streamlining should be accompanied by a regulatory recognition that the proposed "one-size-fits-all" approach simply cannot work, particularly in California's Central Valley and Delta. Finally, these efforts must be launched at the same time as any proposed rules that would give the Corps and EPA more authority over flood control projects and other projects.

Without these efforts, public safety will become something that California's Central Valley simply cannot afford, and may not be able to afford, either the newly necessary permitting or the resulting fines or litigation. (p. 6-7)

[200] Indeed, the Sacramento Bee reported in the early 2000s on Reclamation District 556, which sits in the Delta near the town, and which was struggling to maintain 12.5 miles of levee on $50,000 a year.

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.862 Because of the unique burdens placed on our region, the California Central Valley Flood Control Association must oppose the proposed rule in its current form. With the passage of this rule, much of the Central Valley and nearly all of the reclamation districts' territory will fall under Clean Water Act jurisdiction. Projects on the landside of levees will become newly jurisdictional, resulting in huge delays and cost overruns.

Meanwhile, the current Section 10, Section 401, and Section 404 permitting processes remain full of uncertainties for reclamation districts, and result in high costs and unneeded delays. This permitting process would not change even as the permitting jurisdiction vastly expands. Additionally, permitting Corps and EPA staff to apply their "best judgment" in the application of existing floodplain standards will have disastrously uneven consequences. Finally, because of the way most of their levees are designed, California's Central Valley flood control system operators and maintainers would be bound to presumptions and permit standards that could never be rebutted. (p. 8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The final rule does not establish any regulatory requirements or change implementation of CWA programs or processes, which are outside the scope of this rule."**

Carson Water Subconservancy District (Doc. #13573)

12.863 We are aware of projects in our area that are dependent upon Corps permits which have been delayed because the Corps was unable to issue permits in a timely manner due to its workload. In the past 10 years there have been times when proposed water quality improvement projects in the Carson River were delayed a year or two because of the Corps' backlog of pending permits. If the current backlog is one to two years, what will the backlog be when additional projects identified by the proposed rule will need Corps approval? (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

12.864 We have concerns that Section 404, the "dredge and fill" permit program, could cause other enforcement issues involving activities such as weed control, fertilizer applications, and construction of fences or ditches. This additional oversight will provide very minimal benefits to the overall water quality in the Carson River watershed, while enforcement would most likely increase expenses for producers. (p. 3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. It is not clear how narrowing and clarifying the scope of jurisdiction could lead to expanded enforcement issues.**

Brown County, Kansas (Doc. #13603)

12.865 The inclusion of all tributaries as waters of the US is a major expansion of actual practice. Typically ephemeral channels upstream of the blue lines on a USGS contour map were normally not considered waters of the US by the general public. On occasion a 404 permit would be requested on larger projects, but the general public ignored any federal jurisdiction, and to our knowledge the Corps and EPA has seldom pursued private land owners that failed to get a permit for work on these headwater ephemeral channels. So in our view the proposed definition of waters of the US will include all ephemeral channels and doubles or triples the actual miles of channels regulated. (p. 1)

Agency Response: **The agencies disagree with the commenter's description of tributary. Tributary is defined in the final rule; they must have a bed and banks and another indicator of ordinary high water mark. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries**

Cascade County Commissioners (Doc. #16904)

12.866 It appears the current permitting process for larvicide treatment in waterways and/or pesticide (mosquito abatement) and herbicide (weed management) applications along waterways will remain unchanged under the new rule; however additional clarification is suggested.

Cascade County has historically applied for and received a CWA-404 Permit for aerial and land-based larvicide applications in jurisdictional waters where mosquito larvae are present. The larvicide prevents mosquito larvae from maturing to the adult stage and is

an effective mosquito control measure. The current permitting process has been routine and the permit easily acquired. How will the new rulemaking affect the current permit process or delay authorization for larvicide and pesticide applications? Likewise, the County utilizes chemical and biologic measures for weed management. What additional regulations might be required for herbicide applications adjacent to waterways or along stream banks when manufacturer instructions are followed? Similar to the situation whereby NRCS conservation practices will change in future years, so will larvicide, pesticide and herbicide treatments. How will the rulemaking accommodate future practices when new products for insect and weed management are approved in the market? (p. 3)

Agency Response: **We presume the commenter meant to refer to the 402 Pesticides General Permit (PGP) (rather and 404). Obtaining coverage under the 402 PGP is efficient and streamlined and should continue to be. See also summary response for Section 12.3.**

City of Portsmouth, Virginia (Doc. #17057)

12.867 If the City has to provide mitigation for impacts incurred greater than allowed under the Nationwide Permit program, the mitigation may have to be in the form of stream mitigation instead of wetland mitigation. Stream mitigation credits tend to be more expensive and harder to come by than wetland mitigation credits. Therefore, we have a heightened concern as to how this will impact our Public Works and ditch maintenance efforts. (p. 6)

Agency Response: **Comments regarding implementation including potential compensatory mitigation requirements are outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Nebraska Association of Resources Districts (Doc. #11855)

12.868 Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level. (p. 3)

Agency Response: **Comments regarding the issuance of permits are outside the scope of this rulemaking. Further, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as**

"waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Western Coalition of Arid States (Doc. #14407)

12.869 (If ditches do not meet one of both of the proposed exclusions in the Rule) many of the maintenance activities needed in order to operate transmission and distribution ditches will become subject to state and federal §402 or §404 permit requirements. These activities include: converting open ditches to concrete lined or closed pipe systems; replacing damaged linings; channel or bank stabilizations; control system and structure modifications; construction of seepage controls; mechanical and chemical plant and aquatic animal controls; and silt or debris removal. In each instance, coverage under a §402 Pesticide General Permit, §402 Construction General Permit, or §404 Nationwide General Permit may be required. And if the ditch operator discharges excess flows into a groundwater recharge facility that is also an adjacent (a)(6) water, coverage under an individual §402 discharge permit will also be required. (p. 15)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule also includes expanded provisions describing ditches specifically excluded from regulation.

Western Urban Water Coalition (Doc. #15178.1)

12.870 In the arid West, the current Section 404 policies and practices steer many project proponents away from alternatives that involve rivers and perennial streams and toward alternatives that involve dry ephemeral and intermittent drainages that are isolated from and/or lack a significant nexus to a TNW because such drainages are non-jurisdictional and any discharge of dredged or fill material into them will not require a Section 404 permit. Avoidance of the need for a Section 404 permit is frequently a component for evaluating water supply project alternatives in the arid West (Dougherty et al. 2010). Currently, several proposed "off-channel" reservoirs in Colorado are located on ephemeral or intermittent drainages determined to be non-jurisdictional based on isolation. This same approach is also true for other types of projects in the arid West including pipelines, roads and drilling pads.

Because current policy and practices steer many projects away from rivers and perennial streams toward non-jurisdictional ephemeral and intermittent drainages, fewer projects are proposed in jurisdictional waters and wetlands and there are fewer impacts on the resources and functions associated with such jurisdictional waters and wetlands. The current regulations, policies, and practices work as they should to provide incentives to project proponents to develop alternatives that avoid impacts on these waters and wetlands with greater potential to provide significant resources and functions (i.e., those with perennial water sources). Projects can be permitted much more quickly and mitigation efforts, which add significantly to the financial burdens associated with these beneficial water and wastewater initiatives, can be minimized. As proposed, the rule would eliminate this incentive because all drainages that meet the definition of

"tributary" would be jurisdictional by rule (including normally dry ephemeral drainages). In other words, under the proposed rule, there would no longer be an incentive for a project proponent to avoid perennial drainages because all tributaries would be jurisdictional by rule. This will result in greater adverse effects on the resources associated with perennial drainages. The following discussion on isolation and SWANCC, and significant nexus and Rapanos provide context for the how the proposed rule's treatment of ephemeral and intermittent streams is contrary to current policy and practice and how the proposed rule would expand the geographic scope of CWA jurisdiction in the arid West. (p. 7-8)

Agency Response: **Tributary is more narrowly defined in the final rule. According to the final rule, a tributary must have a bed and banks and an ordinary high water mark. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Wyoming County Commissioners Association (Doc. #15434)

12.871 Should the proposed rule be adopted as written, counties will have no choice but to presume that every road or bridge improvement that crosses or otherwise might disturb a dry bed, headwater, or conveyance is automatically a water of the U.S. As a result counties will face the immediate impact of costly and lengthy requirements to secure a 404 permit. For many counties this requires hiring specialized consultants and engineers who design and oversee construction of the project in order to satisfy 404 permit specifications. In addition to the immediate expense, the delay required to secure a 404 permit in some cases can push back county improvement projects for a year or more due to Wyoming's short construction season, difficult terrain, and inclement weather.

Even upon successful issuance of a permit, costs to counties do not cease at completion of construction. Counties are also required to monitor the regrowth of vegetation, often for years as mitigation is affected by outside influences like drought. The EPA' s economic analysis fails to consider the ongoing direct expenses and time delays incurred by counties when a 404 permit is necessary. (p. 9)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis. Specific comments related to permit issuance are outside the scope of this rule.**

Idaho Association of Commerce & Industry (Doc. #15461)

12.872 For mine sites, the following activities would be affected (anticipated increase in activities) by the proposed rule: (…) Increased permitting includes monitoring, reporting, and mitigation requirements, such as additional water treatment, or, as is often

the case, avoiding the jurisdictional area (e.g., cancel or move a construction project to avoid CWA issues). (p. 8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

Massachusetts Water Resources Authority (Doc. #15573)

12.873 In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming, and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined. Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. SCAC's member counties are concerned that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for our counties. The Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. This puts our nation's counties and flood and stormwater management agencies in a precarious position, especially those who are balancing small budgets against public health and safety needs.

Many of our member counties have reported concerns that road and bridge applications, and other infrastructure maintenance programs that have traditionally been authorized pursuant to nationwide permitting programs will in the future require individual permits. The current nationwide permits can be obtained by many of our members within a two to three month period, at a cost to the taxpayer of as little as $1500.00. If these projects were required to obtain individual permits, the time period is estimated to add two to three years to the construction approval process. The additional costs for such permits would run into the hundreds of thousands of dollars due to required engineering studies, mitigation planning, and staff time.

The increase in time and cost will have two major impacts on counties. First, an additional two to three year delay in project construction will mean that projects designed to protect life, health and property will be unnecessarily delayed, thus putting the lives of our local citizens in danger. The second impact on local government will be the useless and unnecessary reduction in funding for other vital public services. For every dollar of increased cost for unnecessary permitting, proportional reductions in other local programs will have to be made. South Carolina law prohibits counties from simply raising local taxes to offset these additional costs. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule. In addition, the rule does not change the current permitting program. Please see summary response for Topic 11: Costs/Benefits and the Economic Analysis document for details on the estimated costs and benefits of the rule.**

Washington State Water Resources Association (Doc. #16543)

12.874 The previously noted "expansion" will, in turn, have negative real world consequences without any concomitant environmental benefits. Adoption of the proposal would significantly increase the time required before an entity can construct or modify necessary infrastructure; significantly increase the costs associated with the permitting, construction and potentially the operation of such infrastructure; unnecessarily increase post-permitting mitigation costs; and potentially even preclude the construction and operation of the infrastructure, placing at risk the ability to timely meet essential consumptive use and environmental/recreational water needs. For example:

- To the extent waters are deemed jurisdictional, it becomes necessary to go through the section 404 permitting process prior to undertaking any dredge and fill activities. This, in turn, triggers the need for state section 401 certifications and may also trip consultation requirements under the Endangered Species Act. Perhaps most importantly, the federal nexus invokes the provisions of the National Environmental Policy Act (NEPA), another costly and time consuming process involving the examination of numerous alternatives, the imposition of additional mitigation requirements, and exposure to costly and lengthy administrative and judicial challenges. This would be true even if the project

crosses only a number of dry arroyos or washes which may periodically flow only in response to precipitation events. As NWRA members can attest, for any large project the NEPA process entails years, if not over a decade, of additional work and millions, if not tens of millions, of additional ratepayer or taxpayer dollars in situations involving the construction of necessary water, wastewater and stormwater infrastructure.

- To the extent additional waters, such as all intermittent or ephemeral streams are now jurisdictional, the ability to utilize nationwide 404 permit provisions is placed at risk. As the scope and length of jurisdictional waters expands, the ability to meet the limitations governing qualification for nationwide status contracts.
- To the extent isolated waters, as aggregated, intermittent or ephemeral streams, or even all tributaries become jurisdictional, it will impede entities' ability to timely respond to the devastating impacts of the forest fires ravaging the West. Post-fire, it is necessary to both restore damaged infrastructure, including essential utility infrastructure which may be located in close proximity to so-called jurisdictional waters, and to construct new facilities designed to hold back debris flows and sediment laden water as rainfall races off of what are now newly burned and hence impervious surfaces. Unnecessary permitting requirements will only add to the difficulties associated with meeting these challenges. (p. 7-8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

League of Oregon Cities (Doc. #16546)

12.875 (…) broadening of jurisdictional regulation is likely to increase permitting and mitigation requirements which can result in additional time, complexities and cost to projects including roadway construction, utility facility expansions, and installation of water lines, intakes and outfalls. These additional requirements could come in the form of compliance considerations under the Endangered Species Act as well as the National Historic Preservation Act. With mounting infrastructure needs and facilities on the verge of non-compliance, we have significant concerns that the proposed rule will result in further litigation, increased costs or permitting delays. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

U.S. Chamber of Commerce (Doc. #14115)

12.876 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 [including]: (…)

- 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. (p. 10)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The existing permitting programs are not changed by this rule.**

12.877 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. (p. 12)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Further, the final rule includes expanded provisions describing the ditches and stormwater control features that are excluded from regulation. The final rule does not change the existing ditch maintenance exemption.**

12.878 *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 ½ 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 ½ acre of WOTUS. Utility companies are often able to configure transmission lines to avoid most wetland and stream impacts, and thereby stay within the ½ 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. (p. 14)

Agency Response: **Implementation of the 404 nationwide permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.879 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. (p. 14-16)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis. Further, the final rule includes expanded provisions describing the ditches and treatment ponds that are excluded from regulation. Also, the existing permit programs are not changed by this rule.

John Deere & Company (Doc. #14136.1)

12.880 Contrary to the claims of agency officials, the proposed definition of "waters of the United States" (WOTUS) would significantly expand the waters and land over which the agencies will exercise jurisdiction. A determination that an area is a WOTUS subjects that area to several requirements under the CWA. The adoption of definitions enlarging the geographical area of agency jurisdiction under the CWA will, therefore, impose numerous time-consuming permitting obligations, additional permit requirements and limitations that are incompatible with many time-sensitive critical farming activities. These permitting requirements, which carry civil and criminal penalties for violations, along with potential citizen lawsuits, fail to take into account the narrow time frames during which farmers *must* plant, cultivate and harvest their crops for optimal results. This expanded jurisdiction thus will effectively make the EPA and Corps the primary agencies exercising regulatory authority over certain agriculture activities in the United States. This is very concerning, as neither agency has as its primary mission the regulation of on-farm activity involving the timely cultivation of crops and livestock husbandry.

The proposed WOTUS definition likewise will increase the agencies' permitting authority under CWA Sections 402 and 404 to worksites and manufacturing facilities, which could impede ongoing operations, future site expansions and construction development that our economy depends upon to support jobs and spur much-needed growth. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis. To the extent that this comment is also referring to the Interpretive Rule, that rule has been withdrawn.**

12.881 The Proposed Definitions Expand the Agencies Geographic Reach Under CWA section 404(f)(1) Thereby Creating Greater Uncertainty and Burdens for Agriculture.

The agencies have asserted in the proposed rule that the definitional changes do not affect any of the exemptions from CWA section 404 permitting requirements, including those for normal farming, silviculture and ranching activities.[201] This assertion misses the mark. The normal farming, silviculture and ranching activities exemption set forth in Section 404(f) was enacted by Congress in response to concerns that the 1972 Federal Water Pollution Control Act Amendments would require farmers to obtain Section 404 permits very broadly on agricultural land. While intended by Congress to be interpreted broadly and reasonably, the application of the exemption has been narrowed and often only exempts a specific activity, rather than the land or the water in which the activity is conducted. Thus, under, the proposed WOTUS definition, additional land and water will become jurisdictional regardless of the normal farming, ranching and silviculture exemption. In addition, this exemption is not available to section 402 NPDES permits.

Section 404 establishes the permit program for discharges of "dredged or fill material" into waters of the United States. Without a section 404 permit such discharges are prohibited by section 301(a) of the CWA into the waters of the United States.[202] This permit program is the central enforcement tool of the CWA. An unpermitted discharge is a CWA violation and subjects the discharger to strict liability.[203]

To qualify for the conditional exemption, a farmer, not the EPA or the Corps, has the burden to demonstrate that proposed activities satisfy the "normal farming, silviculture and ranching activities requirements of Section 404(f)(1)."[204] In many instances this burden may be difficult to meet since the term "normal" in section 404(f) applies to activities associated with the farm or land itself, not agriculture generally. The regulations do not specify the precise area to look at in determining whether there is an established farming operation. Nor are there minimum limits placed on the "area" being brought into farming use. Courts have held that the normal farming activity exemption is available only to activities that are part of an "established farming operation" at the site.[205] (p. 11)

Agency Response: **The agencies continue to assert that the final rule does not affect any of the exemptions under 404(f). To further clarify this, the definition for *Adjacent* in the final rule has been expanded to state that waters subject to established, normal farming, silviculture, and ranching activities are not adjacent.**

12.882 The Proposed Definitions Will Subject More Land To The Recapture Provisions Set Forth In CWA Section 404(f)(2), Resulting in Unintended Consequences.

The "recapture" provision set forth in CWA section 404(f)(2) provides that discharges related to activities that change the use of the waters of the United States, including wetlands, and reduce the reach, or impair the flow or circulation of waters of the United States are not exempted under the normal agricultural activities set forth in section 404(f)(1). The "normal" farming exemption provided by CWA section 404(f)(1) does

[201] 79 Fed. Reg. 22,199 (April 21, 2014).
[202] 33 U.S.C. Secs. 1311(a), 1362(12)(2014).
[203] *United States v. Pozsgai*, 999 F.2d 724 (3rd Cir. 1993); *United States v. Brace*, 41 F. 3d 117 (3rd Cir.1994).
[204] *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995), citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), cert. denied, 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986).
[205] *Brace*, 41 F.3d at 125.

not apply to activities constituting a "new use" of an area subject to the agencies' jurisdiction and that do not adversely affect the area's hydrology.

An expanded waters of the United States definition means that more land will, by necessity, be subject to the recapture provisions set forth in CWA section 404(f)(2). A farmer or rancher removing land from the Conservation Reserve Program will now be required to assess in much greater detail and with far greater certainty those portions of his land falling within the jurisdictional waters of the United States. A farmer wanting to convert this land back into production will also be required to demonstrate that this action does not constitute a "new use" and will not adversely affect the area's hydrology.

An unintentional consequence of an expansive WOTUS definition extending Section 404 permitting requirements to significant portions of farmland may be that farmers will not change the use of their land for fear that any such change would trigger the Section 404(f)(2) recapture provisions. This uncertainty will discourage farmers and ranchers from implementing new types of conservation technologies for fear that they may be locked into a certain farming practice, or worse, subject to civil and criminal enforcement and citizen lawsuits. (p. 12)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies continue to assert that the final rule does not affect any of the exemptions under 404(f) or recapture under 404(f)(2). To further clarify this, the definition for *Adjacent* in the final rule has been expanded to state that waters subject to established, normal farming, silviculture, and ranching activities are not adjacent.**

12.883 The Proposed WOTUS Definition Increases the Number of Projects Required to Obtain Section 404 Permits, Thereby Impeding Much-Needed Improvements to the Nation's Infrastructure.

Under the proposed rule a substantial portion of the nation's waters and land would be jurisdictional under the CWA, thereby resulting in more projects and activities being required to obtain section 404 dredge and fill permits. The section 404 permit process is lengthy and costly, often requiring the use of consultants and legal counsel. Failure to obtain permits can result in enforcement actions and potential civil or criminal penalties of up to $37,500 per day. Such an expansion of the CWA's jurisdictional reach will add delays and costs to an already-overburdened Corps regulatory program. It will also erect significant economic barriers to important projects at a time when our country is facing the need for massive infrastructure improvements.[206] (p. 14)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

[206] Deidre G. Duncan, Kerry L. McGrath, *EPA and U.S. Army Corps Seek to Expand Jurisdiction Under the Clean Water Act*, Engage Volume 13, Issue 1 (March 2012), http://www.fedsoc.org/publications/detail/epa-and-us-army-corps-seek-to-expand-jurisdiction-under-the-clean-wateract.

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.

California Building Industry Association et al. (Doc. #14523)

12.884 The rule will not result in greater clarity and efficiency, but will simply force disputes from the JD phase to the permit phase.

The preamble of the Proposed Rule goes to great lengths to justify this paradigmatic shift from case-by-case to categorical by-rule imposition of jurisdiction, and it justifies the shift under the guise of certainty and efficiency. *See, e.g., id.* at 22,190 ("The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This Rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation"). While this "certainty" and "efficiency" may arguably be true from the perspective of the Agencies (i.e., it is "certain" in that everything is now categorically jurisdictional; it is "efficient" in that Agency personnel are no longer going to bother with tasks like visits to the field to actually investigate the nature of a given feature), it is far from certain and efficient from the perspective of the regulated community. Quite to the contrary, this categorical proclamation of jurisdiction simply defers disputes, conflict, and inevitable litigation from the jurisdictional determination phase to the permit phase.

Admittedly, the jurisdictional delineation phase of the Agencies' Section 404 regulatory program can be time consuming, labor intensive, and expensive. But it serves an essential function for the regulated community. Being able to vet and devise which features on a given property holding are or are not jurisdictional can help inform and define a future project proposal. Avoidance, minimization, and mitigation strategies can be considered and analyzed far more effectively and impactfully early on in the planning stages of a project. The investigation, debate, and analysis of CWA jurisdiction can greatly inform this early process.

But under the approach of the Proposed Rule, all of this early analysis and potential for collaboration is done away with. All features potentially fitting within the broad definitions of the Proposed Rule are categorically jurisdictional with no further analysis. And the applicant is instead forced into a permit process necessitating a specific project proposal in advance, with all of its attendant avoidance, minimization, and mitigation strategies hardened in advance, for features which that applicant may deeply contest are in fact jurisdictional.

Thus, the Proposed Rule eliminates the forum for collaboration and throws all potential disputes into the forum of hard line proposals, advance study at significant cost, and where stakes preclude avenues of compromise. This will not lead to increased clarity and efficiency. On the contrary, it will heighten conflict, increase costs, and ensure increased litigation. (p. 27-28)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

Resource Development Council for Alaska, Inc. (Doc. #14649)

12.885 The EPA and Corps should evaluate the potential impacts approval of the proposed rule will have on existing permits and permit stipulations. The evaluation should be published with potential opportunities for mitigation. (p. 3)

Agency Response: **Implementation of the permitting program is beyond the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Cooperative Network (Doc. #15184)

12.886 A vast expansion of the Clean Water Act that would create significant challenges for cooperatives that build and maintain power lines in largely rural service territories. Specifically, it appears that existing general permits may become inadequate to address basic utility construction, power restoration, and other maintenance activities if the WOTUS definition is changed as proposed. Because this proposed rule would include intermittent and ephemeral streams and ditches and floodplains as a WOTUS, the scope of projects will be amplified and could trigger notification and other general permit provisions that don't apply today, or exceed the scope of the respective general permit and trigger site-specific permitting. Restoring power after a storm event is a life safety concern that becomes infinitely more complex when utilities would possibility need to obtain a site-specific permit, obtain regulatory approval under an existing general permit, or become subject to general permit conditions that did not apply previously. (p. 2)

Agency Response: **Implementation of the 404 general permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Automotive Recyclers Association (Doc. #15343)

12.887 As you well know, the major components of a NPDES stormwater permit include a statement authorizing the discharge, and the specific locations for which a discharge is authorized. Permit writers also spend a majority of their time deriving appropriate effluent limits based on applicable technology-based and water quality-based standards. Under the proposed rule, it appears that the permit writers would need to understand the

new water categories and definitions and include the different standards for the different water bodies in the permit. No protocol was proposed in the rule for this process and the rule also is silent on creating an infrastructure under which affected industries could provide input on their stormwater discharges to multiple water bodies.

As well, the rule offered no discussion on how additional waterway characteristics will affect the MSGP which covers multiple facilities within a specific category. In deciding whether to develop a general permit, permitting authorities must consider several factors including whether only a small percentage of facilities to be covered have the potential for violations of water quality standards. This decision process might have to change if there were additional waters under the proposed rule that would now have the potential to be polluted by the said facilities. (p. 7)

Agency Response: **Please see summary responses for Sections 12.3 and 7.4.4.**

Council of Industrial Boiler Owners (Doc. #15401)

12.888 CIBO members are concerned that the proposed requirement that waters be aggregated with other "similar waters" in the region for determining whether they have a significant nexus to navigable waters. This will cause a gridlock in the CWA permitting process for facilities expecting to permit a project or activity with a Nationwide Permit (NWP) and facilities that are subject to National Pollutant Discharge Elimination System (NPDES) permits. (p. 4)

Agency Response: **In the final rule, the agencies provided additional clarity by expanding the discussion of "similarly situated" in the preamble and the rule identifies (paragraph (a)(7)) five subcategories of waters (praire potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal praire wetlands) that the agencies have determined are "similarly situated" for purposes of a significant nexus determination.**

12.889 NWPs streamlined wetland permits specifically authorized by the CWA that authorize specific, limited activities which allow applicants to design projects in a way that comports with the regulatory parameters of the NWP and lends predictability to the issuance of a permit. These permits are reauthorized every five years by the Corps, which requires each NWP to be re-analyzed under the rigorous National Environmental Policy Act (NEPA) process and the CWA 404(b)(1) process. These reviews ensure that any project authorized under a NWP is in public interest and will not significantly degrade US waters and that few impacts will be incurred by the project.

This proposed rule, with its aggregate impacts focus, could greatly complicate the reissuance of the NWPs, and perhaps invite legal challenges to regulatory conclusions reauthorizing NWPs. Without NWPs, the Corps would otherwise have to issue individual permits for each project, which take almost seven times longer to process than regular NWPs.[207] Without these NWPs, the Corps could not provide an adequate level of review for major projects, which would reduce its ability to enforce wetland laws. The

[207] Congressional Research Service, January 30, 2012; The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments; Copeland, Claudia, p.2, available at http://www.fas.org/sgp/crs/natsec/97-223.pdf

proposed rule and its aggregate impacts on wetlands, once aggregated with other wetlands and expanded determinations of their significant nexus to downstream waters would impede this already efficient Corps program and the Corps will be forced to reduce the number of NWPs they issue. This potential effect of the proposed rule greatly increases the regulatory burden of the Corps and creates the possibility for unnecessary wetland degradation. (p. 4-5)

Agency Response: **Implementation of the 404 nationwide permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Idaho Association of Commerce & Industry (Doc. #15461)

12.890 Electric utilities also are required to obtain permits under section 404 of the CWA whenever it engages in dredging or filling activities within the ordinary high water mark of a WOTUS. Currently, much of the work can be done under Nation Wide Permits because of the nature of the work and limited extent of the impact. Because of the uncertainty of whether currently non-jurisdictional waters and ephemeral features will become jurisdictional under the significant nexus definition of the proposed rule, electric utilities will be required to engage in additional permitting, including acquiring Individual Permits, and mitigation that would not be necessary under the existing definition of WOTUS[208]. Individual Permits are often complicated and expensive because they require consultation with multiple state and federal agencies, along with acquiring associated 401 permits. The cost of obtaining a Nation Wide Permit can vary from $10,000 to $40,000, while the cost of obtaining and Individual Permit is substantially higher, ranging from $100,000 to $500,000, depending on the complexity of the project. With an expansion of waters that are considered jurisdictional, many projects that would not require an Individual Permit today will require one under the proposed definition. Therefore, contrary to the Agencies claim, the cost impact to the regulated community will be significant.

To emphasize this point, much of the impact on electric utilities of the proposed rule occurs during activities that preserve electricity reliability and protect national security. Transmission and distribution corridors, substations, and new generation facilities are and will continue to be a critical component of preserving electric reliability to customers, including important national security functions through that reliability. The delivery of electricity to support: these critical functions requires the construction, expansion, operation, and maintenance of transmission and distribution lines, which often cross hundreds of miles of land in remote areas. Because of the geographic extent of these lines, there are numerous opportunities to cross or run adjacent to waters that are jurisdictional under section 404. Under the proposed rule, entire floodplains, streams,

[208] Nation Wide Permits are limited in scope and geographic impact and are designed for commonly occurring, smaller projects with well-defined impacts. Individual Permits are necessary when the acreage of impacts is larger (*e.g.*, transmission line construction).

ephemeral feature, ditches (per se jurisdictional under the proposed rule), "similarly situated waters," among numerous others, and waters adjacent to them would be considered WOTUS and may require an Individual Permit, rather than the more cost-effective Nation Wide Permit. If the cost of obtaining the Individual Permit, including associated mitigation, is prohibitive important upgrades and new construction will not occur, or will be delayed, leading to reliability and national security risks.

For example, Nationwide Permit 12 for utility lines authorizes ground disturbances of only ½ acre per project. Under the proposed rule, as previously discussed, the Agencies may assert jurisdiction over such features where they determine the existence of a stream bed, bank, and OHWM, or other flow contributing features regardless of a bed, bank, and OHWM. Of course, this is inherently a highly subjective and inconsistent practice, even with the Agencies' attempt to clarify some terms.[209] Thus, although each crossing of a WOTUS is a separate project, if a line continuously crisscrosses a feature deemed jurisdictional, it may be considered a single impact of more than ½ acre. As a result, the existing Nationwide Permit for transmission fines may be rendered inoperative because the Agencies may determine a much greater impact to WOTUS based on an expanded conception of jurisdictional waters. The proposed rule is silent on how it would ensure a consistent application of the proposed rule, other than treating virtually all "waters" as WOTUS.

As it stands, the proposed rule will broadly expand what is considered a WOTUS and will significantly affect the ability of electric utilities to address future electricity demands. All of the preceding impacts will delay energy development, increase the cost of electricity to consumers, and may force decisions that impact the reliability of electricity. (p. 14-15)

Agency Response: **Implementation of the 404 nationwide permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Water Advocacy Coalition (Doc. #17921.1)

12.891 Throughout the preamble to the proposed rule, and in its supporting documentation, in discussing and evaluating the definitional change of waters of the United States, the agencies focus almost exclusively on the change's impacts on the section 404 program. But the agencies propose to substitute their new definition of waters of the United States throughout the CWA regulations, which will result in broadened scope and additional obligations for *all* CWA programs. The term navigable waters is used throughout the CWA and its regulations 135 times. The term waters of the United States is used 98 times. The scope of the definition of waters of the United States dictates the scope of the CWA's programs.

[209] Rapanos, 547 U.S. at 734. Justice Kennedy discusses the ambiguity of terms that are not sufficiently detailed to provide appropriate jurisdictional limits.

Despite that fact, the agencies have failed to consider the significant implications of this major change on all of the CWA's programs. For example, nowhere does the preamble to the proposed rule discuss impacts to the section 303 WQS and TMDL programs, section 311 oil spill prevention program, section 401 certification, or section 402 permit program (covering, e.g., individual permits, industrial stormwater general permits, construction stormwater general permits, and pesticide general permits). Furthermore, as discussed in more detail in section V.C., the discussion of impacts of the proposed rule on the section 404 dredged or fill permit program is woefully inadequate.

As all industries impacted by the CWA are aware, even with the current jurisdictional reach, the agencies cannot process permits in a timely fashion. The substantially expanded jurisdiction proposed by the rule will require considerable additional federal and State resources to timely process permit applications and otherwise implement the affected programs. In addition, considerably increased agency budgets will be required to meet these requirements. Without consideration of these practical impacts, the proposed rule essentially sets the agencies up for failure, and sets industry up for increased delays in project development and increased expenses for navigating any project through requisite CWA permitting. (p. 74)

Agency Response: **The preamble to the final rule clearly recognizes and considers the impacts of clarifying the definition of "waters of the United States" on all applicable CWA programs. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.892 Section 404 requires a permit for the discharge of dredged or fill material into waters of the U.S. 33 U.S.C. § 1344. The proposed rule's definition of waters of the United States will result in more activities triggering section 404 permitting requirements. Features such as ditches, waters in floodplains, and isolated waters, which were not previously considered jurisdictional, will now be covered by the proposed rule.[210] Any discharge of dredged or fill material into these newly jurisdictional features will trigger CWA section 404 requirements.

The proposed rule will increase the need for individual permitting because fewer activities will qualify for general permits. NWPs are available under CWA section 404(e) for activities which are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." The NWPs have maximum acreage thresholds. For example, NWP 12 allows for discharges of dredged or fill material for the construction, maintenance, repair, and removal of utility lines that will not result in the loss of greater than one-half-acre of waters of the United States for each single and complete project.[211] With more features and areas considered waters of the United States, many activities will exceed the NWP threshold, and applicants will be forced to rely on

[210] *See* 79 Fed. Reg. at 22,193.
[211] 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).

individual permits. Individual permits are much more costly than general permits: the average cost to prepare an NWP application is $35,954, but the average cost to prepare an individual permit application is $337,577.[212] Increased individual permitting also means increased delays for permit applicants. While a NWP may take only ten months to obtain, it can take over two years to obtain an individual permit.[213] And a large increase in individual permit applications is likely to overwhelm EPA and Corps staff, increasing delays. These delays will result in lost opportunity costs for stakeholders. Overall, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines that previously would have relied heavily on general permits.

Under the proposed rule, permittees will likely face increased mitigation requirements because unavoidable impacts to newly jurisdictional features and waters would require additional mitigation. Corps regulations require compensatory mitigation through mitigation banks, in-lieu fee mitigation, or permittee-responsible mitigation, to offset unavoidable impacts to waters of the United States authorized through section 404 permits. 33 C.F.R. § 332. Such mitigation is not only costly, but it is also difficult in many instances to obtain the requisite number of available mitigation credits. The increase in jurisdiction and associated mitigation requirements could cause a run on mitigation bank credits. As explained in Professor David L. Sunding's review of the agencies' economic analysis for the proposed rule, EPA's estimate of the increased mitigation costs are far too low and lack proper documentation and explanation.[214] In reality, the proposed rule's expanded definition of waters of the United States will result in a significant increase in mitigation costs, placing a heavy burden on project proponents.

In addition, inherent uncertainty in the rule will increase costs and impose substantial burdens to compliance. The agencies acknowledge that jurisdictional uncertainty increases paperwork, costs, and time, while decreasing a business' willingness to invest.[215] As discussed throughout these comments, the proposed rule suffers from a lack of clarity in many critical respects and will not reduce uncertainty or unpredictability in CWA implementation. Among other ambiguities, the proposed rule fails to provide a quantifiable method for determining "significant nexus;" fails to define "upland," "perennial flow," and other key terms; and leaves important determinations (e.g., floodplain interval, shallow subsurface flow) to the agencies' "best professional judgment." These and other inherent uncertainties are likely to produce confusion over

[212] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects).
[213] *Id.* at 76.
[214] David Sunding, Ph.D., The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (May 15, 2014) ("Sunding Review") (attached hereto as Exhibit 19) at 18-19.
[215] EPA (primary author) and U.S. Army Corps of Engineers (contributing author), Economic Analysis of Proposed Revised Definition of Waters of the United States (Mar. 2014) at 10, *available at* http://www2.epa.gov/sites/production /files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf ("Economic Analysis").

whether a feature is a water of the United States and whether a facility must seek a section 404 permit for work that impacts the feature. Confusion over the definition will increase costs to comply with section 404, complicate project design and engineering efforts designed to avoid jurisdictional impacts, and increase the likelihood of discharges to unrecognized waters of the United States without a permit. In addition, as a result of the proposed rule's uncertainties, section 404 permittees may be subject to additional enforcement actions and citizen suits.

Increased section 404 permitting requirements will subject project proponents to additional federal and State environmental compliance burdens. A Corps section 404 permit decision triggers the National Environmental Policy Act, Coastal Zone Management Act, National Historic Preservation Act, and Endangered Species Act ("ESA"). 33 C.F.R. § 325.2. Additional requirements and determinations, including environmental assessments or impact statements, certifications of consistency with the State's Coastal Zone Management Plan, ESA section 7 consultation, and consultation with State historic preservation offices, would lengthen delays, increase opportunity costs, increase the burdens on federal and State agencies, and increase the overall cost of permits.

The proposed rule may also reach green infrastructure. EPA has pushed permittees to develop and implement green infrastructure in recent years.[216] Because green infrastructure is not exempt under the proposed rule, a section 404 permit, as well as other monitoring and regulatory requirements, could now be required for green infrastructure construction and maintenance where the green infrastructure is developed in areas considered to be "waters of the United States" under the proposed rule. The potential for additional regulation will discourage the development of green infrastructure. (p. 74-76)

Agency Response: **Implementation of the 404 nationwide permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis. To the extent that this comment is also referring to the Interpretive Rule, that rule has been withdrawn. The greater clarity and narrower scope of the final rule should also ensure that it does not act to discourage development of green infrastructure.**

[216] See, e.g., EPA, Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow Control, No. 832-R-14-001 (Mar. 2014), available at http://water.epa.gov/infrastructure/greeninfrastructure/upload/Greening_CSO_Plans.PDF.

John Deere & Company (Doc. #14136.1)

12.893 The Proposed Definitions Will Subject More Land To The Recapture Provisions Set Forth In CWA Section 404(1)(2), Resulting in Unintended Consequences

The "recapture" provision set forth in CWA section 404(1)(2) provides that discharges related to activities that change the use of the waters of the United States, including wetlands, and reduce the reach, or impair the flow or circulation of waters of the United States are not exempted under the normal agricultural activities set forth in section 404(1)(1). The "normal" farming exemption provided by CWA section 404(1)(1) does not apply to activities constituting a "new use" of an area subject to the agencies' jurisdiction and that do not adversely affect the area's hydrology.

An expanded waters of the United States definition means that more land will, by necessity, be subject to the recapture provisions set forth in CWA section 404(1)(2). A farmer or rancher removing land from the Conservation Reserve Program will now be required to assess in much greater detail and with far greater certainty those portions of his land falling within the jurisdictional waters of the United States. A farmer wanting to convert this land back into production will also be required to demonstrate that this action does not constitute a "new use" and will not adversely affect the area's hydrology.

An unintentional consequence of an expansive WOTUS definition extending Section 404 permitting requirements to significant portions of farmland may be that farmers will not change the use of their land for fear that any such change would trigger the Section 404(1)(2) recapture provisions. This uncertainty will discourage farmers and ranchers from implementing new types of conservation technologies for fear that they may be locked into a certain farming practice, or worse, subject to civil and criminal enforcement and citizen lawsuits. (p. 12)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also leaves in place all existing agricultural exemptions and does not change the Section 404(f)(2) recapture provision.**

12.894 The Proposed WOTUS Definition Increases the Number of Projects Required to Obtain Section 404 Permits, Thereby Impeding Much-Needed Improvements to the Nation's Infrastructure

Under the proposed rule a substantial portion of the nation's waters and land would be jurisdictional under the CWA, thereby resulting in more projects and activities being required to obtain section 404 dredge and fill permits. The section 404 permit process is lengthy and costly, often requiring the use of consultants and legal counsel. Failure to obtain permits can result in enforcement actions and potential civil or criminal penalties of up to $37,500 per day. Such an expansion of the CWA's jurisdictional reach will add delays and costs to an already-overburdened Corps regulatory program. It will also erect

significant economic barriers to important projects at a time when our country is facing the need for massive infrastructure improvements.[217] (p. 13)

Agency Response: **Implementation of the Section 404 permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

Minnkota Power Cooperative, Inc. (Doc. #19607)

12.895 Under this Proposed Rule (if finalized), agency field staff could evaluate and determine which waters are subject to jurisdiction which could cover multiple CWA permitting programs. The determination criteria described within this Proposed Rule (or lack thereof) appears to be relatively wide open to interpretation by the Agencies, making it prone to variability in evaluation by different Agency personnel. This overreaching regulatory burden would result in: I) extended review and approval times, 2) significantly more permits being required, including those for smaller projects where permitting is not currently required, 3) increased expenses both directly and indirectly, and 4) more difficult project planning and financing arrangements. Our review of this Proposed Rule indicates that the Agencies have significantly underestimated the increase in jurisdictional waters and features would it be finalized in its current form. Under this Proposed Rule, if virtually any proposed project is challenged, it would seem easy for the challenging party or Agencies to demonstrate a significant nexus due to the ambiguity in this Proposed Rule. (p. 2-3)

Agency Response: **Implementation of the CWA permitting programs are outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

12.896 In some cases, this Proposed Rule and the Agencies rely upon reports such as the Environmental Law Institute (ELI) report which clearly mischaracterizes regulatory compliance programs that multiple states have primacy for and have had for quite some time. One example is Minnesota's section 404 permitting program which has been in place for quite some time. The ELI report states that federal control is needed in

[217] Deidre G. Duncan, Kerry L. McGrath, *EPA and US. Army Corps Seek to Expand Jurisdiction Under the Clean Water Act,* Engage Volume 13, Issue 1 (March 2012)

Minnesota because they don't have a regulatory program and authority to enforce it, which is clearly not the case. (p. 3)

Agency Response: The agencies are aware of the existence and extent of Minnesota's regulatory program.

Building Industry Association of Washington (Doc. #13622)

12.897 At a fragile economic time when many housing markets are just beginning to recover, increasing the current backlog for CWA permits is very concerning when there is no environmental benefit for Washingtonians. With the current backlog for CWA permits of 15,000 to 20,000 many environmentally sound projects will simply never get started due to the mere potential of having to obtain a CWA permit. Moreover, those homeowners and builders brave enough to tackle the current two to three year wait time it takes to receive a permit under the CWA will be rewarded with added complexity, increased costs, and even longer waiting times for projects. Compliance and transactional costs for the hiring of CWA consultants and engineers as well as unknown liabilities and post construction costs incurred as a result of the rule change will not only adversely affect residential construction, increasing the cost of homes, but will also impact all Washingtonians as lot availability of developable land will suffer. The lack of developable land causes higher priced homes, sprawl, pollution, and traffic as people move farther from city centers to find the homes they desire. As an organization that champions housing affordability, we write in opposition to higher home prices and needless permits, paperwork, and penalties that are sure to come if the recently proposed rule comes into effect. BIAW supports housing choices and shorter commute times so families can spend more time together and less time polluting our highways going from home to work and this proposed rule works against those goals without helping the environment. (p. 2)

Agency Response: Implementation of the Section 404 permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

12.898 The expanded definition creates uncertainty. By expanding the definition of navigable waters to include (1) "any" flows including ditches and culverts, (2) vaguely defined "riparian areas" and "floodplains," (4) shallow subsurface water connects, and (5) "other waters" subject to case-by case analysis at the EPA's discretion – federal jurisdiction vastly expands – but in no certain terms. Consequently, homeowners and construction activities already regulated by state local entities are, also, potentially subject to federal regulators, at their discretion, rather than under CWA passed by Congress. This means

homeowners and homebuilders cannot read the law and know whether it applies to them – rather they have to roll the dice and potentially spend exorbitant amounts of time and money to simply to find out whether the property is subject to federal regulation or not. This was not Congress's intent. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Commercial Real Estate Development Association (Doc. #14621)

12.899 Of particular note is that the Proposed Rule does not mention which areas surrounding new WOTUS determinations will also be impacted with regards to mitigation requirements. Currently, the geographic scope of federal regulation of WOTUS often includes 25' to 50' (or more) upland riparian buffers by Corps permit regulations for streams and open waters (i.e., Nationwide Permit General Condition C.23.(f), Federal Register Vol. 77 No. 34, February 21, 2012, pg. 10285). This could result in a significant increase in the area of land regulated by the federal government by an order of magnitude much greater than the physical area of WOTUS – e.g., a 5-foot wide ephemeral stream would have at least a 25-foot buffer (or more) on each side, or 50-feet, 10 times the size of the stream. We anticipate streams as small as 1-3 feet wide will be determined jurisdictional by the Corps. If the current buffer requirement is needed for these types of waters, the economic impact would be significant. (p. 2-3)

Agency Response: **Implementation of the 404 nationwide permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.900 The primary reason why significant portions of the public are so concerned with the extent of the definition of WOTUS is due to the financial burdens and the requirements of dealing with the current CWA permitting program. The Corps and EPA should refocused their efforts on developing a successful and simplified permit process by determining:

- What is regulated (areas and activities).
- What is required (of applicants).
- Timeliness requirements (for agency responses).

NAIOP's proposed changes will clarify and clearly communicate what is regulated in terms of area. The proposed rule is lacking in any attempt to define or articulate the activities in such areas that the federal government proposes to regulate. While this was attempted for agricultural activities, we suggest that a stakeholder group be formed to spell out what activities shall not be allowed in WOTUS without a CWA permit. An effective permit program needs to include a specific list and description of what is required for an application to be complete. States that have done so have dramatically

reduced the time that staff and applicants expend on "getting in the door" with a complete application suitable for a timely review. Timeliness requirements are critical for effective and efficient CWA permit review. A timeframe for completeness review must be established (e.g., 15 days). The regulators must either ask for more information consistent with the program requirements or accept the application. Then, depending on the type of permit, an outside timeframe for issuance must be mandated for all permits. (p. 7)

Agency Response: Implementation of the regulatory program is outside the scope of this rulemaking.

Leigh Hanson, Inc. (Doc. #15781)

12.901 Lehigh Hanson believes that as proposed this rule will have a significant negative effect on existing and new NPDES discharge requirements and CWA section 404 permitting requirements.

Sand and Gravel Pits that currently mine material from below the water table and which are located within a floodplain could become subject to new permitting based on the mining pit being determined jurisdictional under the proposed rule. This is particularly concerning since the proposed rule does not define the frequency or period of moderate or high water flows (is it a 5- year, 10-year, 100-year or 500-year flood event?) for an area to be classified as "floodplain." An example can be drawn from a section of farmland that had the top soil removed to expose the sand below. The sand deposit extends to below the water table and a clam bucket or dredge is used to remove the sand where a lake has been created by the mining process. Water from a dredge conveyance would potentially need to be treated for sediments before it could be returned to the lake. The capital cost for sedimentation control of conveyance water would be approximately $1-$2M. If sand and gravel is dewatered on a clam shell dredge, it is likely that the screen underflow discharge returned to the lake will be classified as discharge to a WOTUS and thus may require sedimentation treatment. There is no economic engineering solution for treating underflow water from a clam shell dredge to WOTUS. This would preclude mining deeper than 30-40 feet, which is the current limit of suction dredge technology. Lehigh Hanson would lose the ability to mine in several existing locations under such a scenario.

Both EPA and Corps personnel have acknowledged that many permitting decisions would be made on a case by case basis. This is unacceptable and impractical. Interpretations can vary widely and as a direct result it negatively affects planning for expansions and limits plans for leasing or acquiring new reserves. For example, if the new lake in the previous scenario overflows from natural rain events to a small creek, would this flow require permitting? Is the newly created lake now a WOTUS? Is the ditch that the lake discharges into a WOTUS? Without clear, definitive answers to these questions, a case by case determination of whether permits would be required (under current regulation they would not be required) could add immeasurable delays and unknown costs to the operation.

Current permitting of new reserves can take 12-18 months when there are clear guidelines for interpreting existing regulation. We have also experienced environmental permitting timelines ranging from 5 to 10 years, which historically have involved

competing agencies and varied interpretations of existing policy. The uncertainty regarding the interpretation of this proposed rule and the anticipated increased workload of field regulatory personnel will undoubtedly lead to further delays and gridlock.

Lehigh Hanson believes that permitting complexity would increase significantly in areas representing more than 35% of our 2013 production and market shipments. Added uncertainty could even lead to abandonment of permitting activities in some of these jurisdictions.

In several locations where new permitting would be required due to the expansion of wetlands delineation or the inclusion of intermittent and ephemeral streams, the associated economics and time delays could lead us to conclude that the operations would no longer be competitive.

Significant concerns exist over the ability to permit future natural sand deposits. Most natural sands in the US were deposited as hydraulic sediments. Under the proposed rule, reserves of natural sand will become increasingly difficult to permit due to their proximity to natural wetlands, flood plains and intermittent and ephemeral streams. State Departments of Transportation (DOT's) specify/require ASTM C33 sands for concrete paving and for other concrete infrastructure. For various technical reasons, there is a very strong preference for natural sands in place of manufactured sand for use in State DOT and commercial construction. Consequently, if these materials are not available for future construction projects, industry and DOT specifications most likely will need to be modified to accommodate loss of access to natural sand as existing deposits are exhausted. This loss also is likely to result in increased construction costs.

Since the proposed rule presumes almost everything as jurisdictional (except other waters), we believe that this expansive approach coupled with desk based reviews (with no details prescribed) will likely create a scenario where fewer activities are subject to Jurisdictional Determination requests. However, the growth in the number of areas now considered ''jurisdictional" will increase the Corps workload tremendously for assessment of mitigations, alternatives testing and permit approvals (including 106 Federal Nexus reviews). We have existing projects which already have been delayed in regulatory review by the Corps for more than 6 months. With increased permitting and static staffing, it is likely that wait time for permits will increase significantly. (p. 2-3)

Agency Response: **Implementation of the Section 404 permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

Ames Construction, Inc. (Doc. #17045)

12.902 (…) under current conditions, securing individual permit coverage typically takes more than a year, costs hundreds of thousands of dollars, and requires the support of expert

technical consultants, and often lawyers. The current program also imposes certain avoidance, minimization, and mitigation requirements. In addition, the act of applying for permit coverage triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act. In light of the scope of the proposed jurisdictional expansion, it will be nearly impossible for my company to develop public or private land containing drainage ditches, stormwater control basins, ponds or other water features that are arguably subject to the rule's expansive jurisdictional reach without first obtaining a costly federal CWA permit. (p. 1)

Agency Response: **Implementation of the Section 404 permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

National Association of Home Builders (Doc. #19540)

12.903 The Proposed Rule will Result in Increased Clean Water Act Section 404 Permitting Requirements.

Section 404 of the CWA requires a permit for the discharge of dredged or fill material into waters of the United States.[218] The proposed rule's expansive definition of waters of the United States will result in more activities triggering the Section 404 permitting requirements. Features such as ditches, all waters in floodplains and riparian areas, and isolated waters, which were not previously considered jurisdictional, will now be covered by the proposed rule.[219] Any discharge of dredged or fill material into these newly jurisdictional features will first require the project proponent to obtain a CWA Section 404 permit. The onslaught of new permits will burden the Corps permit writers and state water quality officers, and delays will plague property owners and businesses.

Further, under the proposed rule, permittees will likely face increased mitigation requirements because unavoidable impacts to newly jurisdictional features and waters would require additional mitigation. Corps regulations require compensatory mitigation through mitigation banks, in-lieu fee mitigation, or permittee-responsible mitigation, to offset unavoidable impacts to waters of the United States authorized through CWA Section 404 permits.[220] Such mitigation is not only costly, but it is also difficult in many instances to obtain the requisite number of available mitigation credits or to create such credits onsite or nearby. The increase in jurisdiction and associated mitigation requirements could cause a run on mitigation bank credits, making them more expensive and difficult to obtain. As explained in Dr. David Sunding's review of EPA's Economic Analysis, EPA's estimate of the increased mitigation costs are far too low and lack proper

[218] 33 U.S.C. § 1344.
[219] *See* 79 Fed. Reg. at 22,193.
[220] 33 C.F.R. § 332

documentation and explanation.[221] In reality, the proposed rule's expanded definition of "waters of the United States" will result in a significant increase in mitigation costs, placing a heavy burden on project proponents.

In addition, the inherent uncertainty of the rule will increase costs and impose substantial burdens on compliance. The Agencies acknowledge that jurisdictional uncertainty increases paperwork, costs, and time while decreasing a business' willingness to invest, yet have not done enough to address this impact.[222] As discussed throughout these comments, the proposed rule suffers from a lack of clarity in many critical respects and will not reduce uncertainty or unpredictability in CWA implementation. Among other ambiguities, the proposed rule fails to provide a quantifiable method for determining "significant nexus;" fails to define "upland," "perennial flow," and other key terms; and leaves important determinations (e.g., floodplain interval, shallow subsurface flow) to the agencies' "best professional judgment." These and other uncertainties will produce confusion over whether a feature is a "water of the United States" and whether a facility must seek a Section 404 permit for work that impacts the feature. Confusion over the definition will increase costs to comply with Section 404, complicate project design and engineering efforts designed to avoid jurisdictional impacts, and increase the likelihood of unintended illegal discharges. In addition, as a result of the proposed rule's uncertainties, Section 404 permittees may be subject to additional enforcement actions and citizen suits. (p. 118-119)

Agency Response: **Implementation of the Section 404 permit program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, make jurisdictional determinations on a case-by-case basis.**

12.904 The Proposed Rule will Adversely Impact Clean Water Act Permitting Processes.

The expansive definition of "waters of the United States" under the proposed rule will result in more CWA permit applications, an increased permit backlog, and further limit the applicability of the Nationwide Permit program. Additionally, the proposal does not address how existing permits will be treated if the rule becomes final. (p. 129)

Agency Response: **Implementation of the permitting program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is**

[221] Dr. David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States" (May 15, 2014) at 18,19 (hereinafter, Sunding Review of EPA's Economic Analysis), *available at* http://www.nam.org/Issues/Environment/Water-Regulations/WOTUS-Economic-Report-FINAL.aspxWOTUS-Economic-Report-FINAL.pdf

[222] EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 10 (March 2014) (hereinafter, EPA Economic Analysis), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003

narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

12.905 The Proposed Rule will make it more Challenging to Obtain Nationwide Permits, Resulting in a Surge of Individual Permits

As a result of the expansive "tributary," "adjacent waters," and "other waters" definitions, the proposed rule will increase the number of CWA permits landowners will need to obtain. What's more, the proposed rule will increase the need for individual permitting because fewer activities will qualify for general permits. Nationwide permits (NWPs) are available under CWA Section 404(e) for activities which are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."[223] Each NWP has a maximum acreage threshold that can be disturbed pursuant to that permit. For example, NWP 12 allows for discharges of dredged or fill material for the construction, maintenance, repair and removal of utility lines that will not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.[224] With more features and areas considered waters of the United States it will be increasingly difficult to avoid and minimize impacts, many activities will exceed the NWP threshold, and applicants will be forced to rely on individual permits. Individual permits are much more costly than general permits. In 2002, the average cost to prepare an NWP application was $35,954, but the average cost to prepare an individual permit application was $337,577.[225] In the ten-plus years since these costs were calculated, it is certain that they have increased considerably.

An increased number of individual permits also means increased delays for permit applicants and increased workloads for permit writers. While an NWP may take up to ten months to obtain, it can take over two years to obtain an individual permit.[226] And a large increase in individual permit applications is likely to overwhelm Corps and state staff, further increasing delays. These delays will result in lost opportunity costs for stakeholders. For instance, home builders and land developers often obtain construction and development loans to finance their projects. The terms and conditions of these loans can require the builder or developer to begin repayment as early as six months after issuance. If a project requires an individual permit, the applicant may not even be able to get a project off the ground before he/she needs to begin repaying the loan needed to fund it. Without question, the costs and delays associated with more individual permits due to the expanded scope of federal jurisdiction will disrupt the ability of home builders and

[223] 33 U.S.C. § 1344(e).
[224] 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).
[225] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J, 59 at 74 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects) (hereinafter, Sunding and Zilberman Economics of Environmental Regulations) *available at* http://are.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf
[226] *Id*. at 76

land developers to do business. More broadly, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines that previously would have relied heavily on general permits.

NAHB's concerns are bolstered in light of *National Association of Home Builders v. Army Corps of Engineers*, in which the D.C. Circuit Court of Appeals found that a revised CWA 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.[227] Indeed, today's proposed changes to the "waters of the United States" definition could jeopardize the future of the entire NWP program. (p. 129-130)

Agency Response: The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Texas Mining and Reclamation Association (Doc. #10750)

12.906 Mining operations are required to obtain all appropriate environmental licenses and permits in advance of any land disturbance, including CWA Sections 404, 402, and 401 permits and certifications. By way of one example, under Section 404 of the CWA, mining operations are typically required to mitigate the disturbance of onsite "waters of the United States" through the creation of off-site and on-site wetlands and streams. If the rule is not clarified to exclude these on-site operational water management features from the definition of "waters of the United States," the mining industry will be forced to obtain permits and provide mitigation in a never ending regulatory loop to meet other performance standards and requirements, including those required under the CWA, SMCRA, Mine Safety and Health Act, etc.

As such, TMRA urges the Agencies to revise the proposal to clarify that on-site water management features, including all structures – natural and man-made - that contain, convey, and, as necessary, chemically or physically treat on-site water associated with mining operations, continue to not constitute "waters of the United States. Failure to do so will have serious implications on the mining industry in Texas, possibly rendering some mining operations unfeasible. (p. 4)

Agency Response: Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In the rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland

[227] *National Association of Home Builders v. Army Corps of Engineers,* 417 F.3d 1272 (D.C. Cir. 2005).

and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively and operationally unchanged. The agencies add exclusions for all waters and features identified as generally exempt in preamble language from Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent. These exclusions are reflective of current agencies' practice, and their inclusion in the rule furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. However, current general permits or the future development of general permits consistent with CWA section 404(e) are beyond the scope of the final rule.

12.907 Many activities, e.g., construction of sediment ponds on mine sites, are already subject to comprehensive Section 404 permitting requirements if they involve discharging into an existing jurisdictional water. Section 404 permitting often involves lengthy and expensive consultations among federal and state agencies to evaluate the impacts of proposed discharges. Permit applicants are also required to obtain Section 401 state water quality certifications as part of the permitting process. If the proposed rule results in the assertion of CWA jurisdiction over various on-site water management features, Texas mining companies will face even more complicating permitting requirements for routine activities on mine sites, which will impose substantial costs and operational delays without appreciable environmental benefit, and could lead to mining operators being unable to perform timely and necessary maintenance and safety functions while awaiting a CWA permitting decision.

To illustrate, Texas mining companies are constantly maintaining, modifying, moving, and reclaiming ditches during the life of the mine because of the dynamic nature of mining operations. If mining companies must now obtain Section 404 permit coverage each time they have to conduct one of these ditch-related activities, operations would effectively come to a halt due to the delays and burdens of permitting. Or worse, mining companies might find themselves in a position where they are unable to comply with other regulatory requirements such as those relating to the removal and reclamation of temporary structures under SMCRA if they need a Section 404 permit to clean or reclaim a ditch.[228] The Agencies provided no analysis of how many additional Section 404 permits will be required if a 404 permit is required every time a water management ditch is moved or maintained. Furthermore, the Corps has not analyzed how it will meet the increased demand on its resources. Indeed, under the existing nationwide permits for mining, operators would be required to apply for a permit for every 300 linear feet of

[228] 30 U.S.C.§ 1265(c).

ditch that will require maintenance. Considering perimeter and drainage ditches can be several thousands of linear feet, how will the Corps manage this additional workload? Furthermore, what kind of lead time will be needed where obtaining a simple permit for any mining operations typically takes anywhere from a several months to years?

Clearly the EPA and COE did not anticipate that the proposed definition would entail such complex and burdensome requirements. However, clarification is necessary to assure that their expectations are codified in the definition. Otherwise, TMRA requests that a complete analysis of the impacts of defining operational waters internal to a mine site as "waters of the United States" be conducted.

Such permitting would also bring with it mandatory mitigation requirements, which would place further strain on mitigation banks. In certain parts of the country, mitigation credits are becoming scarce and expensive – and this is the case in Texas as well. As a result of the proposed rule, mitigation costs are almost certain to rise to the point where at least some mining operations, operational improvements, and small or large scale expansions could become cost prohibitive or outright impossible.

The proposed rule will also trigger increased Section 402 permitting obligations for mining-related activities should additional previously non-jurisdictional waters become jurisdictional. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches conveying waters to ponds and impoundments, could likely be considered jurisdictional waters subject to water quality standards, total maximum daily loads, and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges to those very same ditches themselves.

By way of another example, under the proposed rule mining companies could be put in the impossible situation of having features designed to either store or treat water runoff from disturbed lands to improve water quality be themselves required to meet water quality standards. Under such a scenario, how would any mining operation meet existing permit limits if the very systems the Agencies relied on in determining available compliance technologies - i.e. ponds, impoundments, ditches, and conveyances - are no longer available to assist with pre-discharge treatment? Were this to happen, every Texas mine would be immediately out of compliance with CWA requirements unless they treated their water before it even entered a mine conveyance system.

In other words, without clarifying language the proposed rule would create the absurd result of requiring Texas miners to treat water to meet NPDES effluent limits before water is conveyed to water treatment systems or downstream sediment ponds, effectively unnecessarily treating the same water twice before leaving the mine site. The Agencies must address these ambiguities in the proposed rule by confirming that these mine site waters are not "waters of the United States" to avoid such substantial unintended consequences.

Likewise, with respect to Section 402, by essentially moving the extent of federal CWA jurisdiction upstream, the proposal would lead to confusion concerning outfall and receiving waters determinations. During the last 40 years, innumerable NPDES permits have been issued, each of which identifies one or multiple outfalls, which in turn each have in the permit an identified "receiving water" and monitoring location. Some of

these determinations were made decades ago, and have been reflected in several successive NPDES permits. Will permittees and permit issuers now be required to reassess determinations that have been reasonably relied on by regulators and permittees alike for decades – and which the Agencies have not identified as causing any environmental problems – based on the new proposal? If not, the Agencies should specify that outfall and receiving water designations in previously issued NPDES permits cannot be modified based on the new rule (p. 10-12)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including artificial ponds created in dry land for the purpose of settling basins; stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and a variety of wastewater recycling structures created in dry land including detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.**

The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. Already issued permits are not affected by this rule.

The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization.

Pennsylvania Coal Alliance (Doc. #13074)

12.908 [Regarding Diversion and Collection Ditches] The need for Section 404 permitting is a major impediment to fulfilling the obligations of a mining permit. For example, E&S plans may require ditches to be lined with riprap and constructed with check dams or other structures, both of which would require a Section 404 permit. Operations may necessitate frequent movement or modification of these ditches, with each movement requiring a Section 404 permit. In addition, under Pennsylvania law, these same ditches would be required to be maintained under the E&S plan and removed as part of reclamation activities, again requiring a Section 404 permit. Given the long length of ditches that can run the perimeter of a mining area, individual Section 404 permitting may be required for any or all of these activities, resulting in extended wait times before any modification, maintenance or reclamation could be completed. At every stage of development, delays in receiving, or the inability to receive, a Section 404 permit could cause a violation of the requirements of the mining permit and significant delays and downtime, both of which could compromise the ability of an operator to continue operations. Even if mining operations are able to continue, restoration/mitigation would be required for Section 404 impacts to these newly designated jurisdictional waters, increasing demand for mitigation projects and, likewise, increasing the cost of mitigation banking credits.

In addition to the Section 404 ramifications, if diversion and/or treatment ditches are considered to be jurisdictional, point source discharges to these ditches would require an NPDES permit, and the ditches themselves could, arguably, be subject to monitoring and compliance with water quality standards and effluent limitations at each of, likely, many point source discharges to each ditch. Conflicts arise because these ditches (in conjunction with treatment ponds and sedimentation basins) are installed to control and treat the collected water prior to discharge to a jurisdictional water. If these ditches are considered to be jurisdictional waters, effluent limitations would need to be met when the water reached these features. The very nature of mining and the purpose of these ditches make compliance with effluent limitations and associated water quality standards in the ditches and treatment ponds an impossibility in nearly every situation. By making compliance with the NPDES permit so difficult, the Proposed Rule would make discharges to these ditches and ponds subject to actions by third party groups asserting claims against the mine operator for not meeting effluent limitations or water quality standards. (p. 10)

Agency Response: **Implementation of the CWA permitting programs is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including artificial ponds created in dry land for the purpose of settling basins; stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and a variety of wastewater recycling structures created in dry land including detention and retention basins built for wastewater recycling,**

groundwater recharge basins, and percolation ponds built for wastewater recycling. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ditches that do not flow, either directly or through another water, into a traditional navigable water. The rule also clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule.

12.909 *Settling and Treatment Ponds*. Similarly, settling and treatment ponds are installed to collect and manage discharges from mine sites. Settling ponds typically detain the surface water and groundwater being diverted around the mine site to reduce the sediment load of the diverted water. Treatment ponds are installed to treat groundwater flowing through, or surface water flowing over, mined areas. If necessary, treatment may include the addition of chemicals, including flocculants, oxidizers or pH adjusters. Other treatment methods include aeration and passive treatment. Treatment ponds may be synthetically lined or constructed of compacted material to prevent infiltration. Very similar to the discussion above regarding ditches, settling and treatment ponds could be considered to be jurisdictional waters under the Proposed Rule as currently drafted. Conflicts with state law would arise because many efforts to maintain a liner and containment capacity would require Section 404 permitting, if the ponds would be considered jurisdictional waters. In addition, NPDES (Section 402) issues would arise, as discussed above, again making it nearly impossible for effluent limitations and water quality standards to be met for the ponds. Additional NPDES issues would arise if chemicals were added to the pond. (p. 10)

Agency Response: **The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including artificial ponds created in dry land for the purpose of settling basins; stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and a variety of wastewater recycling structures created in dry land including detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ditches that do not flow, either directly or through another water, into a traditional navigable water.**

12.910 *Site Reclamation.* If on-site ditches and ponds are considered to be jurisdictional waters, the Section 404 program permitting requirements would conflict and interfere with the operators' ability to comply with the state reclamation requirements and, subsequently, the operators' ability to get their bonds released. It would also conflict with agreements with landowners as to how and when reclamation would be completed. (p. 11)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems,**

including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including artificial ponds created in dry land for the purpose of settling basins; stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and a variety of wastewater recycling structures created in dry land including detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ditches that do not flow, either directly or through another water, into a traditional navigable water.

American Exploration & Mining Association (Doc. #13616)

12.911 AEMA members are required to manage storm and runoff water in the course of conducting their operations. The proposed rule will impose federal CWA regulation to features that are constructed and used pursuant to other federal and state regulatory programs. AEMA members also conduct activities and operations that are likely to cross or impact ephemeral drainages and ditches. To illustrate, mining companies are constantly maintaining, modifying, moving, and reclaiming ditches during the life of the mine because of the dynamic nature of mining operations. If mining companies must now obtain Section 404 permit coverage each time they have to conduct one of these ditch-related activities, operations would effectively come to a halt due to the delays and burdens of permitting. Or worse, mining companies might find themselves in a position where they are unable to comply with other regulatory requirements such as the reclamation requirements of the 43 C.F.R. 3809 regulations. (p. 4)

Agency Response: Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water.

12.912 In addition to the implications for Section 404 permitting, the proposed rule is also likely to trigger increased Section 402 permitting obligations for mining-related activities as additional waters within mine sites that were previously non-jurisdictional become jurisdictional. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches conveying waters to ponds and impoundments, could likely be considered jurisdictional waters subject to water quality

standards, total maximum daily loads, and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges to those very same ditches. Additionally, by way of another example, under the proposed rule mining companies could be put in the impossible situation of having features designed to either store or treat mining-related materials to improve water quality be themselves required to meet water quality standards. (p. 5)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water.**

Alliance Coal, LLC (Doc. #14577)

12.913 Under Section404 of the Clean Water Act, mining operations are typically required to mitigate the disturbance of onsite waters of the United States through the creation of offsite and onsite wetlands and streams. If the rule is not clarified to exclude these post-disturbance areas from the definition of waters of the United States, the mining industry will be forced to obtain permits and provide mitigation in a never ending regulatory loop to meet other performance standards of Environmental rules and regulations (i.e., SMCRA, MSHA, etc.). (p. 1)

Agency Response: **To the extent that the commenter is referring to section 404 compensatory mitigation sites, these sites should already be provided protections from future disturbance pursuant to existing regulations (i.e., 40 CFR 230.97(a)). This final rule does not change those existing requirements.**

County Commissioners Association of Pennsylvania (Doc. #14579)

12.914 … [A] complex web of laws, regulations and policies has made it increasingly difficult, less efficient and more costly for counties to undertake needed waterway infrastructure projects such as dams and levees, and storm water management. These projects are critical elements of public health and safety, helping to manage flooding events, assuring water quality and promoting sustainable land use and community development. As a priority for this year, Pennsylvania's counties are encouraging a review of current federal and state laws and regulations with a goal of promoting more effective policies and procedures.

The confusing Waters of the U.S. definition proposed by EPA and Army Corps goes in the entirely opposite direction of this goal, tangling the web further rather than facilitating more efficient delivery of environmental programs. We are very concerned that, despite the assertions of the EPA and Army Corps to the contrary, the proposed rule would modify and expand existing regulations which have been in place for over 25 years. For Pennsylvania, because of the strong tradition of state and local oversight that has been in place for decades, subjecting more waters to federal jurisdiction represents only a paper fix, increasing the paperwork, time and cost for acquiring additional federal permits without any actual improvement to water quality. (p. 1-2)

Agency Response: **The rule only provides a definition for "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See the Economic Analysis for the final rule for further discussion on the predicted jurisdictional changes under the final rule.**

12.915 *Pennsylvania's Clean Streams Law:* Presentations made by the EPA have indicated that the proposed rule will help states protect their waters because two-thirds of the nation's states rely on the federal definition. However, other states, including Pennsylvania, apply jurisdiction to "waters of the state," which must be as inclusive as "waters of the U.S." but may be more inclusive. Pennsylvania's Clean Streams Law, enacted prior to the federal Clean Water Act, includes a definition of "waters of the commonwealth" which protects all of the state's "rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries" of the commonwealth. This statute also provides the foundation of delegation to the Pennsylvania Department of Environmental Protection (DEP) of the National Pollution Discharge Elimination System (NPDES) program under section 402 of the Clean Water Act.

While the Clean Streams Law is the principal governing statute regarding Pennsylvania's water quality, other state statutes addressing water quality and control include the Dam Safety and Encroachment Act (Act 325 of 1978), the Flood Plain Management Act (Act 166 of 1978), the Sewage Facilities Act (Act 537 of 1965), the Storm Water Management Act (Act 167 of 1978), the Water Resources Planning Act (Act 220 of 2002) and the Nutrient Management Act (Act 38 of 2005, replacing Act 6 of 1993). Under these laws, Pennsylvania has developed comprehensive regulations and an extensive permitting system to assure our water quality remains at the highest levels. In addition, our definition of "waters of the commonwealth" already covers the types of waters it appears the EPA and Army Corps are seeking jurisdiction over in the proposed Waters of the U.S. rule.

Despite these extensive protections already in place, EPA has continued to heavily rely on a 2013 Environmental Law Institute study, *State Constraints – State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act.* This study, referenced in the background information supporting the rulemaking (though not in the rulemaking itself), fails to identify

Pennsylvania's state statutes and regulations; in fact, there is no mention of the Clean Streams Law at all. Instead, the study proposes that the Waters of the U.S. rulemaking is needed to address states' regulatory loopholes, including Pennsylvania. Given that the background to the proposed rule states, "This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources….under the CWA," we would hope that the EPA and Army Corps would withdraw this rule until such time as it has a better, and more accurate, understanding of existing state laws, regulations and programs developed pursuant to that primary responsibility.

Since it seems likely that the proposed Waters of the U.S. definition would expand the scope of waters under federal jurisdiction (as discussed below), this means new permits would be required for activities and waters that are already regulated under state law. In addition to the cost and time associated with preparing and filing these applications, many entities report that it is at least a 30-day wait for approval of a nationwide permit, as many as 60 days for approval of an isolated permit and up to 180 days or longer for an individual permit. If these permits are required for activities that are traditionally just routine maintenance, the expansion of jurisdiction creates a bureaucratic mess for what should be a simple task.

Further, states are required to expand their current water quality designations to protect jurisdictional waters, increasing reporting and attainment standards at the state level. Section 305(b) of the Clean Water Act requires a report from states that includes (among other items) a description of the water quality of all navigable waters in the state and an analysis of the extent to which they meet the 101(a)(2) goals of the Act. Any increase to do these surveys and reports (and to what gain?) will also create a cost for local governments as resources are used for these purposes rather than for on-the-ground projects that actually benefit water quality.

Again, the expansion of federal jurisdiction over waters, as interpreted in this proposed rule, would do nothing to better protect Pennsylvania's water resources, only create more paperwork, make permitting processes more costly and more time consuming – and ultimately, undermine the good work we have been doing in this state for decades. (p. 2-3)

Agency Response: **The rule only provides a definition for "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Nothing in this rule limits the ability of states to regulate a broader scope of waters than the federal government. The agencies' understanding of existing state laws is not defined by a study conducted by the Environmental Law Institute.**

12.916 *State and Local Oversight.* In addition to the oversight provided by the state's DEP, under the Pennsylvania Conservation District Law (Act 217 of 1945), all counties except Philadelphia were authorized to create a county conservation district "as a primary local government unit responsible for the conservation of natural resources in this Commonwealth and to be responsible for implementing programs, projects and activities

to quantify, prevent and control nonpoint sources of pollution" (Section 2). County conservation districts bring a local perspective to balancing environmental protection with growth, including local geologic and topographic knowledge. In addition, their knowledge and experience of the issues in their communities lead to better management of resources, targeted technical assistance, educational guidance to landowners on matters such as reducing soil erosion, storm water management, dirt and gravel road pollution prevention, protection of water quality and prevention of hazardous situations such as floods.

The 66 districts also accept delegation agreements with DEP and the State Conservation Commission to implement nutrient management, permitting processes, wetland management, bridges, and erosion and sedimentation controls. The districts have three options – basic education, technical assistance (non-enforcement) and enforcement; twelve districts are enforcement districts. Conservation districts also cooperate with DEP regarding spraying for black fly populations along affected streams, and have been actively engaged in the development and implementation of Pennsylvania's Chesapeake Bay Watershed Implementation Plan to help meet the Total Maximum Daily Load (TMDL) goals set by the EPA.

Again, since the proposed Waters of the U.S. definition appears to expand the scope of waters under federal jurisdiction (as discussed below), it follows that EPA and Army Corps would have additional oversight responsibilities for those waters, undermining our successful model of local oversight. Not only is this duplicative, but this additional layer of permitting would be reviewed and approved by staff at EPA's regional offices, which cover several states. With such an expansive territory, it is far more difficult for EPA regional staff to be active regularly in the communities for which they work and to have the "boots on the ground" that can help develop solutions.

We urge the EPA and Army Corp to include counties in all decision-making processes as they develop new regulations and programs that will affect waterway infrastructure, including withdrawal of the currently proposed Waters of the U.S. definition until such local input can be considered. This way, counties may remain fully engaged as the foundation for local conservation and environmental problem-solving efforts. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies understand and appreciate the important role counties play in developing and implementing environmental regulations and have and will continue to coordinate with counties on the development and implementation of such regulations. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.**

12.917 Proposed Definition of "Waters of the U.S. The proposed Waters of the U.S. (hereafter referred to as WOTUS) definition would modify existing regulations regarding which waters fall under federal jurisdiction through the Clean Water Act. Its purpose is to

clarify issues raised in U.S. Supreme Court decisions over the past decade or so that have created uncertainty over the scope of CWA jurisdiction. The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of Clean Water Act jurisdiction, defining WOTUS under federal jurisdiction to include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands and "other waters." It also redefines or contains new definitions for key terms, such as adjacency, riparian area and flood plain.

While EPA and Army Corp claim that the intention is to provide more regulatory certainty for land developers, farmers and other businesses, the language used only results in additional confusion. A good regulation would be clear, so everyone – both regulator and regulated – knows what is allowed and when a permit is required. Instead, the key terms used by the proposed WOTUS definition are inadequately explained, even less clear than current law and raise important questions. Because the proposed definitions are vague, the only certainty is that this matter will be tied up in the courts and projects unnecessarily delayed for years to come, creating additional doubt within industries and communities across the state and assuring resources are devoted to administrative and legal burdens rather than actually protecting water quality. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to address the kind of unintended confusion highlighted by the commenter. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.**

12.918 *Practical Examples.* In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, this permit process can be extremely cumbersome, time-consuming and expensive. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, creating legal vulnerabilities for communities that are responsible for maintaining these ditches, even if the federal permit is not approved in a timely manner. (p. 6)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all**

ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.

Continental Resources, Inc. (Doc. #14655)

12.919 ... the changes in the Proposed Rule would wreak havoc on the Section 404 program, expanding the number and types of waters that are jurisdictional. The agencies acknowledge that any expansion in jurisdictional waters will, in turn, result in the following impacts: higher permitting application costs, additional compensatory mitigation costs, increased permitting time and associated value of financial or opportunity costs of carrying development capital for longer periods of time, and higher costs and time associated with avoiding impacts on newly defined jurisdictional waters or minimizing impacts on jurisdictional waters. Economic Analysis at 13. Continental agrees that it will experience all of these impacts-and more. Such impacts could delay Continental's plans for exploration, development, and production.

Continental is troubled by the unauthorized expansion of jurisdiction over wet features not previously considered jurisdictional, such as ditches, marginal and ephemeral waters in a riparian area or floodplain, isolated waters, and prairie potholes. Any expansion in jurisdiction will result in more activities triggering Section 404 requirements. Continental is concerned that there may be a number of important unintended consequences for the Section 404 program associated with the expanded jurisdictional definition. (p. 15-16)

Agency Response: The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

12.920 Continental may need to apply for new NWPs where they are not currently required. There are likely to be many new instances under the Proposed Rule where Continental may need to seek a Nationwide Permit ("NWP") when it would not have been required to obtain a NWP under the current rules. The most likely activities include pad development, construction of roads, pipelines, and other infrastructure, as well as routine maintenance activities. This expansion will occur when waters that have been well-accepted to be non-jurisdictional are now likely to be jurisdictional-particularly the category of "other waters" where the agency analysis indicated none was currently

jurisdictional but 17 percent would be jurisdictional under the Proposed Rule. Continental believes the agencies have, at best, severely underestimated and, at worst, intentionally misrepresented, the true scope of impacts of the Proposed Rule. As described in Section IV, the independent report commissioned by Continental estimates that, in the SCOOP, there would be a 50 percent increase in jurisdiction over ephemeral streams and a 40 to 100 percent increase in jurisdiction over wetlands; in the Bakken there would be a 17 to 100 percent increase in jurisdiction over prairie potholes and an 85 percent increase in jurisdiction over ditches.

The new Section 404 obligations triggered by expanded CWA jurisdiction will require Continental to seek NWPs in areas where waters were previously non-jurisdictional. Given Continental's estimate of the increased CWA jurisdiction associated with the Proposed Rule, the numbers of new NWPs could be significant. These new NWPs would result in increased costs and delays and greater mitigation requirements. In general, Continental expects that it will need to dedicate more in-house staff and outside consultants to handle the increased number of permit applications, permit tracking, and compliance conditions (such as sampling, monitoring, record keeping, and reporting). So, too, the federal government will need to ramp up its staffing to accommodate the increased workload associated with more permits-both individual and NWPs. Given that the agencies are already overwhelmed by current workloads, new jurisdictional determinations and permit review will require the agencies to find needed staffing and funds. (p. 16)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

12.921 Continental may need to apply for individual permits when NWPs are sufficient under the current rule. The Proposed Rule is likely to force Continental and other companies to rely more often on individual permits instead of NWPs. Continental currently relies on a number of NWPs to facilitate its operations. To qualify for many NWPs, the applicant must establish its impacts on "waters of the United States" or on "wetlands" do not exceed minimum thresholds expressed in terms of acres or stream feet of impacts. For example, NWP 3 covering maintenance activities limits removal of accumulated sediments and debris within 200 feet on either side of the structure; NWP 12 covering utility line activities limits the losses to ½-acre of waters of the United States; NWP 13 covering bank stabilization limits activities less than 500 linear feet along the bank and 1 cubic yard per running foot; NWP 14 covering linear transportation projects limits the losses to ½-acre of non-tidal waters of the United States and 1/3-acre of tidal waters of

the United States; NWP 18 covering minor discharges "limits the losses to 1/10-acre of waters of the United States; NWP 41 which requires preconstruction notification for reshaping existing drainage ditches when more than 500 linear feet of a drainage ditch is reshaped; and NWP 43 covering stormwater management facilities (e.g., retention basins, outfall structures) limits the losses to ½-acre of non-tidal waters of the United States and no more than 300 linear feet of a stream bed. Continental relies on these and other NWPs.

Other NWPs do not have a quantifiable limit but require the Corps of Engineers to make a qualitative finding. For example, NWP 33 covering temporary construction, access, and dewatering requires a finding that there will be "minimal adverse effects on aquatic resources," a harder standard to meet if there are more aquatic resources considered. The term "aquatic resources" presumably includes any "waters of the United States, including wetlands that serve as habitat for interrelated and interacting communities and populations of plants and animals." 40 C.F.R. § 230.3(c). Under the Proposed Rule, Continental may be prohibited from using NWP 33 based on any minor impact to "aquatic resources" triggered solely by a newly-designated jurisdictional water. This would significantly increase Continental's need to rely on expensive, time-consuming individual permits and would impose additional mitigation requirements. Finally, the NWP General Conditions are also affected and may hinder Continental's ability to rely on the NWPs discussed above. For example, Condition 2's prohibition on any substantial disruption of aquatic life cycle movements, Condition 8' s limit on adverse effects to the aquatic system due to the impoundment of water, Condition 9's management of water flows such as stream channelization and storm water management, Condition 23' s use of compensatory mitigation may become less available given the ½-acre limit, and Condition 31's preconstruction notification ("PCN") requirements that require delineation of wetlands and other waters (e.g., lakes, ponds, intermittent and ephemeral streams) on the project site. (p. 16-17)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. The rule only provides a definition for "waters of the U.S." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S which also require authorization. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.922 Continental may be required to comply with other federal environmental laws. By creating new federal actions, new individual permits are likely to trigger new obligations under federal environmental statutes, including the National Environmental Policy Act ("NEPA"), National Historic Preservation Act ("NHPA"), and the Endangered Species Act ("ESA"). In Continental's experience, compliance with these environmental laws can be incredibly time consuming and result in one or more years of delay in Continental's planned exploration, development, and production timeframes. Some projects and geographic areas might be cancelled because of the costs and delays associated with ancillary permitting requirements associated with obtaining individual Section 404 permits. This unintended outcome is .utterly inappropriate given that it is

based upon the Proposed Rule's unsubstantiated inclusion of countless ditches and isolated waters previously and properly deemed non-jurisdictional. (p. 17-18)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program, including compliance with other environmental statutes, is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Montana Mining Association (Doc. #14763)

12.923 MMA members are required to manage storm and runoff water in the course of conducting their operations. The proposed rule will impose federal CWA regulation to features that are constructed and used pursuant to other federal and state regulatory programs. MMA members also conduct activities and operations that are likely to cross or impact ephemeral drainages and ditches. To illustrate, mining companies are constantly maintaining, modifying, moving, and reclaiming ditches during the life of the mine because of the dynamic nature of mining operations. If mining companies must now obtain Section 404 permit coverage each time they have to conduct one of these ditch-related activities, operations would effectively come to a halt due to the delays and burdens of permitting. Or worse, mining companies might find themselves in a position where they are unable to comply with other regulatory requirements such as the reclamation requirements of the 43 C.F.R. 3809 regulations (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides additional clarification regarding the types of stormwater management features and ditches that are excluded from regulation. The exemption for certain ditch maintenance activities remains unchanged.**

Midway Gold US and MDW Pan (Doc. #15056)

12.924 The proposed rule appears to categorically conclude that tributaries have a significant nexus to traditional navigable waters, interstate waters and territorial seas. Waters and wetlands adjacent to tributaries also, apparently, will automatically be jurisdictional. Thus, in addition to current state requirements for managing storm and runoff water, the proposed rule would impose federal CWA regulation to features constructed and used. The rule could require mining companies to obtain Section 404 permits to conduct ditch-related activities (maintenance, modifications, movements and reclamation) which would impose significant delays and burdens for such federal permitting. Routine operational activities such as clearing vegetation, removing silt and stabilizing banks for ditches could require a section 404 permit. Stormwater discharge into ditches also could require section 402 permitting. Even the simplest of operational functions such as weed control near ditches and impoundments could trigger section 404 or 402 permitting obligations. (p. 3)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The exemption for certain ditch maintenance activities remains unchanged.**

National Mining Association (Doc. #15059)

12.925 Many activities, *e.g.*, construction of sediment ponds and tailings dams on mine sites, are already subject to comprehensive Section 404 permitting requirements if they involve discharging into an existing jurisdictional water or wetland. Section 404 permitting often involves lengthy and expensive consultations among federal and state agencies to evaluate the impacts of proposed discharges. Permit applicants are also required to obtain Section 401 state water quality certifications as part of the permitting process. If the proposed rule results in the assertion of CWA jurisdiction over various on-site water management features, mining companies will face even more complicated permitting requirements for routine activities on mine sites, which will impose substantial costs and operational delays without discernible or appreciable environmental benefit, and could prevent mining operators from performing timely and necessary maintenance and safety functions while awaiting a CWA permitting decision.

To illustrate, mining companies are constantly maintaining, modifying, moving, and reclaiming ditches during the life of the mine because of the dynamic nature of mining operations. If mining companies must now obtain Section 404 permit coverage each time they have to conduct one of these ditch-related activities, operations would effectively come to a halt due to the delays and burdens of permitting. Or worse, mining companies might find themselves in a position where they are unable to comply with other regulatory requirements such as those relating to the removal and reclamation of temporary structures under SMCRA if they need a Section 404 permit to clean or reclaim a ditch.[229] Notably, the Agencies have provided no analysis of how many additional Section 404 permits will be required if a 404 permit is required every time a water management ditch is moved or maintained. (p. 15-16)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing**

[229] 30 U.S.C.§ 1265(c).

categories such as tributaries. In addition, the rule provides additional clarification regarding the types of stormwater and wastewater management features and ditches that are excluded from regulation. The exemption for certain ditch maintenance activities remains unchanged.

12.926 Furthermore, the Corps has not analyzed how it will meet the increased demand on its resources. For example, operators would be required to apply for permits for ditch maintenance. Considering perimeter and drainage ditches at mine sites can be several thousand linear feet, individual permits will likely be required given the 300 linear feet limit in nationwide permits. How will the Corps manage this additional workload? What kind of lead time will be needed to process such applications when obtaining a simple permit for any mining operation typically takes anywhere from several months to years? If the Agencies ultimately take the position that on-site waters at mine sites are jurisdictional, such an analysis must be conducted prior to the publication of any final rule, particularly in light of the fact that Congress did not contemplate that mining operations would be subjected to such disruptive permitting requirements. (p. 16)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

12.927 Additionally, this type of permitting necessitates mandatory mitigation requirements, placing a further strain on mitigation banks. In certain parts of the country, mitigation credits are already very limited – a problem that has been compounded by increasing demands by the Corps for higher mitigation ratios. As a result of the proposed rule, mitigation costs are almost certain to rise to the point where at least some mining operations, operational improvements, and small or large scale expansions become cost prohibitive or outright impossible.[230] (p. 16)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be**

[230] For example, recent quotes from Colorado wetland banks, including the Riverdale Mitigation Bank and the Middle South Platte Mitigation Bank, indicate costs between $75,000 and $85,000 per credit-acre. This is substantially higher than the stated range of $32,000 and $66,000 used for Colorado in Appendix A of the economic analysis of the proposed rule. Elsewhere, the Great Salt Lake area currently averages around $50,000 per credit-acre, and Ecosystems Marketplace – State of Biodiversity Markets (2010) estimates that a credit can cost anywhere from $3,000 to $653,000 per credit-acre depending on the type of wetland and the local market, but that the average price is $74,535 per credit-acre.

defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The cost of compensatory mitigation credits varies considerably over space and time and these credit prices are subject to market forces. As we have seen in many parts of the country, as the price of credits increases, more compensation providers enter the market providing compensation credits which helps to control costs.

Illinois Coal Association (Doc. #15517)

12.928 The Proposed Rule would significantly impede daily operations and routine expansions at many of our members' mine sites. The potential expansion of jurisdiction over previously unregulated features such as ephemeral streams, sediment ponds, drainage ditches, vernal pools and other "fill and spill" features is particularly problematic. These features pervade our coalfields and, thus, are frequently encountered during routine activities such as construction and maintenance of access and haul roads or roadside ditches. Having to account for impacts to these features within the section 404 context would increase both pem1itting costs and associated economic losses due to project delays for our members by several orders of magnitude. (p. 2)

Agency Response: The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides additional clarification regarding the types of stormwater and wastewater management features, erosional features and ditches that are excluded from regulation. The exemption for certain ditch maintenance activities remains unchanged.

Halliburton Energy Services, Inc. (Doc. #15509)

12.929 HESI's own experience with one mining operation in the western United States is that this consistent application of federal jurisdiction as being limited by a break in the OHWM is regularly confirmed through the jurisdictional determination process. If the definition of tributary is expanded to ignore breaks in the OHWM, it could mean as many as eight Section 404 permitting actions needed *per year* for that single facility, resulting in delays and losses in operational flexibility and market responsiveness that would have significant impacts on these mining operations. For example, if there are specific clay sources demanded by the market, the mining operation could face a new level of process and delay that would impact its business operations if gaining access to the areas where these sources are found required disturbance of ephemeral streams now considered jurisdictional for which permits had not previously been obtained. Of course, there

would also be additional costs associated with the permitting action itself and potential new requirements for mitigation.[231] (p. 4)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides additional clarification regarding the types of stormwater and wastewater management features, erosional features and ditches that are excluded from regulation.**

American Gas Association (Doc. #16173)

12.930 Finally, under the agencies' proposed concept of "adjacent waters", natural gas project proponents may find themselves undertaking required CWA mitigation measures to mitigate their maintenance or repair of pre-existing infrastructure. For example, a water of the State, a riparian land habitat, or other land-locked isolated wetland that could be retroactively deemed U.S. water, would limit a project proponent's ability to maintain or replace infrastructure in such areas (pipelines, storage yards, access roads). Additional mitigation for these newly designated federal areas will also increase the volume of surrounding area cordoned off for mitigation banks and severely limit siting area for new projects. As described above, if man-made conveyances are regulated as "adjacent' to tributaries, that would extend CWA permitting to activities that utilities must undertake for environmental compliance with EPA rules, state rules, and best management practices. Their regulation as WOTUS will create unprecedented, wasteful permitting and mitigation challenges for hundreds of minimal water features on dozens of miles of pipeline project siting. For example, a CWA § 404 permit for such conveyances would require the complementary creation of "offsetting" U.S. water in the same hydrologic area—triggering additional mitigation for the environmental compliance structure itself. (p. 10)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to address the kind of unintended confusion highlighted by the commenter. Further, compensatory mitigation projects do not currently require compensation and this will not change under the rule.**

[231] The plurality in *Rapanos* noted the time-consuming and costly nature of the Section 404 permitting process. 547 U.S. at 721. The study conducted by Arcadis and submitted by the American Petroleum Institute further documents the delays and costs that would be associated with the expansion of federal jurisdiction under the proposed rule.

12.931 The sweeping determination of jurisdiction that could result from such aggregation would pose particularly detrimental impacts to natural gas utilities that regularly utilize Nationwide Permits for routine maintenance and construction activity on separate and distant pipeline projects. Gas utilities utilize nationwide permits under CWA section 404(e) for activities which are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment", subject to a maximum acreage threshold. For example, utilities use Nationwide Permit 12 to discharge dredged or fill material in the course of construction, maintenance, repair and removal of utility lines, so long as the projects permitted do not result in loss of greater than ½ acre of Waters of the U.S. for each "single and complete" project. AGA is very concerned that if field inspectors interpret the "other waters" standard to broadly cover minor stream crossings, ditches, and other "adjacent" water features and erected structures for conveyance across otherwise separate utility line projects, the Nationwide Permit acreage thresholds will be quickly exceeded and applicants will be compelled to rely on individual permits. Additionally, the proposed definitions for "adjacent" waters and "tributaries" can lead to serious arguments among field experts and regulators as to whether aggregate multiple components of a natural gas project into one Water of the U.S. would require an individual Section 404 permit instead of a nationwide permit.

The consequences of aggregation are significant: while nationwide permit authorizations for minor work take on the order of days to months to receive, individual permits add months or years to project reviews – and several times the cost of obtaining a nationwide permit. Therefore, AGA urges the Agencies to reconsider the inclusion of an open-ended "other waters" category in its regulatory proposal. The proposal should also clearly state that gas utilities will not lose the important benefits of the nationwide permit program under existing permits for their separate and complete pipeline projects. The Agencies should also assure the regulated public that the rule will not put permittees at a disadvantage in seeking coverage for new projects. (p. 11-12)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, and significant nexus. This narrowing of scope and clarifying of definitions are designed to address the kinds of concerns regarding subjectivity in the proposed rule highlighted by the commenter.**

12.932 The Agencies Should Ensure that a Revised Proposed Rule Clearly Demonstrates When Federal Action under the Clean Water Act is Not Required, thereby Protecting Permittees from Triggering Protracted Federal, State and Tribal Consultations.

AGA is concerned that the Proposed Rule defines WOTUS too broadly for field officers at state and federal agencies to make accurate determinations on the need for CWA permits, thereby triggering additional consultation provisions irrespective of whether a formal federal action or permit is ultimately required. For example, consultations under

the §106 National Historic Preservation Act are triggered when Army Corps is reviewing permit applications in project areas designated as NHPA areas. The Corps has its own additional §106 review procedures, and the process has no clear rules, or deadlines, and creates significant delays for natural gas utility projects. Another potential source of extensive delays for natural gas utility projects is the Endangered Species Act Section 7 or Section 10 consultation, which can take years to complete in conjunction with obtaining necessary federal permits. (p. 12)

Agency Response: **Implementation of the Section 404 permitting program, including compliance with other environmental statutes, is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, and significant nexus. This narrowing of scope and clarifying of definitions are designed to address the kinds of concerns in the proposed rule highlighted by the commenter.**

Dominion Resources Services (Doc. #16338)

12.933 The proposed definition of WOTUS includes more features than are currently regulated as WOTUS such as more ditches, floodplain waters, and isolated waters. If these additional features are considered jurisdictional, more activities will trigger the need for a CWA section 404 permit in all of the above mentioned aspects of our business. With respect to ditches alone (which would be regulated subject only to narrow and difficult to demonstrate exclusions), we rely on networks of ditches to manage stormwater at our facilities, and our electric and natural gas utility line corridors often follow infrastructure (such as roadways) or span areas (such as farmlands) that similarly rely on ditches to manage water. The proposed rule would expand jurisdiction to ditches that do not meet other exemptions in the proposed rule.

Another example of features that could be newly jurisdictional under the proposed rule are certain ephemeral features. We currently own solar projects in the Eastern, Midwest and Western United States. Through project planning, we have been able to avoid jurisdictional features and in some cases avoided all jurisdictional features and section 404 permitting requirements altogether. Given the new definitions of the terms "tributary", "adjacent", and "other waters", some ditches and ephemeral features that were previously not considered jurisdictional would now be jurisdictional. These changes would make avoidance and minimization of WOTUS more difficult and would increase impacts requiring permits. To the extent our infrastructure cannot avoid and must cross or otherwise impact ditches or other newly regulated features such as certain ephemeral features, we will be subject to more section 404 permit requirements and lengthier section 404 permit processing.

In addition, many of our projects currently qualify for CWA section 404 general permits, including nationwide permits (NWP). NWPs are designed to provide streamlined processing for projects that have minimal environmental impact and are faster and less costly than individual permits. As a result of the expansion of areas considered WOTUS,

the rule could cause more projects to exceed NWP permit thresholds, resulting in more projects undergoing lengthier and more costly individual permit processes. For example, our natural gas and electric linear projects often rely on NWP 12 for utility lines for a range of activities including new line construction and maintenance of existing lines. NWP 12 is available only for projects that meet specified limits, including impacts of no more than ½ acre of WOTUS for each "single and complete" project. We make efforts to configure utility lines to stay within the ½ acre limit by avoiding wetland and stream features. The proposed rule's expansion of jurisdiction to include the types of ditches, ponds, and other wet features often found on land spanned by our utility lines will increase the likelihood that many of our projects will be unable to stay within NWP 12 impact thresholds. The proposed rule poses similar concerns for NWP 51 for land-based renewable projects which has similar impact thresholds. This means that a project that would qualify for a NWP today may require an individual permit under the proposed rule, requiring more mitigation and associated costs and causing overall increases in permitting costs and delays. (p. 3-4)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule.**

Gas Processors Association (Doc. #16340)

12.934 The Proposed Rule will Hinder Clean Water Act Permitting and Undermine the Efficiency of the Nationwide Permit Program

GPA is highly concerned that the permitting process for GPA member projects will be significantly affected if this rule is finalized as proposed. According to the Executive Summary of the proposed rule: "The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying 'water of the United States' *less complicated and more efficient."* 79 Fed. Reg. at 22190 (emphasis added). EPA and the Corps add that, "this rule will result *in more effective and efficient CWA permit evaluations and increased certainty and less litigation*." *Id*. (emphasis added). Even if the proposed rule makes the process of identifying jurisdictional waters

more effective and efficient, the rule will make the process of obtaining permits less so. The agencies' categorical inclusion of all tributaries and adjacent wetlands as jurisdictional will dramatically increase the caseload of the regulatory agencies charged with administering permitting programs for point source discharges (§402) and dredging/filling (§404). This "simplified definition" will lock up the permitting process by slowing down the turnaround time for needed permits which will put a financial burden on the midstream sector.

Additionally, GPA is concerned that the expanded definition of "waters of the United States" will jeopardize the agencies' general and nationwide permit programs. Under Section 404(e) of the Clean Water Act, the Corps may issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. *See* 33 U.S.C. § 1344. Currently, many of the activities conducted in the oil and gas industry, particularly in the mid-stream sector, have many available permitting options when it comes to projects that may impact waters of the United States. For projects deemed to have "minimal impact(s)," there are many specific project-type Regional, General, and Nationwide permits that companies can obtain to seek approval for an activity. Many times, oil and gas companies will re-route, re-design, or change the "footprint" of a project in order to minimize impacts and allow the work to be performed under a much less onerous permitting process. The Nationwide permitting program was developed as a way to more efficiently process permits with minimal impacts to the aquatic environment. In fact, roughly 90% of the permits processed by the Corps are either General or Nationwide permits. Even with 90% of the permits being streamlined in this manner, the Corps and other agencies (such as wildlife agencies and historic preservation offices) are apparently still very stretched, resource-wise, to process these permits in a timely fashion as evidenced by GPA members' experiences in recent permitting activities.

We are concerned that the proposed rule expands the universe of waters that are considered waters of the United States, which will result in an increased number of projects that will no longer be deemed to be "minimal impact" and therefore would not qualify for approval under one of the General or Nationwide permits. This proposed rule appears to be necessitating more usage of an Individual permit type of review, which takes significantly longer and requires more resources, both financially and in personnel time (for both the agency and the project proponents). With the federal agencies already significantly burdened with project reviews, this scenario will further increase their burden and degrade an efficient and proven permit process. As with many other industries, the midstream sector of the oil and gas industry relies greatly on regulatory certainty and the predictability of permitting costs and timeframes to evaluate and justify the economics of projects and the hiring of employees. Implementation of the proposed rule changes will impact thousands of direct and indirect jobs throughout the United States in our sector of the industry alone and greatly impede natural gas infrastructure development.

Furthermore, if many projects are no longer deemed "minimal impact," the entire premise of the Nationwide and General permitting process is undermined. GPA questions how EPA can justify such a harsh and overreaching rule change, when a favorable National Environmental Policy Act (NEPA) analysis must be achieved each time the Nationwide

Permits are approved for use. If the most recent NEPA review of the Nationwide Permits determined that there was no impact, then there should be no reason to make such sweeping and significant changes. (p. 4-5)

Agency Response: **Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule**

Utah Mining Association (Doc. #16349)

12.935 Notably, mining operations are required to obtain all appropriate environmental licenses and permits in advance of any land disturbance, including CWA Sections 404, 402, and 401 permits and certifications. By way of one example, under Section 404 of the CWA, mining operations are typically required to mitigate the disturbance of onsite "waters of the United States" through the creation of off-site and on-site wetlands and streams. If the rule is not clarified to exclude these post-disturbance areas from the definition of "waters of the United States," the mining industry will be forced to obtain permits and provide mitigation in a never ending regulatory loop to meet other performance standards and requirements, including those required under the CWA, SMCRA, Mine Safety and Health Act, etc.

UMA therefore urges the Agencies to revise the proposal to clarify that on-site water management features, including all structures – natural and man-made - that contain, convey, and, as necessary, chemically or physically treat on-site water associated with mining operations, continue to not constitute "waters of the United States." Failure to do so will have serious implications on the mining industry, rendering most, if not all, mining operations unfeasible. (p. 3)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the CWA permitting programs is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule**

puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water.

FMC Corporation (Doc. #16505)

12.936 Since the Wyoming definition of waters of the state already includes all tributaries, proposed discharges into these bodies are evaluated by WDEQ and permits are written that include the appropriate water quality limits. The analyses require a thorough understanding of background water quality, use attainability and other characteristics of the water body, whether or not the discharge is into an intermittent or ephemeral drainage. The proposed rule will drive EPA to add extra layers of analyses simply to satisfy a perceived need to clarify jurisdiction, when in the case of Wyoming, such clarification would be redundant. An unintended consequence might be that jurisdiction in Wyoming would be reduced under this new rule, an outcome that clearly would not serve to advance the goals of the Clean Water Act (CWA). (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Nothing in this rule limits the ability of states to regulate a broader scope of waters than the federal government. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.

Kentucky Oil and Gas Association (Doc. #16527)

12.937 The need for Section 404 (dredge and fill) permitting could be vastly increased as waters of the United States expand. Typically, Kentucky's oil and gas activities will qualify for authorization under a Nationwide Permit (NWP) (i.e., NWP 12 for utility lines or NWP 39 for commercial/ industrial activities). However, NWPs often have limits on the length or acreage of impacts that may be authorized. As more and more features are determined to be waters of the United States, it will be very difficult to comply with these limits. As a result, industry will be required to seek Individual Permits, which are significantly more expensive and require much more time to obtain than a NWP authorization. Likewise, the length of time required for issuance of an Individual Permit is extreme. As a result, operations could grind to a halt awaiting on USACE's authorizing the company's proposed operations. (p. 6)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.938 As part of Section 404 permitting, compliance with endangered species and cultural/historical resources regulations must be demonstrated. In order to comply with these regulations, it is often necessary to conduct surveys, restrict tree-cutting activities to certain periods of the year (Indiana bat requirement), and mitigate for the impacts. These requirements greatly increase the cost of operations as permits cannot be obtained without concurrence from the United States Fish and Wildlife Service and State Historic Preservation Offices. In addition to increasing costs, these requirements will also significantly delay permit issuance as timeframes for endangered species surveys are typically seasonal dependent on some aspect of the species' activities. (p. 7)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program, including compliance with other environmental statutes, is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Petroleum Association of Wyoming (Doc. #18815)

12.939 Throughout Wyoming, facilities have been constructed in areas that the Corps has previously determined to be *non-jurisdictional*. For example, in many cases oil storage facilities, infrastructure, roads, produced water impoundments, etc. have been evaluated on a case-specific basis and the Corps or EPA has determined they are in locations that are not jurisdictional. To cite just one particular class of facilities in Wyoming to illustrate this problem, PAW points to coal bed methane ("CBM") produced water impoundments in the Powder River Basin of Wyoming. In many cases, CBM operators sought Corps Jurisdictional Determinations prior to constructing impoundments in the upper reaches of ephemeral drainages. The Corps entered many, perhaps hundreds, of Jurisdictional Determinations for such impoundments. The vast majority of these requests resulted in determinations from the local Corps officer of *non-jurisdictional*, based on site-specific characteristics.

Under the proposed rule, which removes any flow duration guideline and which provides that tributary characteristics can apparently be evaluated at any point within the tributary, many of these facilities (or the locations in which they were built) could become categorically *jurisdictional* under paragraph (a) (5) of the proposed rule. If for some reason they fell outside of the (a) (5) characteristics, they could still potentially be captured under the (a) (6) or (7) criteria as "adjacent" or "other" waters. The fact that a drainage feature that fails to meet jurisdictional elements under a site-specific inquiry could become jurisdictional by rule under a categorical inclusion by rule demonstrates

that the proposed rule is arbitrary and capricious. Certainly, a site-specific inquiry should control over a categorical determination. The proposed rule is therefore overbroad.

The implications of converting non-jurisdictional locations and facilities into jurisdictional facilities present a number of challenges to the industry. For example, to reclaim facilities constructed under non-jurisdictional determinations could now require a §404 permit. In addition, as discussed below, facilities storing oil may become subject to SPCC planning, reporting and notification requirements where none currently exist, and where application of such requirements is unreasonable. (p. 9)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Specifically, the agencies have limited the tributaries that are "waters of the United States" to those that have both a bed and banks and another indicator of ordinary high water mark. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. However, current general permits or the future development of general permits consistent with CWA section 404(e) are beyond the scope of the final rule.**

12.940 The oil and gas industry frequently utilizes Nationwide Permits ("NWP") for such activities as pipeline construction, road construction and facility construction. The broad and vague definitions of "tributary," "adjacent" and the catch-all "other waters" leaves much uncertainty as to what constitutes WOTUS for purposes of necessitating §404 permit coverage to undertake construction activities . While purporting to add "clarity" to the regulatory environment, such clarity merely serves to create uncertainty and delay projects. It is unclear how the proposed rule would affect the numerous small projects authorized under the NWP provisions that are commonly utilized by the industry, but it appears that the expansion of jurisdiction could significantly broaden §404 requirements in Wyoming. (p. 11)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.941 In addition to construction activities, PAW members also are required to undertake reclamation activities, such as disking, seeding, fertilizing, and pesticide application in areas that could qualify as WOTUS under the proposed rule. To avoid the potential for enforcement, an operator could be required to submit a request for a jurisdictional determination or a permit application in advance of undertaking such activities, or risk enforcement by the agencies. The effectiveness of the NWP program for such activities would also become uncertain, and would be particularly difficult to navigate in areas where the agencies relied upon aggregation of drainage features in a watershed to

potentially assert jurisdiction, or in floodplains. Projects will also likely incur significant delays while agencies complete individual jurisdictional determinations. This expanded workload will also place additional burdens on agency budgets and already diminished regulatory staff numbers.

Perhaps ironically, under the physical environments in which these reclamation activities usually occur in Wyoming, the problem is not the *presence* of water, it is the *absence* of water needed to establish vegetation and meet reclamation goals. Thus, the overbroad definition of WOTUS in the proposed rule would regulate dry land property, not water, and infringe upon the state, federal government and private landowners' efforts to ensure reclamation goals are met. It would also impede oil and gas operators' ability to accomplish reclamation goals in a timely and efficient manner. PAW contends the over-breadth of the proposed rule would frustrate congressional intent in such situations, and add unnecessary costs and delays to industry, state, federal government and private landowners. (p. 12)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. In addition, the agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations.**

Independent Petroleum Association of America (Doc. #18864)

12.942 With 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), it is anticipated the 404 permitting program will expand and will result in pressure on the capacity to identify available mitigation banks and other options. Such expansion has been confirmed by the USACE *Economic Analysis,* p. 29. Assessment of whether such "other waters" and any related discharges would significantly affect the chemical, physical, or biological integrity of a jurisdictional water is required under the new proposed definition. For example, the proposal would provide that the USACE would use the watershed of the single point of entry closest to the 1NW rather than at the single reach.[232] The expansive nature of this proposal is evident. (p. 5-6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

[232] Executive Order, 12866, 58 Fed. Reg. 51735 (1993).

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, and significant nexus. The cost of compensatory mitigation credits varies considerably over space and time and these credit prices are subject to market forces. As we have seen in many parts of the country, as the price of credits increases, more compensation providers enter the market providing compensation credits which helps to control costs. See the Economic Analysis prepared by the agencies for the final rule for further discussion on the predicted jurisdictional changes under the final rule.

12.943 The need for Section 404 (dredge and fill) permitting could be vastly increased as waters of the United States expand. Typically, Kentucky's oil and natural gas activities will qualify for authorization under a NWP (i.e., NWP 12 for utility lines or NWP 39 for commercial/industrial activities). However, NWPs often have limits on the length or acreage of impacts that may be authorized. As more and more features are determined to be waters of the United States, it will be very difficult to comply with these limits. As a result, industry will be required to seek Individual Permits, which are significantly more expensive and require much more time to obtain than a NWP authorization. Likewise, the length of time required for issuance of an Individual Permit is extreme. As a result, operations could grind to a halt awaiting on USACE's authorizing the company's proposed operations. (p. 10)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

12.944 The changes proposed by the USACE and EPA to Section 404 of the CWA could significantly impact oil and natural gas operations. 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 waters of the United States jurisdiction beyond the "high water" mark to include the drainage area of a tributary - from ridge top to ridge top on either side of a stream.[233] Even if the definition of Riparian Area is physically limited, the definition of "Other Waters" is so vague, that

[233] Please see the attached topographic maps with the shaded pink area which depict the proposed jurisdictional area for Example #I and Example #2. The area in the Kentucky example is now expanded to approximately I500 acres and the area in Illinois is expanded to approximately 4,000 acres.

"case specific" analysis of ephemeral streams could consider the entire watershed to be "nexus" to a navigable river, or the entire upland around a wetland to be "nexus", and, therefore, require permits. The result of these changes likely mean every stream crossing and well pad will require a nationwide permit from the USACE, and, possibly, an individual permit. (p. 10)

Agency Response: Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to avoid the kind of unbounded jurisdiction described by the commenter. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations.

Coon Run Levee and Drainage District (Doc. #8366)

12.945 The Corps, which oversees the 404 permit program, is already experiencing a logjam in evaluating and processing permits. The redefinition of "waters of the United States" will create more lengthy delays since the number of waterways on which appropriate permitted activity occurs will increase radically. The flood of permit requests resulting from the multitude of new "waters of the United States" permits will inundate Corps staff already swamped under the current permitting regime. This puts drainage districts, which are in the business of flood and stormwater management, in a precarious position. (p. 2)

Agency Response: The rule only provides a definition for "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

12.946 We are also concerned that districts will be vulnerable to citizen suits under this proposed rule if the federal permit process is not streamlined and well defined. (p. 2)

Agency Response: No rule can prevent lawsuits, but the agencies believe the final rule is well supported by science and the CWA.

12.947 We are also concerned that current statewide permits for routine projects in the district will be eliminated subjecting the district to seeking costly and time consuming individual 404 permits. (p. 2)

Agency Response: **Implementation of the Section 404 permitting program, including statewide general permit programs, is beyond the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. However, current general permits or the future development of general permits consistent with CWA section 404(e) are beyond the scope of the final rule.**

12.948 The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject our district to increasingly complex and costly federal regulatory requirements under the proposed rule which impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure, and water reuse. (p. 2)

Agency Response: **As discussed in the preamble to the final rule, the agencies are aware that this definitional change affects more than just the Section 404 program. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

North American Meat Association (Doc. #13071)

12.949 The revised definition also 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. In addition, the rule as written will likely result in a greater number of "impaired" federal waters under section 303, imposing more burdens on States to evaluate and list these waters. If finalized as proposed the rule could trigger section 404 dredge and fill requirements for circumstances where such permits have historically not been necessary, imposing additional cost and delays involved with obtaining permits and the higher mitigation costs incurred to offset the impact of work done in newly-defined WOTUS areas. (p. 10)

Agency Response: **As discussed in the preamble to the final rule, the agencies are aware that this definitional change affects more than just the Section 404 program. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or**

Section 311 requirements which also require authorization. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

12.950 Section 404 requires a permit for the discharge of dredge or fill material into "waters of the U.S."[234]. The proposed rule's definition of "waters of the United States" will trigger section 404 permitting requirements for more activities. Features such as ditches, waters in floodplains, and isolated waters, which were not previously considered jurisdictional, will now be covered by the proposed rule.[235] Any discharge of dredge or fill material into these newly jurisdictional features will trigger CWA section 404 requirements.

The proposed rule will increase the need for individual permitting because less activities will qualify for general permits. Nationwide permits (NWPs) are available under CWA section 404(e) for activities which are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." The NWPs have maximum acreage thresholds. NWP 12 allows for discharges of dredged or fill material for the construction, maintenance, repair and removal of utility lines that will not result in losing greater than ½-acre of waters of the U.S. for each single and complete project.[236] With more features and areas considered "waters of the United States," many activities will exceed the NWP threshold, and applicants will be forced to rely on individual permits.

Individual permits are much more costly than general permits: the average cost to prepare an NWP application is $35,954, but the average cost to prepare an individual permit application is $337,577. Increased individual permitting also means increased delays for permit applicants. While a NWP may take only ten months to obtain, it can take over two years to obtain an individual permit. And a large increase in individual permit applications is likely to overwhelm EPA and Corps staff, increasing delays. These delays will cause significant lost opportunity costs for stakeholders. Overall, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines that previously would have relied heavily on general permits. The proposed changes to the "waters of the U.S." definition could jeopardize the future of the entire NWP program. (p. 11)

Agency Response: **The rule only provides a definition for "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Also see**

[234] 33 U.S.C. § 1344
[235] See 79 *Fed. Reg*. at 22,193
[236] 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).

the Economic Analysis for the final rule for further discussion on the predicted jurisdictional changes under the final rule.

Iowa Corn Growers Association (Doc. #13269)

12.951 SBA points out the significant economic impact this rule will have through increased permitting requirements. If CWA jurisdiction is expanded (…), more farmers will need to obtain CWA §404 permits from the Corps resulting in increased costs and longer turnaround times on project approvals, which already have many delays. All of this will result in a delay of projects – projects specifically designed to *advance* water quality. It is our experience that if the drainage features described above are found to be WOTUS, there will be increased permitting obligations, costs, and liabilities, even with the normal farming exemption outlined in 404(f)(1). First, this will add an additional step of producers having to ask the Corps for the normal farming exemption, and secondly, the Corps has a history of being very reluctant to grant this exemption. (p. 5-6)

Agency Response: See the Economic Analysis prepared by the agencies for the final rule for further discussion on the predicted jurisdictional changes under the final rule. The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

North Dakota Soybean Growers Association (Doc. #14121)

12.952 Processes for jurisdictional determination decisions and potential disagreements are not identified. Will there be "preliminary determinations" or some other interim process so that farmers and ranchers are not relegated to a bureaucratic limbo subsequent to a permitting application? We believe that greatly expanded jurisdictional territories, certainly those beyond the traditional U.S. CWA, are very likely to incur more, not fewer, expenditures of time, talent, and treasure. We believe that an expanding requirement for significant collaboration will occur between the EPA and the Corps' on all jurisdictional and enforcement issues. Are the current databases and communication processes compatible? (p. 11)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies also intend to retain the concept of preliminary JDs.

There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Texas Farm Bureau (Doc. #14129)

12.953 Overly-broad definitions of tributaries, adjacent areas, and floodplains will result in "waters of the United States" being expanded into production areas of fields and pastures. Farmers and ranchers would have to seek NPDES permit authority to plow, plant, fertilize, and control pests in newly classified "waters". Other changes made through the "Interpretive Rule" will result in additional burdens and compliance issues associated with §404 Permitting. (p. 2)

Agency Response: The rule does not change the Section 404 regulatory program. All exemptions, including those for ongoing farming, remain. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to avoid the kind of unbounded jurisdiction described by the commenter. The "Interpretive Rule" has been withdrawn.

Wyoming Farm Bureau Federation (Doc. #14406)

12.954 These proposed rules will certainly increase permitting requirements for WyFB members. Activities which are currently "normal" activities under Section 404 of the Clean Water Act will be no longer be such should this rule go forward. Simple acts such as repairing fence, tilling soil, applying pesticides or fertilizers, etc. would not be "normal" in many instances. Permits from governmental agencies are not free, either in time or money. Because permits are not instantaneous, many of these activities would not be able to be performed until permits are in hand, should these rules go forward. (p. 4)

Agency Response: The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States" including the Section 404(f)(1) exemptions for normal ongoing farming. That said, the scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer

waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

National Corn Growers Association (Doc. #14968)

12.955 In the case of the Section 404 dredge and fill permitting program, it is NCGA's understanding that if the drainage features like those depicted in Figures 1 and 2 are made WOTUS, or could be possibly WOTUS, that farmers in many parts of the country will invariably face stepped up Section 404 obligations, costs and liabilities. This will be despite the "normal farming exemption" in Section 404(f)(1). At a basic level this will be for the simple reason that there will be an exponential increase in the number of instances whereby farmers will have to approach the Corps and seek the normal farming exemption. Time and cost will be involved in those requests in nearly every instance. Furthermore, the Corps in many of its districts have a long history of being very reluctant to grant the normal farming exemption (claiming a recapture of the activities under Section 404(f)(2)), or of being able to impose certain constraints on activities in granting the normal farming exemption. (p. 12)

Agency Response: The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The updated Economic Analysis prepared by the agencies indicates the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. See the Economic Analysis for the final rule for further discussion on the predicted jurisdictional changes under the final rule.

12.956 The issues under Section 404 do not stop there. The Section 404(f)(1) normal farming exemption does not include many activities like land shaping that may occur in these drainage systems to facilitate the creation or management of more effective farm drainage ways. Making these ephemeral and intermittent drainage features WOTUS will invariable result in more Section 404 permitting in farm country. All of these Section 404 concerns could result from either the Corps' own implementation of their program in light of the rulemaking, or as a result of activists' lawsuits under the CWA forcing them, or farmers, to do so. (p. 12)

Agency Response: The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also provides greater clarity. The rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a

tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches.

Arizona Farm Bureau Federation (Doc. #15064)

12.957 Not only would the proposed rule suffocate normal farming and ranching operations erroneously in the name of water quality, but it also unnecessarily opens up daily lives to EPA compliance with the Fish and Wildlife Coordination Act. The ambiguous wording of the rule is ripe for litigation as left to the interpretation of agency enforcement and environmental litigants. (p. 3)

Agency Response: The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

El Dorado Irrigation District (Doc. #15231)

12.958 The proposed rule is inconsistent with EPA 'sown water transfer rule. The proposed rule indicates that ditches or other conveyances may constitute "tributaries" if they "connect two or more waters of the United States." (79 Fed. Reg. No. 76, 22203 (April 21, 2014).) This part of the proposed rule is inconsistent with EPA's own Water Transfers Rule, as set forth in 40 CFR 122.3(i). The Water Transfers Rule provides that water transfers are exempt from the requirements of obtaining a permit under section 402. (40 CFR § 122.3(i); but see *Catskill Mountains Chapter a/Trout Unlimited, Inc. v. U.S. EPA*, 8 F.Supp.3d 500 (S.D.N.Y. March 28, 2014) (vacating the water transfer rule) pending appeal in the 211d Circuit.) "Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." (40 CFR § l22.3(i).) Such water transfers are ubiquitous throughout the Western United States, particularly in mountainous regions.

For example, EID owns and operates Echo Lake, a high mountain reservoir that diverts and stores water from the Upper Truckee River watershed at an elevation of approximately 7,200 feet above sea level as part of its Project 184. From Echo Lake, EID transfers water into the South Fork American River watershed, via approximately 3,250 feet of enclosed conduit and tunnel. The transfer simply moves water from one watershed (at its very headwaters) to another, without subjecting the water to any intervening use [image omitted].

The Water Transfers Rule exclusion to the permitting requirements of section 402, however, does not apply to the permit requirements of section 404. Therefore, by expanding the definition of "tributary" to include conveyances that merely "connect two or more waters of the United States," the proposed rule would require permits under section 404, but not 402, for water transfers. Such an outcome is illogical. If conveying

water through man-made channels from one water of the United States to another, without any intervening use, does not require a permit under section 402, why should it require such a permit under section 404? (p. 8)

Agency Response: **See summary response 12.3. This comment appears to say that it would be inconsistent because discharges from a water transfer would not require a 402 permit because of the water transfer rule, but discharges of dredged or fill material into a water transfer conduit could require a CWA 404 permit. A Section 404 permit applies to the discharge of dredged or fill material into a waters of the U.S not for transfer or discharge of water. Please see summary response at 12.3 which explains that the water transfer rule is not changed by the final rule. The water transfer rule is about which discharge needs a permit, under 402 not whether the water conveyance is a water of the U.S (and thus may need a 404 permit for discharges of dredged or fill into the water conveyance),.**

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

12.959 Most importantly, treating such water bodies [referring to "water bodies on mill property that are part of commercial activities"] as WOTUS would do little, if anything, to further the goals of the CWA, and it would impose excessive regulatory burdens on both facility operators and CWA permitting and enforcement authorities. A prohibition on discharge of fill material into, or dredging fill material out of, a water body without a permit makes no sense when that water body was created for the purpose of storing water containing suspended solids, or of settling solids out of that water, for example. Water quality standards designed to protect aquatic life in, or to assure the aesthetics of, a natural water body serve no purpose if applied to a water body that is part of an industrial operation. Maintaining healthy aquatic organisms in a water body may be the opposite of what is needed in ponds used to store water to be used for commercial purposes, such as for cooling water or for water used to process food or manufacture drugs. If EPA were to claim WOTUS jurisdiction over such ponds, EPA and state agencies would take on a tremendous burden of having to develop new water quality standards that would be appropriate for such uses, as well as issue CWA section 402 or section 404 permits for discharges into or activities related to maintenance of those waters – and for little or no regulatory benefit. (p. 3-4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water.**

National Barley Growers Association (Doc. #15627)

12.960 Because the language in the proposed new definition of WOTUS is so broad and general, businesses may need to retain expert wetlands and legal consultants before even beginning construction/expansion projects to evaluate whether the project will impact any areas that could be classified as WOTUS under the new definition. Based on the definitions it is also highly likely that more projects of minor water quality significance will require CWA Section 401/404 consultation, certification, and federal permitting. These additional requirements will significantly affect the cost of land acquisition and projects costs, and will likely create delays in the permitting and construction schedule. The broader WOTUS definition will likely impact storm water management programs and add complexity for insignificant activities. We are concerned that minor storm water related activities could become regulated activities triggering unnecessary and time-consuming Federal reviews including NEPA requirements. Relatively minor activities such as clearing sediment from storm water basins or moving storm water drains would then require additional permitting and reviews, which would result in an unnecessary increase in time and money to complete the work. (p. 4)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to avoid the kind of unbounded jurisdiction described by the commenter. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

12.961 There is concern that EPA and/or the Corps will use the ambiguity of the Proposed Rule in terms of the WOTUS definition to over-ride state and local control of the aforementioned water management activities. This creates significant concern for barley producers that their regular farming activities will be subject to a National Pollutant Discharge Elimination System (NPDES) and/or Section 404 permitting process. This is an unacceptably heavy burden for barley producers, as a farm simply cannot remain viable if ongoing farming practices are subject to a wide array of regulatory permitting requirements that may take months and/or years to acquire. Based on experience, barley producers believe that if either EPA or the Corps gains such control over routine farming activities, much of the farmland in the Northern Plains will become un-farmable due to the lack of timely water management activities. (p. 4-5)

Agency Response: Section 402 and 404 permit implementation is outside the scope of this rule. However, the rule does not alter longstanding agricultural exemptions for normal farming in Section 404(f)(1). In addition, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under

the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Peltzer & Richardson LC (Doc. #16360)

12.962 (Irrigation ditches and canals that are constructed wholly in uplands and drain only uplands) are currently exempted from NPDES permit requirements [33 U.S.C. §1342(*l*)(1) and (*p*)(1)]. If (these ditches) escape the exclusion and are therefore considered "jurisdictional" for other purposes of the CWA, they will be subject to other permitting requirements. The most onerous of these is the requirement to obtain a "fill" permit under section 404 of the Act. This section was clearly designed to prevent the fill of the nation's navigable waterways; it has no application whatsoever to ditches and canals, yet it constitutes the single biggest regulatory burden on owners of these waterways, as well as the agencies implementing the CWA. For example, even the construction of a simple culvert for road purposes or installation of a measuring weir would require a "fill" permit be obtained, absent a specific showing that this exclusion applies. This must be recognized as an absurdity that desperately needs correction. (p. 5-6)

Agency Response: The rule clarifies the types of ditches that are excluded from regulations including ephemeral ditches that are not a relocated tributary or excavated in a tributary; intermittent ditches that are not a relocated tributary, excavated in a tributary, or drain wetlands; and ditches that do not flow, either directly or through another water, into a traditional navigable water.

Loup Basin Reclamation District (Doc. #16474)

12.963 (…) Nebraska has long coordinated with the agencies in water-related matters, including Section 404 guidelines. They serve as a basis upon which farmers, wildlife-enthusiasts, and construction firms, alike, may rely and comply with necessary rules. The proposed guidelines unnecessarily complicate existing state water quality requirements and best practices, while broadening its statutory control over more area. This expansion of federal authority over bodies not traditionally considered waters would lead to confusion, project delays, and increased costs for farming activities, due to an increase in permits that would be required. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See the Economic Analysis for the final rule for further discussion on the predicted jurisdictional changes under the final rule.

Florida Crystals Corporation (Doc. #16652)

12.964 By having jurisdiction over even a part of a project site, the agencies gain control over the entire project. Most large projects require the use of at least some wetlands or ditches, and the Army Corps will examine the environmental effects of the overall project – even those portions on uplands – when issuing permits. Army Corps permits under CWA § 404 commonly have conditions which address those upland impacts. Outside opposition groups use lawsuits against CWA § 404 permits as a tool to try to block

projects which they believe are undesirable from a land use perspective, often after they have failed to persuade local officials to refuse to approve the projects. There are many examples of such lawsuits. For instance, environmental groups stopped a biotechnology incubator planned for former farmlands in South Florida by challenging an Army Corps CWA § 404 permit to fill a small portion of the site and arguing that the agency did not adequately analyze how the project might induce suburban sprawl in the area. *Fla. Wildlife Fed'n v. US. Army Corps of Eng'rs,* 401 F.Supp.2d 1298 (S.D. Fla. 2005). In another example, environmental groups tried to block construction of a shopping mall in Central Florida by challenging a CWA § 404 permit after losing a political battle in local land use forums over the zoning of the site. *Sierra Club v. Van Antwerp,* 661 F.3d 1147 (D.C. Cir. 2011). There are many more examples, but these illustrate how CWA regulatory jurisdiction has become a tool to control land use. (p. 9)

Agency Response: **The rule only provides for a definition of "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Calloway County Farm Bureau (Doc. #16158.1)

12.965 As I review the proposed rule, it troubles me with the confusing standards of determining regulatory oversight that would be established if implemented. Rather than providing a clear determination of how navigable waters, as established in the Clean Water Act, would be determined, the proposed rule uses an ambiguous "significant nexus" standard that uses near proximity, aggregation and best professional judgment. I fear this will only lead to an increase in litigation by groups determined to limit agricultural production rather than implementing practices that protect the environment through the use of agriculture. (p. 1)

Agency Response: **The final rule reduces the number of instances where signification nexus determinations must be made and clarifies the definition of significant nexus to reduce subjectivity in its application. For example, the agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.**

Agribusiness Association of Kentucky (Doc. #18005)

12.966 If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer – including organic fertilizer (manure) – another necessary and beneficial aspect of many farming operations. 40 CFR §122.2 (definition of "pollutant"). It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields – and put EPA into the business of regulating whether, when, and how a farmer's crops may be fertilized. In fact, if low spots on pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue the owner of cows that "discharge" manure into those "waters" without a section 402 permit. They could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains.[237] Given the "very low" "threshold" the Agencies apply before "truly de minimis activities" turn into "adverse effects on any aquatic function," farmers and ranchers would even have to think about whether "walking, bicycling, or driving a vehicle through" a jurisdictional feature is prohibited.[238] Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits, discussed below at Section III) if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time. (p. 3)

Agency Response: **The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.967 The Agencies have repeatedly overstated the protection afforded by the normal farming and ranching exemption by refusing to publicly acknowledge their interpretation of an "established" operation.[239] Our research, as well as experiences within the forestry sector, indicates that only operations that commenced (at the same location) in 1977 or earlier would be deemed "established" – and any later commenced operation would require a section 404 permit. Despite multiple inquiries, the Agencies have refused to provide any public confirmation or denial on this point. In at least one private meeting, however, EPA officials have admitted that farming (in a jurisdictional feature) that has not been ongoing since 1977 would require a section 404 permit, but "only for the first year" – after that, it would be an "established" operation. See Letter from Craig Hill,

[237] A plow has been found to be a point source. *See Borden Ranch P 'ship v. United States Army Corps of Eng'rs,* 261 F.3d 810 (9th Cir. 2001).

[238] Fed. Reg. 45,008, 45,020 (Aug. 25, 1993).

[239] On March 25, 2014, the Agencies issued an immediately effective "interpretive rule" concerning the application of "normal" farming exemptions to 56 listed conservation practices. Although the Agencies claim to have "expanded" agriculture's CWA exemptions through this interpretive rule, we strongly disagree with that conclusion and provided comments to and requested withdrawal of the interpretive rule. As described in comments submitted by AFBF to that docket, the interpretive rule provides no meaningful protection from the harmful implications of the expansion of "navigable waters" and, in fact, further narrows the already limited "normal" farming exemption. *See* American Farm Bureau Federation "Comments in Response to Notice of Availability Regarding the Exemption From Permitting Under Section 404(0(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, EPA–HQ–OW-2013-0820; 9908-97–OW (July 7, 2014) (attached hereto as Appendix J). We hereby attach and incorporate those comments by reference in their entirety.

President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water (Sept. 29, 2014) (http://www.regulations.gov/#!documentDetail;D=EPAHQ-OW-2011-0880-7633). We request clarification on this important point in any final Agency action on the proposed rule. We request clarification on this important point in any final Agency action on the proposed rule. (p. 14-15)

Agency Response: **The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In the final rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland has been excluded from this definition since 1992, and remains substantively and operationally unchanged.**

12.968 The Agencies also downplay the impact of the "recapture" provision. Seeking to allay farmer concerns, the proposal claims that the term "tributary" does not include ephemeral features located on farmlands that do not possess a bed and bank are not tributaries. 79 Fed. Reg. at 22,204. Yet, the Agencies tip their hand in this carefully worded section of the preamble. According to the Agencies, if farming has eliminated a bed and bank where one previously existed (e.g., cultivation has leveled out changes in gradient on the field), the Agencies would view that as "converting" a jurisdictional water into a "non-jurisdictional water." *Id.* at n.8.Any such conversion, according to the Agencies, would require a Section 404 permit unless it occurred prior to enactment of the CWA. (p. 15)

Agency Response: **The rule does not alter longstanding agricultural exemptions in determinations regarding "waters of the United States." That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In the final rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland has been excluded from this definition since 1992, and remains substantively and operationally unchanged.**

Kittson County, Minnesota (Doc. #1244)

12.969 Although I support the need for clean water for all residents of the US and for future generations I would like to have you know that if you are going to be requiring more 404 permits you need to do a much better job of administering and delivering the permitting process. In the Red River Valley of Minnesota we have already experienced delays of which are unacceptable. When it takes two years or more to obtain an IP (individual permit) the costs of the original project go up due to inflation and the internal administrative time negotiating the permit become excessive and unacceptable. (p. 1)

Agency Response: **The rule only provides for a definition of "waters of the U.S." Implementation of the Section 404 permitting program is outside the scope of this rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that**

under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

12.970 Why are you putting all this effort into adopting more rules when we are not seeing any improvement in your metrics for meeting your delivery deadlines for 404 permits? The St. Paul, MN. COE office either needs more staff or different staff who can deliver permits in a timely manner. We are applying for permits with applications filled out by professional wetland engineering consultants as requested by the COE and compared to several years ago when the applications were done on the local level with help from the County SWCD's and the State BWSR but were told that if we went with professional consultants we would be getting faster turnaround on our permit applications. Since then we are spending over $10,000 on each permit application by hiring a consultant and we have not seen any improvement. (p. 1)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

12.971 In addition, the State of Minnesota already has a wetland protection program which in our district requires that wetlands be replaced at a 2:1 ratio. This is more restrictive than the COE 404 guidelines which accept mitigation at a 1:1 ratio. The State already has a bank of credits for local road projects which can be used for mitigation if it cannot be done on site. (p. 1)

Agency Response: **Nothing in this rule impacts the ability of states to develop more environmentally protective program.**

Lake Charles Harbor and Terminal District (Doc. #14448)

The cumulative effect of proposed changes is an increase in the amount of land where activities will come under the jurisdiction of the CWA. The District is concerned that this increased coverage will result in larger numbers of jurisdictional determinations and permits to be evaluated, further clogging the Corps understaffed regulatory function and further delaying the issuance of permits critical for the phenomenal industrial development expected in southwest Louisiana. In short, this proposal will increase permitting and mitigation burdens, project costs will increase, and permits will be further delayed. (p. 2)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

Union Pacific Railroad Company (Doc. #15254)

12.972 The Proposed Rule would also substantially increase the burden on regulated entities and federal and State agencies, resulting in diversion of limited resources, increased permitting delays, expenses and litigation without benefitting water quality or the environment. The Agencies are already struggling to process permits in a timely manner. They, as well as other federal and State agencies involved in CWA permitting, will not be able to handle the additional notifications, consultations, reviews, assessments and approvals that will be required as a result of the vastly expanded scope of CWA jurisdiction under the Proposed Rule. (p. 4)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do

not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations

12.973 An expansion of CWA jurisdiction will also significantly and unnecessarily increase the burden for the Agencies, which are already often unable to process permits, conduct inspections and perform other statutory requirements in a timely fashion. It will increase this burden for State and local Agencies, as well, especially in States delegated with CWA implementation authority. And the expansion will create these burdens and adverse effects without benefiting water quality, which is already adequately protected under State and federal law. (p. 22)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

12.974 The Significant Increase in CWA Jurisdiction Under the Proposed Rule will Impair Safe and Efficient Rail Operations and Delay Necessary Infrastructure Construction, Maintenance and Repairs. (…)

Other railroad construction, maintenance and related activities also occur near jurisdictional waters. For example, installation of new track, replacement of culverts, construction and repair of bridges and installation of fiber optic, signal and cable lines are all common activities along railroad rights of way. To the extent that these rail maintenance activities occur in areas already subject to CWA jurisdiction, as defined by the holding in Rapanos, the railroads' resources already are severely stretched in order to schedule maintenance, repair, replacement and construction activities so that adequate time exists to satisfy CWA Section 404 and other regulatory requirements.[240] Given the more than 140,000 miles of rail line in the United States, a substantial amount of which is near, crosses, or is adjacent to navigable and/or relatively permanent surface waters, this current level of regulation is extremely burdensome. Expanded CWA jurisdiction under the Proposed Rule will extend far beyond ditches and will hamper and delay construction, maintenance and repair of culverts, bridges, causeways, roadbeds, and virtually every structure and activity required for safe, efficient and reliable railroad operations.

[240] We note that, if CWA jurisdiction exists, such permitting also often requires Section 401 certifications from USEPA or State agencies, and consultations with U.S. Fish & Wildlife, and review and approval by other agencies, a process that can require weeks, months or even years to complete.

The inevitable increase in waters that will become subject to CWA jurisdiction under the Proposed Rule will make compliance even more difficult and will result in further delays in obtaining agency approvals. This in turn will adversely affect carefully coordinated rail freight operations, maintenance and construction schedules, and will inevitably threaten the safety and efficiency of rail operations. Railroads also have to respond to emergency situations, such as floods, mudslides, avalanches, debris flows, hurricanes and storm events, quickly and efficiently providing goods and services. Interruptions and delays in rail service can be catastrophic for businesses, consumers and the economy, and may even threaten public health and safety. (p. 23)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

12.975 The Proposed Rule will Increase Burdens on the Agencies, and on State and Local Permitting and Enforcement Authorities

The Agencies are already struggling to process permits in a timely manner and simply will not be able to handle the notifications, consultations, reviews, assessments and approvals that will result from the greatly expanded scope of CWA jurisdiction under the Proposed Rule. According to a recent report concerning utility project permitting, in 2011 the Corps completed review of 71 percent of individual Section 404 applications within 120 days of deeming the application complete, and completed review of 75 percent of general permit applications within 60 days of deeming the application complete.[241] The periods of time required for the Corps' review of the remaining 25-29 percent of such permit applications are presumably longer.

These time frames are far too long for approval of urgent projects and are intolerable for emergency repairs and response activities. The existing resources of the Agencies will be stretched much thinner under the Proposed Rule. Moreover, the impact of expanded

[241] U.S. Governmental Accountability Office, Report to Congressional Committees, Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps and Time Frames Vary, GAO-13-221, pp. 26-30 (Feb. 2013), http://www.gao.gov/products/GAO-13-221.

CWA jurisdiction will not only fall upon the Agencies, but also on other federal, State and local Agencies that must be consulted in the permitting process (e.g., USFWS, SHPOs and 401certification authorities) or which have delegated authority for CWA implementation – State and local agencies that have their own responsibilities for protecting water quality, as well as their own fiscal constraints. Recent revisions to the Corps' Nationwide Permits, which require further staff involvement in reviews of preconstruction notification and coordination with other Agencies, have further exacerbated the problem.

The Agencies' analysis of the Proposed Rule ignores the current backlog of permit applications and grossly underestimates the resources that would be required for implementation of the Proposed Rule. A more thorough and realistic analysis of the regulatory costs and benefits of the standards and requirements set out in the Proposed Rule is needed, together with an increased budget authorization approved by Congress to cover the additional personnel and related costs required by the expanded CWA jurisdiction, if such increased budget authorization can be obtained. (p. 23-24)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Airports Council International – North America (Doc. #16370)

12.976 The Proposed Rule will likely cause additional problems of special concern to those airports built on permeable fill material. In such circumstances, areas of differential settling on and around the airfield can rapidly meet jurisdictional wetland criteria. It is our experience that under these conditions jurisdictional criteria [hydric soils, inundation period and hydrophytic vegetation] can develop in as few as three to five years of regular surface ponding. Over the years some airports have submitted jurisdictional determinations (JDs) on a regular basis to the Corps in order to identify and fill these "isolated wetlands" to address the waterfowl attractant issue under 14 CFR Part 139 without incurring a regulatory burden under federal standards. To remove this regulatory exclusion by rule based on a "shallow subsurface hydrologic connection" potentially adds yet another regulatory burden to the airport to comply with FAA mandates to manage hazardous wildlife attractants on and around the airport. (p. 8)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Also, the final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.**

Airlines for America (Doc. #15439)

12.977 EPA and the Corps repeatedly have assured stakeholders that the proposal does not expand CWA jurisdiction but simply revises agency regulations to reflect the Agencies' longstanding interpretations. A4A supports this aim. Unfortunately, however, the Proposed Rule appears sweepingly broad in its reach. Moreover, it invites broad interpretation by reason of the subjective standard of "significant nexus" that the Agencies have employed when seeking to describe the proper reach of the Act.[242] Most important, it would operate unpredictably in the context of airports. An example is illustrative. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In Addition, the final rule reduces the number of instances where signification nexus determinations must be made and clarifies the definition of significant nexus to reduce subjectivity in its application. For example, the agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.**

[242] "'Significant nexus' is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a 'significant nexus.' There is a gradient in the relation of waters to each other, and this is documented in the Report." 79 Fed. Reg. at 22193, col.2.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

12.978 This general comment refers to Section 328.3, *Federal Register* pages 22262-22263. If the proposed definitions result in changes to mitigation requirements/ratios, these impacts need to be given consideration, documented, and published for public notice. (p. 3)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. Further, the rule does not alter or change the mitigation rule. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

SD1 (Doc. #15140)

12.979 The consequences of failing to develop a rigorous scientifically-based set of gradient and regionally based tests for "significant nexus" to establish whether adjoining and neighboring water bodies are truly WOTUS will likely be an exceptional increase in the number of case-specific determinations rather than a decrease, with concurrent increases in paperwork and litigation involving citizen lawsuits. The absence of clear guidance for what constitutes a "significant nexus" will likely result in many projects having to go through the same sets of arguments as to what is and is not WOTUS, with no guarantee that the same determination will be achieved. As such, the proposed rule, as currently constituted, fails to advance the stated goal of:

"*Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations*…" (p. 4)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.

Southern Illinois Power Cooperative (Doc. #15486)

12.980 Maintenance and construction is regularly performed on water management features located within the plant footprint including stormwater conveyances (i.e., canals, ditches, washes, swales, arroyos, containment basins and ponds); other water management features (e.g., cooling ponds, spill diversion ditches, raw water and service water ponds, intake and discharge canals, construction pond, roadside and other ditches); waste and wastewater treatment systems; building and equipment pads; and SPCC containment areas. Typically, these on-site structures and features have not been considered jurisdictional by EPA or state water regulatory agencies.

Such features function to control and manage wastewater, stormwater, and other waters in order to prevent pollutants or even heat from reaching WOTUS. They may be part of the water management system at any power plant including those fueled by coal, natural gas, and nuclear. Just because a feature or conduit coveys a pollutant to a downstream waterbody should not justify asserting that a feature or conduit itself is jurisdictional.

Were such water management features and conveyances to become WOTUS, facilities would be confronted with additional permitting issues. Water management structures determined to be WOTUS would require discharge permits. The discharge to the water management system would have to be treated and possibly meet state water quality standards before it is sent to the treatment system designed to treat the water in the first place. Not only that, but 404 permits could be required to maintain the water management systems. Would cleaning the systems to remove sediment or scale be considered "dredging;" would modifying equipment be considered "fill"?

In comments on EPA's proposed steam electric effluent limitation guidelines, NRECA encouraged EPA to establish "water bubbles" over power plants, similar to those promulgated for the iron and steel industry. Within the bubble, the plant would be able to manage its water by possibly trading between and among sources, so long as discharges from the plant met applicable limits. Allowing and encouraging plant-wide water management systems and centralized wastewater treatment can actually contribute to improved environmental performance by encouraging water recycling, re-use and conservation. (p. 6-7)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water. The Section**

404(f)(1) exemption for ditch maintenance remains in effect. The proposed steam electric effluent guidelines are outside the scope of this rulemaking.

12.981 (Regarding "Decommissioning Retiring Sites"] As the electric utility industry brings new generation resources online, older plants are being decommissioned and their sites are frequently remediated for other uses. Such "brownfields" development has been encouraged for years by EPA as well as state and local parties interested in economic development. The proposed rule would hamper efforts to make these sites available for continued, productive use.

Decommissioning often requires cleaning and filling ditches, canals and treatment ponds on the site, as well as grading and other groundwork. These features often have not been treated as jurisdictional in the past, but might be deemed WOTUS under the proposed rule. Remediation work could require a section 404 permit and compensatory mitigation in essence requiring mitigation for mitigation! Added costs and delays could result in companies electing to mothball rather than restore sites, reducing the sites value and utility for all. (p. 8)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are excluded from the rule. In addition, the rule provides additional clarification regarding the kinds of water management features that are excluded from the rule including stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule also provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water. Compensatory mitigation projects do not currently require compensation and this will not change under this rule.

NW Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

12.982 As written, the rule creates confusion to the status of NWPs relying on the 300 linear foot assessment because the proposed definition of "tributary" would include all streams with a bed, bank and OHWM. The proposed rule should clarify that NWP evaluations under the 404 program are not affected by the rulemaking.

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and

predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

Duke Energy (Doc. #13029)

12.983 The inclusion of ditches is a concern for Duke Energy for the potential effect that it could have on several routine activities. For example, including ditches as "waters of the Unites States" could significantly increase § 404 permitting for construction or maintenance of transmission or distribution lines, just based on the number of roadside ditch crossings. As another example, at every power generation site that Duke Energy owns there are various types of ditches or conveyances used to transport water for various water management purposes, such as transporting low volume wastewater to a collection pond or stormwater management conveyances that drain runoff following precipitation events. Duke Energy is concerned that additional § 404 permitting could be required for activities necessary for routine maintenance of these conveyances, such as clearing out vegetation or debris, even though they may already be regulated under other programs, such as the facility's NPDES permit or Florida's Environmental Resource Permit (ERP) program. (p. 27)

Agency Response: The rule provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary and ditches that do not flow, either directly or through another water, into a traditional navigable water. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule

12.984 Under the proposed rule, virtually all waters could potentially become jurisdictional and, as a result, even more projects and activities will be required to obtain § 404 permits. (p. 51)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying the definition of tributary, the rule also clarifies definitions for adjacent, neighboring, significant nexus, ordinary high water mark, and high tide line. This narrowing of scope and clarifying of definitions are designed to avoid the kind of unbounded jurisdiction described by the commenter.

12.985 Applying for a § 404 permit can also trigger additional requirements that involve consultation with other state and federal agencies. For example, permit applicants must obtain a state water quality certification to proceed with the § 404 permit process. Permit applicants may also need to engage in consultations with various federal agencies to evaluate the impacts of the proposed activity under the National Environmental Policy

Act (NEPA), the Endangered Species Act (ESA), the National Historic Preservation Act, and other federal statutes. These consultations are often lengthy and burdensome resulting in additional costs, delays and project changes. In addition, the agencies' increased jurisdiction will affect § 404 compensatory mitigation costs. With the significant expansion of jurisdiction to include every tributary, regardless of size or flow regime, along with the majority of ditches, it will become increasingly difficult to minimize or avoid impacts to "waters of the United States" for projects. This could also substantially increase the amount of time needed to obtain general and individual § 404 permits. These delays and cost increases provide no additional environmental protection. (p. 52)

Agency Response: **Implementation of the section 404 permit program including requirements of other related acts such as NEPA and the ESA are outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

Duncan Valley Electric Cooperative, Inc. (Doc. #13033)

12.986 The Section 404 permitting process often results in significant time delays, which can be more injurious to cooperatives than the direct costs associated with permitting. Our experience has been that the Agencies are already struggling under the current workload to process Section 404 permits in a timely fashion, and the substantial increase in federal jurisdiction promised by the Proposed Rule will only add to the Agencies' and regulated community's permitting burden. (p. 2)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Upper Niobrara White Natural Resources District (Doc. #13562)

12.987 Currently, the Section 402 and 303 programs are run by the NDEQ who relies on not only the federal rules but also state statutes. Through the implementation of the

programs, the Department works closely with local stakeholders and the NRDs to ensure water quality in protected through both regulatory and non-regulatory actions – local solutions for local problems. By expanding jurisdiction, the control would shift and local control would be lost and the broad decisions could be made without any local input. It is recommended the rule be withdrawn and if necessary re-worked to specifically address the issues related to the Section 404 program rather than the entire CWA. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Nothing in this rule limits local input or the ability of states to enact more environmentally protective programs. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.**

Murray Energy Corporation (Doc. #13954)

12.988 Wastewater treatment systems on mines utilize a series of ponds (*i.e.*, bench ponds and sediment ponds), natural drainages, and man-made drainage ditches, including both permanent and temporary ditches. These systems are required by federal regulations pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"). *See e.g.,* 30 C.F.R. § 816.41. Construction of surface mine bench ponds and sediment ponds is already generally subject to 404 permitting, and *outfalls* from the ditches draining them are also already commonly subject to CWA Section 402 permit requirements. The Proposed Rule would add a burdensome and unworkable layer of complexity to this permitting scheme for surface mines by making the drainage ditches *themselves* subject to CWA jurisdiction. (p. 12)

Agency Response: **The rule provides additional clarification regarding the types of ditches that are excluded from the rule including ephemeral ditches that are not a relocated tributary or excavated in a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. Also, the CWA exemption for ditch maintenance remains in effect and is not changed by this rule**

Southern Company (Doc. #14134)

12.989 With its expansion of jurisdiction, the proposal will undermine the efficiency afforded by the Corps' NWP program by pushing many projects into the more costly and

administratively complex realm of individual permits. By way of one example of particular interest to Southern Company and the electric utility industry at large, the expansion of jurisdictional waters resulting under the agencies' proposal would limit the use and availability of NWP 12. Given the importance of NWP 12 (and other NWPs) for utilities and utility line activities, the increased likelihood of exceeding the ≤ ½-acre eligibility threshold is particularly troubling for Southern Company. Eligibility under numerous other NWPs is likely to be similarly limited given the jurisdictional implications under various parts of the proposal – e.g., because impacts to previously non-jurisdictional ephemeral ditches would, under the new terms in the proposed rule, count towards the linear foot limitations establishing eligibility under various NWPs. Expanded jurisdiction will invariably result in more jurisdictional impacts from construction-related activities, giving rise to more compensatory mitigation to offset these impacts and increasing the complexity and costs of permitting. (p. 15-16)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

12.990 If a pipeline is constructed across a normally dry wash or dry arroyo, and the construction activity occurs only when water is not flowing, will the project nevertheless need a section 404 permit (if the answer is "yes" or "maybe," are there any limits on the amount or frequency of flow that must pass through the wash or arroyo); (p. 7-8)

Agency Response: **Where that wash or arroyo has sufficient flow to establish an OHWM and it meets the agencies' regulatory definition of tributary then it is a water of the United States and a section 404 permit may needed. Where these washes or arroyos lack an OHWM or otherwise do not meet the definition of tributary they are erosional features and no section 404 permit would be required for discharges resulting from the pipeline construction.**

The Clean Energy Group Waters Initiative (Doc. #14616)

12.991 Linear projects often have a number of crossings of WOTUS, which will increase if the extent or number of jurisdictional waters increases as a result of this rule. Further, expanding the extent of jurisdictional waters would also likely link previously isolated crossings into a single crossing, increasing the likelihood of triggering an individual permit. Even a three percent increase in jurisdictional waters could tip a number of proposed projects into the individual permit process increasing costs and timelines and, thus, decreasing the likelihood of completion. This would jeopardize large portions of the nation's near- and long-term energy policy goals, including renewables and

transmission integral to achieving the goals and objectives of the Administration's Climate Action Plan. (p. 8-9)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.992 We are also concerned that expanding WOTUS' jurisdictional status could undermine the NWP program by preventing and/or significantly delaying project development and infrastructure modernization efforts. Undermining the NWP process would result in the following adverse consequences, as identified by the Corps in its existing NWP 12 Decision Document:

(1) reduce the Corps' ability to pursue the current level of review for other activities that have greater adverse effects on the aquatic environment;

(2) reduce the Corps' ability to conduct compliance actions;

(3) require substantial additional resources for the Corps to evaluate minor activities through the individual permit process, and for the public and federal, tribal, and state resource agencies to review and comment; and

(4) eliminate the incentive to design projects that meet the existing terms and conditions of a NWP. (p. 9)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

12.993 Additionally, the Corps' general offices may be forced to develop regional permits if the NWP process is undermined by an expansion of the WOTUS' jurisdiction. The Corps has acknowledged that such a result would be "an impractical and inefficient method" for permitting activities with minimal adverse effects on aquatic life, such as those described here. In particular, the Corps also notes that companies that operate in more than one Corps district, "would be adversely affected by the widespread use of regional permits because of the greater potential for lack of consistency and predictability in the

authorization of similar activities…"[243] In addition, this process could result in inconsistencies and arbitrary differences among regions, with a multitude of adverse impacts to the energy system. (p. 9)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

12.994 We also suggest that the agencies consider implementing an expedited permitting process specifically for these important projects, in the spirit of the existing NWPs, in order to ensure that regulatory uncertainty regarding WOTUS is neither a barrier to the Climate Action Plan nor an impediment to environmentally sound energy infrastructure development. If the WOTUS rule is finalized in its current form, without an expedited permitting process, we are concerned that clean energy infrastructure project delays and cancellations will take place. (p. 12)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

12.995 The time to obtain permits will also increase significantly and permitting authorities may not have the resources to process the influx of applications, as noted in the Corps' concerns above. Currently, based on the member companies' experience, NWPs take between nine and 12 months for processing and could be as little as 45 days if there is no agency intervention. In contrast, based on our members' experiences, individual permits can take between 34 and 36 months. (p. 14)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of**

[243] U.S. Army Corp of Engineers, Decision Document: Nationwide Permit 12 (February 2012) (Available at: http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf).

categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

Metropolitan Water District of Southern California (Doc. #14637)

12.996 An increase in the number of CWA permits required could also impede Metropolitan's ability to support timely conservation and local supply development efforts of member agencies. Metropolitan's member agencies have expressed concern that the proposed rule may delay, increase the cost of, or prevent obtaining funding of their water conservation efforts if CWA permits are required due to the additional time and cost associated with obtaining such permits. For example, a permit application submitted to the Corps in May, 2013 for one of Metropolitan's critical infrastructure projects is still pending. Metropolitan now expects that it will take more than a year to obtain Section 404 permits for its projects. (p. 5)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

Exelon Corporation (Doc. #14641)

12.997 … Exelon operates approximately 7,400 miles of transmission lines. These lines require frequent servicing and maintenance, oftentimes necessitating contact with or work within wetlands and waterways. Expanding the definition of WOTUS, as proposed by the Agencies, would increase the number of transmission and distribution installation and maintenance projects subject to Section 404 permitting and reduce the number of projects for which nationwide or regional general permitting would be available. Generally, a project that requires an Individual Permit requires a year or more in permitting time as compared to weeks or months for a Nationwide Permit. Our comments through the Clean Energy Group provide additional detail on permitting costs. (p. 4)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be

defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

American Public Power Association (Doc. #15008)

12.998 The agencies' proposed expansion of jurisdiction will result in additional permit obligations for all CWA programs. The agencies have failed to consider the significant implications on these programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, including storm water and non-storm water, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 311 oil spill prevention. The draft rule will subject more projects and activities to CWA jurisdiction because more features will be deemed jurisdictional.

These new and greatly expanded permitting requirements come at a time when many state environmental agencies are struggling to meet current levels of service with current resources. It is unreasonable given EPA's previous efforts with states to believe that state fee structures fully cover the costs of permits. This rule adds a significant unfunded mandate to states at the wrong time. Additionally, the proposed expansion of the total miles of jurisdictional waters, also greatly expands the geographic areas of responsibility for many state environmental agencies that are often inadequately funded to carry out clean water activities in the current smaller universe of stream miles. (p. 11)

Agency Response: Implementation of the CWA permitting programs is outside the scope of this rulemaking. The rule only provides a definition for "waters of the U.S." The rule does not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S., or other activities in jurisdictional waters of the U.S. including for example, NPDES permits, water quality standards, or Section 311 requirements which also require authorization. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

Eagle River Water & Sanitation District (Doc. #15116)

12.999 It is recommended that the proposed rule clarify that the current limits in the NWP regulation will continue to apply to the previously-defined waters of the United States, prior to the new rule, until and only after the NWP rule has undergone a complete and thorough public rulemaking (currently scheduled for 2017) where these limits can be carefully reviewed and modified as appropriate to account for the changes in the waters of the United States definition resulting from the proposed rule. (p. 6)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Cache La Poudre Water Users Association (Doc. #15499)

12.1000 To the extent waters not formerly subject to jurisdiction are made jurisdictional, such as small decades-old irrigation ditches and reservoirs, any expansion, reconstruction or enlargement (even perhaps routine maintenance and repair) or these structures could trigger Section 404 of the CWA and require federal permitting, with its attended cost and delay.· Section 401 discharge permitting requirements may also be implicated, as well .as other federal requirements and permitting under the Endangered Species Act or the National Environmental Policy Act. Those of us who have watched water storage projects in this region languish after more than a decade awaiting Environmental Impact Statements shudder at the thought of having the repair, maintenance and improvement of our ditch and reservoir infrastructure (our very lifeblood in this arid land) subject to myriad federal permitting processes. (p. 3)

Agency Response: **Implementation of the CWA permitting programs is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

South Metro Water Supply Authority (Doc. #16481)

12.1001 (…) members of SMWSA would meet unrealistic hardships in developing, operating, and maintaining sustainable water supplies to meet the demands of our communities. There is serious concern among our members, as well as surrounding water providers, that the rule would impose extreme restrictions and hurdles for the development of future necessary water projects. This rule would confuse and expand the scope of the Federal Nexus, resulting in delays and additional regulatory obstacles, even for relatively simple water projects, that do not actually serve to protect the environment. Additionally, the proposed rule will significantly increase the costs for construction or modification of required infrastructure through increased permitting requirements and additional mitigation costs. Despite agency protestations to the contrary, it is beyond argument that the proposed rule would expand the scope of federal jurisdiction in the following ways:

- The proposal would, for the first time, categorize all tributaries as jurisdictional by rule thus triggering the Section 404 permitting process and negating any opportunity to scientifically rebut the case for jurisdiction.
- The proposed rule would, for the first time, categorize "all" adjacent "waters" as jurisdictional by rule, as compared to the prior reference to adjacent "wetlands."
- The proposed rule establishes a new category of "other waters" which may be found jurisdictional.
- The proposed rule classifies all ditches as jurisdictional unless specifically exempted. The exemptions in the proposed rule are ignorant of the realities of water supply in the arid west. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying and refining the definition for tributaries, the final rule also clarifies and refines the definition for adjacent, identifies types of ditches that are excluded from regulation, and replaced the section formerly know as "other waters".**

12.1002 What is the impact of the proposal on impoundments currently regulated under RCRA but for which no exemption exists[?] (p. 4)

Agency Response: **The agencies are not changing their policies regarding the jurisdictional status of impoundments. RCRA jurisdiction is a separate matter from CWA jurisdiction and outside the scope of this rulemaking..**

12.1003 If a pipeline is constructed across a normally dry wash or dry arroyo, and the construction activity occurs only when water is not flowing, will the project nevertheless need a section 404 permit [?] (if the answer is "yes" or "maybe," are there any limits on the amount or frequency of flow that must pass through the wash or arroyo[?]); (p. 4)

Agency Response: **Where that wash or arroyo has sufficient flow to establish an OHWM and it meets the agencies' regulatory definition of tributary then it is a water of the United States and a section 404 permit may be needed. Where these washes or arroyos lack an OHWM or otherwise do not meet the definition of tributary they are erosional features and no section 404 permit would be required for discharges resulting from the pipeline construction.**

Texas Water Development Board (Doc. #16563)

12.1004 More projects in areas considered under the proposed rule to be jurisdictional will require Section 404 permits. This could result in higher mitigation costs for certain types of projects constructed in jurisdictional areas or higher construction costs (e.g., for boring under streams and wetlands) to avoid impacts on jurisdictional waters. (p. 3)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be**

defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

12.1005 Drier areas of the State would see the greatest increase in jurisdictional tributaries due to the greater number of intermittent or ephemeral streams in those areas. The greatest effect would likely be on some off-channel reservoirs that are proposed in the upper reaches of intermittent streams and in areas between major streams. Tributaries and wetlands in many of these reservoir sites could now be considered jurisdictional waters. This could significantly increase the cost and time to develop one of these projects, and affect the design and location of proposed sites. (p. 3)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Xcel Energy, Inc. (Doc. #18023)

12.1006 Xcel Energy is concerned that if field inspectors interpret the "other waters" standard to broadly cover minor stream crossings, ditches, and other "adjacent" water features and erected structures for conveyances across otherwise separate utility line projects, the Nationwide Permit (NWP) acreage thresholds will be quickly exceeded and applicants will be compelled to rely on individual permits. The consequences of aggregation are significant: while NWP authorizations for minor work take a matter of days or weeks to receive, individual permits can add months or years to project reviews-and several times the cost of obtaining a NWP. (p. 4)

Agency Response: Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying and refining the definition for tributaries, the final rule also clarifies and refines the definition for adjacent, identifies types of ditches that are excluded from regulation, and replaced the section formerly known as "other waters".

Association of Illinois Electric Cooperatives (Doc. #16168)

12.1007 Under the proposed rule, if a roadside ditch or other feature is a WOTUS, it would appear that the placement of absorbent constitutes a "fill", and the removal of contaminated media would constitute "dredging" – thus triggering a 404 permit. The current SPCC program is not designed to address spills such as these. (p. 5)

Agency Response: The rule defines the scope of waters of the U.S. subject to the CWA. It will not affect the current implementation of the various CWA programs; implementation of those programs are outside the scope of this rule. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the

rule than under the existing regulations, in part because the rule includes provisions for a number of excluded waters, some of which are excluded by rule for the first time, including many ditches and certain stormwater conveyance features. For further discussion of exclusions, see summary responses for Topic 6.2: Excluded ditches and Topic 7: Features and waters not jurisdictional.

Cascade County - Board of County Commissioners (Doc. #17084)

12.1008 It appears the current permitting process for larvicide treatment in waterways and/or pesticide (mosquito abatement) and herbicide (weed management) applications along waterways will remain unchanged under the new rule; however additional clarification is suggested.

Cascade County has historically applied for and received a CWA-404 Permit for aerial and land-based larvicide applications in jurisdictional waters where mosquito larvae are present. The larvicide prevents mosquito larvae from maturing to the adult stage and is an effective mosquito control measure. The current permitting process has been routine and the permit easily acquired. How will the new rulemaking affect the current permit process or delay authorization for larvicide and pesticide applications. (p. 3)

Agency Response: We presume the commenter meant to refer to the 402 Pesticides General Permit (PGP) (rather and 404). Obtaining coverage under the 402 PGP is efficient and streamlined and should continue to be. See also comment response for Section 12.3.

12.1009 Likewise, the County utilizes chemical and biologic measures for weed management. What additional regulations might be required for herbicide applications adjacent to waterways or along stream banks when manufacturer instructions are followed? Similar to the situation whereby NRCS conservation practices will change in future years, so will larvicide, pesticide and herbicide treatments. How will the rulemaking accommodate future practices when new products for insect and weed management are approved in the market? (p. 3)

Agency Response: The commenter would continue to obtain coverage under the 402 PGP. Speculation regarding future, undetermined changes in practice are beyond the scope of this rulemaking.

Battelle Energy Alliance, LLC (Doc. #16448)

12.1010 Because the definition of "significant nexus" and its accompanying terms are vague, the proposed rule provides little guidance for the public to determine whether a significant nexus exists between a potential "other water" and a categorical navigable water. As a result, the proposed rule effectively forces the public to obtain a "significant nexus" analysis from the agencies for all waters except those specifically listed as exempt. This is likely to increase transaction costs. (p. 5)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent

waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered.

Tucson Electric Power Company (Doc. #19561)

12.1011 Preamble in the proposed rule suggest a decrease the number of jurisdictional determinations and CWA permitting efforts would result from the revised definition of WUS, however UNS believes the implementation of the rule as currently written (i.e. ambiguity of certain definitions such as "tributary'', "adjacent", "neighboring", and "other waters") would increase the complexity of facilitating jurisdictional delineations and increase the number of CWA Section 404 permit applications to be processed by the Corp in Arizona. In the past, the Corps has been inconsistent in their interpretation of the definition of WUS, in the processing of Section 404 permits at the District level, and general administration of the Section 404 permit program. This lack of continuity within the Corps in implementing the CWA regulations has resulted in confusion over which surface water features are subject to regulation, numerous lawsuits, and several Government Accounting Office (GAO) reports.[244] [245] [246] One GAO report states that *"In certain circumstances, Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government."* UNS believes that the proposed rule will result in additional, and continued, confusion among the Districts, consultants and the regulated community.

The map of seasonal and rain dependent streams presented on EPA's website[247] indicates nearly all lands in Arizona (82-100%) are covered with numerous ephemeral drainages and vast flood plain areas. The agencies' jurisdiction over all of these areas would increase jurisdictional determination and Section 404 permit processing times. These extended processing times impact the economic feasibility of new development by adding uncertainty, increased costs for Section 404 permitting and associated mitigation.

UNS project permitting costs and approval timelines would likely increase under the proposed rule. Utility companies typically use Section 404 Nationwide Permit 12 available for utility line activities (NWP 12), because most ephemeral drainage crossings result in loss of less than 112- acre of WUS and under the current definition are a "single and complete project". Currently, each crossing of a "water of the U.S." is treated as a "single and complete project" with independent utility. The definition of "adjacent

[244] Waters and Wetlands. Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction. GA0-04-297. 2004.
[245] Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction. GAO-OS-870.
[246] The Corps of Engineers' Administration of the Section 404 Program. GAO/RCED-88-110.
[247] http://water.epa.gov/lawsregs/guidance/wetlands/upload/IE Stream Percentage high.jpg

waters" in the proposed rule would create large areas of CWA jurisdiction exceeding the 112-acre threshold (e.g. entire floodplains and watersheds would be considered WUS) of NWP 12 permit coverage. If all WUS in the flood plain or riparian area were treated as one interconnected WUS, it would be virtually impossible for utilities to use NWP 12 in Arizona. Instead, utilities would be required to apply for the more costly and time-consuming individual Section 404 permit. Furthermore, it is likely that most of the current Nationwide Permits would be useless for the regulated community, as many more surface water features would be considered WUS by the agencies. (p. 3-4)

Agency Response: **Implementation of the section 404 permit program is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

12.1012 In addition to expanding jurisdiction, the proposed rule would result, not only in a more complex jurisdictional delineation / determination process, but would also result in additional and costly project reviews by other federal agencies. Because the CWA is an "umbrella" regulation, the expansion of the WUS by the proposed rule would result in more conflict with resources and would therefore trigger federal agency review of more projects in accordance with the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act (BGEPA), and Section 106 of the National Historic Preservation Act (NHPA), as these reviews are required for all projects regulated under the CWA. Section 404 of the CW A requires permittees to conduct a thorough review of project activities that affect WUS to ensure compliance with these acts. Typically, this requires additional and often costly and time-consuming studies and lengthy agency consultations that can add significant constraints and financial burden to a project. (p. 4)

Agency Response: **Implementation of the CWA permitting programs, including compliance with other statutes, is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which**

was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.

Partners in Amphibian and Reptile Conservation (Doc. #7499.1)

12.1013 In addition to the questions about terms and language used in the proposed rule, we also have the following questions about permitting and implementation of the rule:

- Given the increased number of permits expected upon implementation of the proposed rule, how will state agencies and the EPA meet their enforcement and permitting obligations, especially given staff reductions at numerous state environmental agencies?
- Will the proposed permitting process include greater permitting burdens by organizations conducting restoration of degraded wetlands/streams, thus reducing the conservation potential of those activities? (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. In light of these factors the agencies' do not anticipate the rule creating greater permit burdens for organizations conducting restoration of degraded wetlands/streams. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.**

Association of State Floodplain Managers (Doc. #19452)

12.1014 We also recommend continuation of this option to "opt out" of a full approved JD in this manner in headwater areas where the upstream limits of "tributaries" may be uncertain and a permitting decision is more expeditious for the landowner.

While the definition of "significant nexus" in the proposed rule is consistent with the decisions of the U.S. Supreme Court and is also scientifically defensible, it may continue to be extremely time consuming and impractical to evaluate and document the presence of a significant nexus in numerous individual regulatory decisions on a case-by-case basis particularly for aquatic resources that full under the "other waters" category. Documentation of a significant nexus in many ways parallels fact finding under the

404(b)(1) guidelines; that is, the documentation of ecological services that have a significant impact on the chemical, physical and biological integrity of downstream waters may guide a permit decision. Therefore, it may be simpler to move directly to a permitting decision. In that decision, the scope of the project impact on the wetland (or water) in question will also be taken into account, and if that impact is minimal, then a permit (or authorization under a general permit) may be approved. In short, the permit process may be more expeditious than documentation of a significant nexus.

Also, numerous dredge and fill activities in small tributaries – such as routine stream crossings, culvert placement, bank stabilization and maintenance – may be covered by existing or future general permits. In these instances, detailed jurisdictional documentation may be unnecessarily time consuming. In headwater areas, it may be more practical to focus the regulatory process more on acceptable activities, and BMP's that should be associated with such activities, than on defining a line between regulated and unregulated channels where such a line is not easily identifiable on the landscape. (p. 8)

Agency Response: **The agencies also intend to retain the concept of preliminary JDs. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying and refining the definition for tributaries, the final rule also clarifies and refines the definitions for adjacent, neighboring and significant nexus; identifies types of ditches that are excluded from regulation, and replaced the section formerly known as "other waters". The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations.**

The Association of State Wetland Managers (Doc. #14131)

12.1015 ASWM recommends development of implementation procedures and any necessary supporting rule language to allow for designation of categories of "other waters" found to have a significant nexus with downstream navigable waters as jurisdictional by rule on a state or regional basis.

> As noted above, we support protection of "other waters" on a categorical basis where it is supported by science, but believe that designation of additional categories of protected "other waters" through a future national rulemaking will be cumbersome and is likely to overlook locally important types of wetlands. Therefore, we recommend that the proposed rule, along with implementing guidance, allow for a process that includes the following attributes:
>
> - The process should provide for designation of categories of "other waters" having a significant nexus with navigable waters within a defined geographic region, in accordance with the provisions of the proposed rule regarding Waters of the United States, following gathering of appropriate documentation, public notice, and review. Such a list could be updated every fifth year, or at some other suitable interval. This would allow for identification, study, and designation or removal of categories of waters over time.
> - The process for designating categories of other waters that are jurisdictional by rule should be a collaborative one, involving one or more states or tribes and Corps Districts, and the EPA, along with other stakeholders.
> - The process should provide for public review and comment of any proposed designations, and define a process for timely approval of the designated categories by the federal agencies. (p. 5)

Agency Response: **In the final rule, the agencies provided additional clarity by expanding the discussion of "similarly situated" in the preamble and the rule identifies (paragraph (a)(7)) five subcategories of waters (praire potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal praire wetlands) that the agencies have determined are "similarly situated" for purposes of a significant nexus determination. The other waters section of the rule has been replaced with provisions that the agencies believe will streamline and facilitate identification of additional waters that have a significant nexus. The agencies are developing guidance to facilitate implementation of the final rule when it becomes effective, which will provide for consistent determinations. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations.**

12.1016 In order to minimize regulatory delays associated with a significant nexus determination, or with distinguishing between regulated tributaries and unregulated ditches where such a distinction is unclear, we recommended continued use of preliminary jurisdictional determinations (JD's). This process allows a landowner to assume that jurisdictional waters "may be" present on a site, and to move directly to a permitting process and avoid the delays involved with obtaining a formal JD, especially where general permits are applicable.

We also recommend continuation of this option to "opt out" of a full approved JD in this manner in headwater areas where the upstream limits of "tributaries" may be uncertain and a permitting decision is more expeditious for the landowner.

While the definition of "significant nexus" in the proposed rule is consistent with the decisions of the U.S. Supreme Court and is also scientifically defensible, it may continue to be extremely time consuming and impractical to evaluate and document the presence of a significant nexus in numerous individual regulatory decisions on a case-by-case basis particularly for aquatic resources that fall under the "other waters" category. Documentation of a significant nexus in many ways parallels fact finding under the 404(b)(1) guidelines; that is, the documentation of ecological services that have a significant impact on the chemical, physical and biological integrity of downstream waters may guide a permit decision. Therefore, it may be simpler to move directly to a permitting decision. In that decision, the scope of the project impact on the wetland (or water) in question will also be taken into account, and if that impact is minimal, then a permit (or authorization under a general permit) may be approved. In short, the permit process may be more expeditious than documentation of a significant nexus.

Also, numerous dredge and fill activities in small tributaries – such as routine stream crossings, culvert placement, bank stabilization and maintenance – may be covered by existing or future general permits. In these instances, detailed jurisdictional documentation may be unnecessarily time consuming. In headwater areas, it may be more practical to focus the regulatory process more on acceptable activities, and best management practices that should be associated with such activities, than on defining a line between regulated and unregulated channels where such a line is not easily identifiable on the landscape. (p. 7-8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition to clarifying and refining the definition for tributaries, the final rule also clarifies and refines the definitions for adjacent, neighboring and significant nexus; identifies types of ditches that are excluded from regulation, and replaced the section formerly know as "other waters". The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations. The agencies also intend to retain the concept of preliminary JDs. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more**

expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Red River Waterway Commission (Doc. #15445)

12.1017 Additionally, with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no-win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects. (p. 2)

Agency Response: Implementation of the CWA permitting programs, including compliance with other statutes, is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule also does not affect permitting tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fills material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs and provides clarity regarding jurisdiction, thus reducing uncertainties and delays.

Water Environment Federation Member Association Governmental Affairs Committees Representing EPA Region 7 (Doc. #15185)

12.1018 It is very questionable whether or not State Agencies and EPA Regional Offices will have the necessary resources to manage the subsequent regulatory requirements resulting from the Proposed Rule. As an example, the Kansas Dept. of Health and Environment (KDHE) has recently estimated that the Proposed Rule would quadruple the number of stream miles required to be regulated. The regulatory work would likely include greatly increased field investigation and sampling efforts, updated UAAs and designated beneficial use declarations, possible reworking of State water quality regulations, public hearings, and other administrative requirements. One must keep in mind that these same State agencies are typically already suffering from budgeting shortfalls and staff attrition due to increased levels of retirements.

Bottom line: It is suggested that economic analyses be re-examined for fundamental resource requirements and that Federal grant funding be considered to help offset the budgetary impacts to the State Agencies. (p. 3-4)

Agency Response: **Implementation of the CWA permitting programs is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determinations**

U.S. House of Representatives – Iowa, Second District (Doc. #1375)

12.1019 The Environmental Protection Agency has maintained since the release of the rule that "It [the rule] does not protect any new types of waters that have not historically been covered under the Clean Water Act programs." This statement does not account for what appears to be an expanded definition of tributaries and adjacencies in the rule leading to more waters protected and also that an increase in permits required is likely. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See the Economic Analysis for the final rule for further discussion on the predicted jurisdictional changes under the final rule.**

United States House of Representatives (Doc. #17458)

12.1020 The proposed rule will additionally require dredge and fill permitting for maintenance activities performed within manmade canals, ditches, stormwater treatment ponds and created stormwater treatment wetlands that already have environmental resource permits issued by the state permitting agencies. In many cases, the maintenance of a stormwater management system must be performed in a timely manner to minimize flooding and water quality impacts. The result of requiring additional permitting for maintenance projects will be to increase costs and the amount of time necessary to complete required maintenance projects for local governments. Additionally, the increased permit requirements will increase the number of permits that will require handling and processing by the US Army Corps of Engineers. A local government is liable for maintaining the integrity of its stormwater management system even if federal permits are not approved by federal agencies in a timely manner. Is it the intent of the federal agencies to increase the permitting burden on local governments and are the agencies prepared to handle and process the number of permit applications in a timely manner? (p. 2-3)

Agency Response: **Implementation of the CWA permitting programs is outside the scope of this rulemaking. That said, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing**

regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will result in a reduction of case-specific determinations which was achieved by making tributaries and adjacent waters jurisdictional by rule coupled with limits on the two types of categories of waters that require a case-specific analysis. Therefore, the agencies do not foresee an increase in delays due to workload on jurisdictional determinations. The agencies believe the final rule will simplify the process of making jurisdictional determination

Committee on Transportation and Infrastructure, U.S. House of Representatives (Doc. #18018)

12.1021 (…) can you clarify whether the draining of a waterbody requires a Clean Water Act permit? Does anything in the proposed rule, or the accompanying documents, change this distinction? (p. 2)

Agency Response: The Section 404 permitting program only regulates the discharge of dredged or fill material in a water of the United States; this will not change under the new rule.

12.4.2 Jurisdictional Determination Process

Summary Response

The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Many definitions for the first time are clarified. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

As appropriate, necessary tools will be developed to assist with the jurisdictional determination process during the implementation phase of the final rule to make the process predictable, efficient, and effective. The agencies note that they do not have the authority to map all waters of the U.S.; jurisdictional determinations are provided at the request of a landowner.

There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Approved jurisdictional determinations that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble to the rule for further discussion on desktop tools in the "Tributary" section. In addition, such desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant or unless new information/new facts that are site specific necessitate the reopening of an approved JD. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Specific Comments

Committee on Space, Science, and Technology (Doc. #16386)

12.1022 Can a jurisdictional determination impact property values? Why or why not? Please provide a detailed rationale and any supporting examples or precedent. (p. 12)

Agency Response: The local tax assessor's office determines what factors are reviewed in the determination of property values for tax purposes. Local markets can also influence property values. For more information on the economic impacts of the rule, please see "Section V. Economic Impacts" of the preamble and the Economic Analysis that accompanies the final rule. The rule provides the definitions of "waters of the U.S." under the Clean Water Act; however, only a landowner can request a jurisdictional determination on their property to ascertain the presence/absence of jurisdictional waters of the U.S.

12.1023 For the following situations, please tell me if your analysis of the scope of the rule grants the EPA regulatory authority:

a. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a navigable water. Can EPA regulate the pond, and therefore their property? (p. 17-18)

Agency Response: **Under paragraph (b) of the rule, "artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds" are excluded from jurisdiction and are not considered "waters of the U.S." Also excluded are, "small ornamental waters created in dry land." The paragraph (b) exclusions are applied before the paragraph (a) categories. If the pond in this example does not meet one of the exclusions, then the pond may be considered an adjacent water under the final rule if the pond meets the definition of adjacent or is determined to have a significant nexus under paragraph (a)(8). The agencies do not have authority to regulate a landowner's property. Under the Clean Water Act, the agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S.**

12.1024 b. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch EPA determines is a tributary to a navigable water. Can EPA regulate the pond, and therefore their property? (p. 18)

Agency Response: **Under paragraph (b) of the rule, "artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds" are excluded from jurisdiction and are not considered "waters of the U.S." Also excluded are "small ornamental waters created in dry land." The paragraph (b) exclusions are applied before the paragraph (a) categories. If the pond did not meet one of the exclusions, then the pond may be considered an adjacent water under the final rule if the pond meets the definition of adjacent or is determined to have a significant nexus under paragraph (a)(8).**

Agency Response: **In addition, the term "neighboring" includes all waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary, excluding ditches that are not a relocated tributary or excavated in a tributary. If a water is within 100 feet of the ordinary high water mark of a ditch that meets the definition of tributary but is not a relocated tributary or excavated in a tributary, and the water is not bordering or contiguous to that ditch, that water would not be "neighboring" under this provision of the rule. The water would be evaluated on a case-specific basis under paragraph (a)(8).**

The agencies do not have authority to regulate a landowner's property. Under the Clean Water Act, the agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S.

12.1025 c. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch which is adjacent to yet another floodplain of a navigable water. Can EPA regulate the pond, and therefore their property? (p. 18)

Agency Response: **Under paragraph (b) of the rule, "artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation,**

settling basins, rice growing, or cooling ponds" are excluded from jurisdiction and are not considered "waters of the U.S." Also excluded are "small ornamental waters created in dry land." The paragraph (b) exclusions are applied before the paragraph (a) categories. If the pond did not meet one of the exclusions, then the pond may be considered an adjacent water under the final rule if the pond meets the definition of adjacent or is determined to have a significant nexus under paragraph (a)(8).

In addition, the term "neighboring" includes all waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a covered tributary, excluding ditches that are not a relocated tributary or excavated in a tributary. If a water is within 100 feet of the ordinary high water mark of a ditch that meets the definition of tributary but is not a relocated tributary or excavated in a tributary, and the water is not bordering or contiguous to that ditch, that water would not be "neighboring" under this provision of the rule. The water would be evaluated on a case-specific basis under paragraph (a)(8). Specifically, the pond would need to meet the definition of adjacent (to the navigable water in this example) to be considered jurisdictional if the ditch is an excluded ditch, to be jurisdictional under the Clean Water Act.

The agencies do not have authority to regulate a landowner's property. The agencies only have authority to regulate jurisdictional activities in jurisdictional waters of the U.S. under the Clean Water Act.

New Mexico Department of Agriculture (Doc. #13024)

12.1026 The Agencies have not been consistent in the predicted changes of jurisdiction as a result of this proposed rule. The Agencies have variously said that jurisdiction will increase, decrease and will not change. NMDA cites this inconsistency as proof of the ambiguity created by the creation of the *other waters* category among other problems with the wording of this proposed rule.

The source of this confusion is that this category would require a prescribed action for every jurisdictional determination (i.e., the definition requires determinations to be made on "a case specific basis.") Currently, there is no such category that requires as extensive attention for every determination. This change would clearly result in less consistency and less clarity for waters that would belong in the new *other waters* category. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Executive Order (E.O.) 13563, signed by President Obama in 2011, requires the regulatory system to "promote predictability and reduce uncertainty" and "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." Therefore, it is important to increase clarity in actions taken by the Agencies. Currently, EPA conducts jurisdictional determinations based on the CWA itself, alongside three key Supreme Court precedents, which is confusing to the regulated public. The intention of the new definition of *Waters of the U.S.* was to increase clarity by combining the

previous definition of *Waters of the U.S.* with these interpretations from the Supreme Court.

However, the language in the proposed definition, for reasons listed in sections above, may, in fact, reduce clarity and cause confusion and frustration among regulated stakeholders. (p. 14-15)

Agency Response: **The Economic Analysis includes a discussion on the predicted changes in jurisdiction. Jurisdictional determinations are made on a case-by-case basis and the final rule was developed to reduce the instances when case-specific significant nexus determinations are required. Under the 2003 and 2008 guidance documents, the agencies were required to do a case-specific review for "isolated" waters and certain waters requiring a significant nexus determination. The final rule will provide clarity and efficiency in making jurisdictional determinations for many categories of waters, but does require a case-specific significant nexus determination for the (a)(7) and (a)(8) waters. As appropriate, necessary tools will be developed to assist with the jurisdictional determination process in the implementation phase of the final rule to make the process predictable, efficient, and effective.**

Kansas Senate Committee on Natural Resources (Doc. #15022.1)

12.1027 This correspondence supplements, details, highlights and requests studies EPA was to have completed prior to proposing WOTUS. I am also apprising EPA of my intent to introduce legislation that will create state data availability, map-boundary and map-certification requirements to be fulfilled prior to publication of federal rules that affect our state. (p. 1)

Agency Response: **The Corps will utilize existing data and mapping tools as necessary to augment its capabilities and enable it to fulfill its responsibilities of implementation under the Rule. Staff will continue to use their best professional judgment and all available information provided to make consistent jurisdictional calls. See the section in the preamble entitled, "Related Acts of Congress, Executive Orders, and Agency Initiatives," for additional information on the rulemaking process and compliance with applicable laws and regulations. The agencies note that they do not have the authority to map all waters of the U.S.; jurisdictional determinations are provided at the landowner's request. Furthermore, the Corps does not have the authority to trespass on private lands to determine jurisdiction if not requested by the owner of the property. Most Corps Districts maintain a list of waters that are considered navigable waters under Section 10 of the Rivers and Harbors Act, which may be informative to the public with regard to which waters may be traditional navigable waters.**

12.1028 With respect to legislation, it is my intent is to introduce legislation requiring a field survey, legal description, and certification by a Professional Land Surveyor (PLS) of any map proposed for Federal rulemaking, Federal permitting or which otherwise could impart a significant federal nexus in our state. As example, the envisioned mapping legislation will require the boundaries of riparian maps from your agency, floodplain maps by the Federal Emergency Management Agency, Critical Habitat maps by US Fish and Wildlife Service, soil maps by Natural Resource Conservation Service and National

Heritage Area maps by the Department of Interior to first be field located and described consistent with the USGS Geodetic and Kansas State Plane Coordinate Systems. Through this activity, the boundary coordinates of all maps for any proposed rule would first be required to be accurately described, clearly documented and certified by a PLS – prior to federal register publication. (p. 3)

Agency Response: The agencies acknowledge the author's comments concerning the potential introduction of legislation regarding maps proposed for Federal rulemaking. The agencies note that they do not have the authority to map all waters of the U.S.; jurisdictional determinations are provided at the landowner's request. Furthermore, the Corps does not have the authority to trespass on private lands to determine jurisdiction if not requested by the owner of the property. Most Corps Districts maintain a list of waters that are considered navigable waters under Section 10 of the Rivers and Harbors Act, which may be informative to the public with regard to which waters may be traditional navigable waters.

State of Oregon (Doc. #15218)

12.1029 With regard to the administration of the proposed rule, we recommend that the rule contain a specific timeframe for the agencies to make their "waters of the United States" jurisdictional call. This timeframe should apply whenever a permit application is submitted to the Corps, and anytime a jurisdictional call is otherwise needed or requested. (p. 2)

Agency Response: There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

12.1030 The Proposed Rule indicates that to improve efficiency the agencies may use a "desktop" analysis if it furnishes sufficient information without the need for information

derived from field observation to make the requisite finding for determining jurisdiction[248]. In addition it is stated in the Proposed Rule the EPA and the USACE are working in partnership with states to develop new tools and resources that have the potential to improve the precision of desk based jurisdictional determinations.[249] It is unclear exactly what is meant by a desktop analysis. Will this analysis involve computer models or digital data? Since it is proposed that jurisdictional determinations may be made by desk top analysis, it is important for the public to understand what the method(s) of analysis will be.

Recommendation**:** The definition or examples of such a desktop analysis should be provided for clarity. (p. 3)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

West Virginia Department of Environmental Protection (Doc. #15415)

12.1031 The proposed regulation does not address how it will affect existing jurisdictional determinations and CWA Section 404 permits. In the interest of regulatory certainty, the WVDEP urges the federal government to clarify that any new regulation will be applied prospectively, that existing jurisdictional determinations remain valid, and that existing CWA Section 404 permits will not need to be revised in light of the regulation. (p. 15)

Agency Response: The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits..

Wyoming Department of Environmental Quality (Doc. #16393)

12.1032 The expansion of CWA jurisdiction into remote, dry ephemeral stream reaches and the uncertainties regarding the application of jurisdiction to "other waters" creates

[248] 3 Federal Register (FR). Vol. 79, No. 76. (Monday, April 21, 2014) Proposed Rules: Definition of ''Waters of the United States'' Under the Clean Water Act. pg. 22195.
[249] Id. pg. 22195.

serious implementation problems for Wyoming, and is certain to result in increased costs to the State and other private and public interests, along with decreased regulatory efficiency. For example, the federal approval process for water quality standards requires the designation of presumptive uses and associated criteria on all waters of the United States. The designation of ephemeral stream channels as waters of the United States under the proposed rule will result in a presumption that the State will have to designate primary contact recreation and aquatic life uses on those channels. But those presumptive uses do not exist and cannot be attained in most, if not all, ephemeral streams in Wyoming. Permits issued for discharges into those channels will then need to comply with the associated recreational and aquatic life criteria to protect those non-existent and unattainable uses.

While the CWA does not require the designation of water uses and criteria that are not attainable, removing a presumed use or applying less stringent criteria requires the development and approval of a "use attainability analysis" and often requires amendments to the state water quality standards regulation. Both of those processes are extremely time consuming and expensive. Moreover, if there is a dispute or question as to whether an ephemeral stream is jurisdictional, the states are not delegated the authority to make jurisdictional determinations. The Corps only performs jurisdictional determinations for 404 permitting, and EPA does not have the staff or resources to perform the evaluations created by the uncertainty and expansion of jurisdiction under the proposed rule. The end result will be greater uncertainty, delayed decision-making, and increased compliance costs, which will not be offset by improved water quality in downstream waters. (p. 5-6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities need to make jurisdictional determinations on a case-specific basis.**

Governor's Office – State of Utah (Doc. #16534)

12.1033 The state believes the EPA and/or Army need to make its jurisdictional determinations within a "reasonable" time frame. Michigan, one of only two states delegated the Section 404 program, is obligated by state statute to process wetlands permits within 90 days (150 days if there is a public hearing). Michigan's average time frame for processing wetland permits is 9 days following the receipt of a complete permit application and 46 days if the permit needs to be public-noticed. Yet only 58% of the Army's wetland applications are completed within 120 days with the average jurisdictional determination taking 90 days. Some permits take over 700 days to complete. That level of performance and those time frames are unreasonable.

The state believes that within 180 days of receiving a complete application, the agencies should be able to make a decision. If they cannot, the state proposes the waters or wetlands would, by default, be deemed to be non-jurisdictional due to inaction. A 180-

day time frame would allow the agencies time to prioritize the workload for jurisdictional determinations and focus on the most crucial ones.

In general, uncertainty and time delays produce much of the conflict and disagreement on EPA's proposed rule in making jurisdictional determinations. The two recommendations noted above would go a long way in resolving these disagreements. (p. 16)

Agency Response: There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

State of Idaho (Doc. #16597)

12.1034 Idaho urges EPA and the Corps to work with a state-federal workgroup to determine a reasonable process for making jurisdictional determinations involving "other waters" and provide remedies in those situations where the permitting agency fails to make a determination. (p. 3)

Agency Response: The process of determining jurisdiction of "other waters" has been described in Section IV.H. Case-Specific Waters of the United States in the preamble. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies will provide a jurisdictional determination at the landowner's request.

There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional

determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Arkansas Attorney General (Doc. #16899)

12.1035 The definition of "significant nexus" in the proposed rule now requires the agencies to make multiple factual determinations before deciding if a body of water – either alone or in combination with similarly situated" waters – significantly affects a navigable waterway. This shift will vastly increase the amount of time necessary to make jurisdictional determinations, which will delay the permitting process and likely lead to increased litigation. (p. 1)

Agency Response: There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. Several categories of waters under the 2003 and 2008 guidance documents required case-specific analysis to determine jurisdiction, including significant nexus determinations. The agencies do not agree that delays in jurisdictional determinations will lead to increased litigation.

State of Alaska (Doc. #19465)

12.1036 Failure to Afford Due Process. The proposed rule provides no mechanism for judicially challenging affirmative jurisdictional determinations before other CWA requirements are imposed. Any rulemaking on the jurisdictional issue must allow regulated entities and states the opportunity to administratively and judicially challenge an affirmative jurisdictional determination before other CWA requirements are imposed. In light of the expensive, time-consuming and punitive consequences flowing from affirmative jurisdictional determinations, the rulemaking must – based on principles of due process and to avoid infringing upon states regulatory authorities – allow jurisdictional determinations to be challenged. (p. 5)

Agency Response: The Corps current regulations allow an affected party to appeal an approved jurisdictional determination, permit applications denied with prejudice, and declined permits; see 33 CFR 331 – Administrative Appeal Process for further information. As of the date of publication of the final rule, approved jurisdictional determinations are not considered "final agency action" and therefore cannot legally be challenged under the Administrative Procedures Act.

12.1037 Many questions and concerns revolve around new terms and concepts introduced in the proposed rule. For example, the term "similarly situated" waters as defined by the agencies may be more expansive than what Justice Kennedy intended in his 2006 Rapanos opinion. The term itself is likely to be subjectively and inconsistently applied by individual field staff personnel. (p. 15)

Agency Response: The agencies acknowledge and note the author's comments concerning the term "similarly situated". See the preamble section for the case-specific significant nexus determination discussions regarding "similarly situated" under (a)(7) and (a)(8) waters. The agencies will evaluate the case by case approach used to assess similarly situated and significant nexus over the past seven years to determine how this process should be improved to ensure it is implemented more effectively under the final rule provisions. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

12.1038 Any new rule must provide the opportunity for an affected state, landowner, or developer – in advance of imposition of any CWA requirement – to obtain timely response to requests for jurisdictional determinations, as well as to administratively and judicially challenge an affirmative jurisdictional determination.

In Alaska, there is so much at stake in advancing a development proposal that a decision to seek a permit under the CWA is often based on the cost of keeping a project moving and does not reflect an assessment of whether jurisdiction exists or is even likely to exist as there is no process to *timely* challenge an affirmative jurisdictional determination. With a short construction season (three to five months) and the long lead time for staging

materials in areas with no roads at all (access is only after travel of hundreds of miles by boat or plane), there is a narrow window each year to conduct field work and obtain approvals for the next season. It is not possible to collect field data for a 404 permit application and receive approvals in the same season in time to stage and initiate work on a project. Since decisions to initiate work must often be made four to six months in advance of the construction season, there are only a couple of months after field data is collected to submit an application and received approval. It is a common occurrence that projects start no earlier than two years after field data collection. Project delay often comes at a significant cost to the project proponent.

Numerous cases exist where applicants cede to the assertion of federal jurisdiction over questionable waters to avoid the need for the Corps to thoroughly document why it is (or is not) taking jurisdiction. Applicants conclude that, with the brief construction season in Alaska, the delay which could result from a drawn out significant nexus determination would be costlier than accepting jurisdiction and complying with permit stipulations and compensatory mitigation requirements. It is uncertain how many of these cases would have resulted in a finding of no jurisdiction had the applicant opted to request an approved jurisdictional determination. However, as the cost of compensatory mitigation continues to increase throughout Alaska, it is possible that the cost-benefit analysis of construction delays versus accepting federal jurisdiction and paying for compensatory mitigation may shift, motivating more applicants to go through the longer approved jurisdictional determination process in the hopes of reducing compensatory mitigation needs. Adoption of the proposed rule would likely narrow opportunities to demonstrate the lack of a significant nexus and could, in the long run, result in increased compensatory mitigation requirements.

To address these long-standing issues, any proposed rule should provide landowners and project proponents with two important and efficient avenues to address CWA jurisdictional concerns. First, a provision should be included that if a landowner or project proponent requests a formal jurisdictional determination and the regulatory authority does not provide one within 30 days, the failure to respond will be deemed a negative jurisdictional determination not only under Section 404, but for all CWA purposes.

Second, a rule must clearly provide a requestor with a process to not only administratively appeal, but also judicially challenge affirmative jurisdictional determinations in advance of imposing the permitting process. This is particularly important because federal agencies take the position that jurisdictional determinations are not considered appealable, final agency actions. That is, no person or entity can judicially challenge an affirmative jurisdictional determination until the actual permitting process – an expensive and time-consuming endeavor – has been completed. In the meantime, absent any meaningful remedy to address challenges to affirmative jurisdictional determinations, individuals and entities are forced to materially change their positions once the permitting process is imposed. In most instances, applicants must enter into legally binding commitments and contractual obligations, spending on average hundreds of thousands of dollars to complete the lengthy 404 (and under the proposed rule, 402) permitting process and advancing expensive compensatory mitigation proposals, in order to obtain a permit and avoid a federal enforcement action when there

may well be no legitimate jurisdiction for imposing the federal permitting process.250 (p. 16-17

Agency Response: **The Corps current regulations allow an affected party to appeal an approved jurisdictional determination, permit applications denied with prejudice, and declined permits; see 33 CFR 331 – Administrative Appeal Process for further information. As of the date of publication of the final rule, approved jurisdictional determinations are not considered "final agency action" and therefore cannot legally be challenged under the Administrative Procedures Act. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies will continue to provide a jurisdictional determination at the landowner's request.**

There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Consolidated Drainage District No. 1, Mississippi County, Missouri (Doc. #6254)

12.1039 The proposed rule would end what currently requires a case-by-case analysis to determine whether there is a significant nexus between a body of navigable water and a wetland. Such case-by-case analyses, while fact-intensive and difficult for a regulatory agency to undertake, enable justice for individual private property owners because their specific situation must be addressed. Owners whose drainage systems are challenged by a regulatory agency currently have an opportunity to show to a neutral judge that their drainage system does not have a connection to an actually navigable body of water. The new rule would make this much more difficult by shifting the burden of proof in the case away from the agency and onto the property owner. (p. 2)

[250] *Cf.* subparagraphs 6 and 7, below, describing these costs and burdens in additional detail.

Agency Response: **The Corps current regulations allow an affected party to appeal an approved jurisdictional determination, permit applications denied with prejudice, and declined permits; see 33 CFR 331 – Administrative Appeal Process for further information. As of the date of publication of the final rule, approved jurisdictional determinations are not considered "final agency action" and therefore cannot legally be challenged under the Administrative Procedures Act. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. Several categories of waters under the 2003 and 2008 guidance documents required case-specific analysis to determine jurisdiction, including significant nexus determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.**

Murray County (Minnesota) Board of Commissioners (Doc. #7528)

12.1040 A likely scenario under the proposed rule would go as follows: A wetland, not adjacent to a traditional navigable water, therefore labeled as "other water" under the proposed rule, is determined by the agencies to be isolated enough so as to not have a significant nexus to traditional navigable water by itself. However, when scrutinized in combination with other similarly situated waters within an ecological region or single point of entry watershed, those waters are determined to have a significant nexus and therefore each individual wetland would be deemed jurisdictional. A Section 404 permit would be required to fill the wetland. But no specific analysis would be conducted to determine whether the fill of that wetland within that ecological region has a more than speculative or insubstantial impact on the chemical, physical, and biological integrity of the first traditional navigable water downstream. (p. 8)

Agency Response: **Please see Section IV.-H. Case-Specific Waters of the United States in the preamble for a discussion on how a significant nexus determination is performed for (a)(7) and (a)(8) waters. A wetland may be adjacent to a traditional navigable water, interstate water, territorial seas, or tributary. A jurisdictional determination is made on a case-by-case basis when requested by a landowner. Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is only specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.**

City of Phoenix, Arizona, Office of Environmental Programs (Doc. #7986)

12.1041 While we conceptually support a unified definition of WOTUS across all sections of the Clean Water Act, as proposed, this could have complicating unintended consequences. For example, here in Arizona the U.S. Army Corps of Engineers provides determinations regarding the extent of WOTUS under §404, while the Arizona Department of Environmental Quality provides determinations under other sections of the Clean Water Act. Under the proposed Rule, it is unclear which agency would provide the definitive determinations, which could lead to time-consuming and inefficient confusion, again with no benefit to the environment. (p. 3)

Agency Response: **The Rule will not change under which sections of the Clean Water Act each agency derives their authority. The Corps will continue to make jurisdictional determinations pursuant to its section 404 authority. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process with consistent application across agencies.**

City of Chesapeake Department of Public Works (Doc. #9615)

12.1042 The Rule states that a *case-specific analysis* will be required when establishing jurisdiction over "other waters." The phrase *case-specific analysis is* ambiguous and has not been thoroughly explained or defined within the Rule, nor is it clear how these *case-specific analysis* will be able to differentiate between a *significant nexus* connection versus just a connection between "other waters" and a WOUS. Furthermore, relying on *case-specific analysis* provides less certainty and predictability for the regulated public. The phrase *case-specific analysis* requires more clarification and explanation on how it will be deployed in the field to make significant nexus determinations. (p. 6)

Agency Response: **The Rule was revised and further clarification of case-specific analysis is in Section IV.-H. Case-Specific Waters of the United States in the preamble. This section will explain how a significant nexus determination will be performed for (a)(7) and (a)(8) waters. It is important to note that every jurisdictional determination that is requested by a landowner is case-specific; however, the final rule limits those circumstances under which case-specific significant nexus determinations are completed to those waters identified in paragraphs (a)(7) and (a)(8). In all other circumstances, water bodies are either jurisdictional by rule, or excluded from jurisdiction.**

Somerset County, Pennsylvania, Commissioners (Doc. #9734)

12.1043 The proposed rule is unclear whether a Section 404 Permit is required for maintenance activity in green infrastructure areas after an area is established; yet, municipalities and private sites require Section 404 permits for MS4 or other green infrastructure construction projects; which brings to question how the Agency distinguishes landscape features as not waters or wetlands from those that will become jurisdictional. Water Reuse, Reclamation and Supply facilities built to generate additional water supplies for irrigation and drinking water are unclear how this definition change will impact a pesticide permit program that is used to control weeds/vegetation around ditches. (p. 2)

Agency Response: **Please see summary response 12.3. The final definitional rule does not change or establish new requirements for complying with the PGP. See also summary responses 12.3.1, 12.3.2, and 7.4.4 regarding stormwater, MS4s, and green infrastructure. The rule adds a new exclusion clarifying that features such as detention and retention basins, groundwater recharge basins, and percolation ponds created in dry land for purposes of wastewater recycling are not waters of the United States. The final rule also includes revised and expanded exclusions for many ditches. Also see summary responses for Topic 6: Ditches and Topic 7: Features and**

waters not jurisdictional, for more information about excluded waters in the final rule.

Lea Soil and Conservation District Board of Supervisors (Doc. #15144)

12.1044 If, as the government declares, the primary objective is to conserve resources and promote clarity, then section (a)(7) is inherently inapposite. This section is a section of last resort, as the agencies' field officers will likely conduct all necessary analysis to determine if: (i) the water is jurisdictional by rule and/or (ii) if the water is exempted under subsection (b). If the answer is no to both counts, only then would the field officer make the investigation to determine if the water maintains the appropriate "nexus" with a water identified in (a)(1) through (a)(3). To do this analysis requires a "region" wide analysis of all other waters that may be "similarly situated" waters. (p. 5)

Agency Response: The Rule was revised and further clarification of case-specific analysis is in Section IV.-H. Case-Specific Waters of the United States in the preamble. This section will explain how a significant nexus determination will be performed for (a)(7) and (a)(8) waters.

The agencies are developing guidance to facilitate effective and efficient implementation of the rule when it becomes effective, which will provide for consistent determinations. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process.

Association of Clean Water Administrators (Doc. #13069)

12.1045 In contrast to the exclusions mentioned above, which provide for greater clarity when identifying waters of the U.S., the concept of "other waters" that are potentially jurisdictional may slow down projects due to the need for significant nexus determinations. It is also unclear whether the 2008 guidance will still be relied upon to make such determinations. If not, there needs to be enough flexibility in the final rule so that the Agencies can work with partners in each state to develop a process for determining a significant nexus. ACWA also strongly encourages the Agencies to work with states on a regional basis to jointly identify policies that consistently implement the significant nexus analysis and allow for grouping of geomorphically similar waterbodies. For waters that do not easily fit into such groups, the burden should be on the Corps and EPA to determine jurisdiction in a timely manner after requests for jurisdictional determinations are made. Importantly, greater transparency from the Corps and better agreement and consistency between Corps districts and EPA are needed if implementing a final rule will be successful. (p. 4)

Agency Response: The Rule was revised and further clarification of case-specific analysis is in Section IV.-H. Case-Specific Waters of the United States in the preamble. This section will explain how a significant nexus determination will be performed for (a)(7) and (a)(8) waters.

The agencies are developing guidance to facilitate effective and efficient implementation of the rule when it becomes effective, which will provide for consistent determinations. It is clear that implementation guidance may require region-specific considerations.

The final rule, its preamble, and any subsequent implementation guidance that is issued supersedes the 2008 Rapanos guidance. The final rule includes a definition of significant nexus upon which the agencies will rely when determining jurisdiction; they will not rely upon the concepts or language included in the 2008 Rapanos guidance.

Association of Minnesota Counties (Doc. #3309)

12.1046 Another question that was frequently highlighted by counties focused on the relationship of the Army Corps of Engineers to these rules and how they would apply and implement them. Who will hold the Army Corps responsible to the timelines when waters require their jurisdictional review? AMC heard many counties indicate that the time taken by the Army Corps to review permits under the current rule has caused extensive delays for both public and private projects. By expanding the jurisdiction to make more waters fall under Corps review there is a significant concern that counties and others will experience a lengthier backlog in their permits. Again, where the rule lacks clarity and definition it will add to the interpretation that is necessary by the Corps, thereby adding to the backlog of projects that must be reviewed.

Agency Response: The agencies are developing guidance to facilitate effective and efficient implementation of the rule when it becomes effective, which will provide for consistent determinations. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. Several categories of waters under the 2003 and 2008 guidance documents required case-specific analysis to determine jurisdiction, including significant nexus determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns. The agencies will continue to provide a jurisdictional determination at the landowner's request; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations are generally more expedient than approved jurisdictional determinations. The majority of jurisdictional determinations completed by the Corps are preliminary; it is important to note that not every permit application requires a jurisdictional determination.

Western Coalition of Arid States (Doc. #14407)

12.1047 Proposed Rule Does Not Address Regulatory Guidance Letters or Agency Jurisdictional Determinations. Nowhere in the proposed rule do the agencies discuss continuance of existing policy or guidance, regulatory guidance letters, or final or pending agency jurisdictional determinations. This is especially problematic as there are some private irrigation companies and federal reclamation projects that operate ditch systems that are already regulated as jurisdictional waters. Within Arizona, the state's water quality standards regulation specifically names two individual irrigation canals and two geographic areas in their §303(c) list of surface waters protected under the CWA. This list includes: the Arlington Canal, Wellton Canal, Phoenix Area Canals, and Yuma Area Canals.8 Irrigation operators in these areas rely upon existing agency guidance to

routinely maintain, respond to and repair storm damage, and perform physical modifications of their ditch systems.

One guidance document in particular, the U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007) , is frequently used to perform such work. We recommend the agencies acknowledge the existence of and include reference to these regulatory guidance letters. Equally troubling is agencies treatment of jurisdictional determinations. Nothing in the preamble or proposed rule discusses the status of existing §404 jurisdictional determinations or draft determinations under agency review. We recommend the agencies clarify that existing RGL's and issued or pending jurisdictional determinations are still valid under the Final Rule. (p. 15-16)

Agency Response: **Once the rule becomes effective, the agencies, as appropriate, will provide information as to which regulatory guidance letters, memorandums, and other sources of guidance regarding jurisdiction remain relevant. The statutory exemptions under 404(f) of the CWA are not affected by the final rule.**

The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Great Lakes Indian Fish and Wildlife Commission (Doc. #15454)

12.1048 As the EPA and the Corps finalize and implement this rule, it bears remembering that the federal government owes particular treaty and trust obligations to GLIFWC's member tribes. This includes the obligation to consult when jurisdictional determinations are made in the ceded territories described above. Tribes may have specific traditional knowledge or other information about certain waterbodies that would aid in the determination of a significant nexus; whether the nexus is purely physical, chemical or biological, or whether the nexus can be based on a connection to interstate or foreign commerce. In addition, tribal interest in a particular waterbody or wetland may counsel the assertion of jurisdiction by the federal government. First, the consequences of a jurisdictional determination may impact a tribe's treaty reserved hunting, fishing or gathering rights, rights that the US government has an obligation to protect. Second, as discussed above, the tribal use of a waterbody to provide resources that may enter into interstate comment should factor into jurisdictional determinations. (p. 4)

Agency Response: **This rule does not change the Corps or EPA's tribal trust responsibilities. Tribes can contact their local agency's Tribal Liaison for any questions regarding government–to–government consultations. State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs..**

Western Urban Water Coalition (Doc. #15178.1)

12.1049 The proposed rule should also retain the concept of isolation and retain the current policies and practices used by the Corps to consider isolation when performing a JD. (p. 23)

Agency Response: **The purpose of the Rule is to clarify the definition of "waters of the United States" in a manner consistent with the Supreme Court decisions, including the SWANCC decision on "isolated" waters and the Rapanos decision. New procedures and implementation guidance will be disseminated following the effective date of the final rule.**

12.1050 The agencies need to consider the unintended consequences of the proposed rule. If implemented as proposed, the determination of the jurisdictional status of an "other water" will potentially take on great regional significance as numerous concerned parties in a watershed will closely monitor the JDs of "other waters" that could result in an entire class of wetlands or waters being determined jurisdictional. The JD process, which in the past has typically been between a permit applicant and the Corps, will become a watershed-wide process with multiple parties entering into the jurisdictional debate in an effort to protect their interests. This will not simplify or streamline the JD process and is likely to increase delays, conflicts, confusion, and challenges. This is particularly likely to happen in the arid West due to the large size of the single-entry point watersheds, the variability of waters within the watersheds, and numerous dry drainages. (p. 33)

Agency Response: **The preamble section describing case-specific significant nexus determinations under (a)(7) and (a)(8) waters provides information specific to these concerns. Implementation guidance to follow the effective date of the final rule may require region-specific considerations. An important note is that all jurisdictional determinations are made on a case-by-case basis when requested by a landowner. Although waters outside the landowner's review area may be considered in a significant nexus determination, the jurisdictional determination is only specific to waters on the landowner's review area.**

Washington State Water Resources Association (Doc. #16543)

12.1051 As jurisdiction will now be established for an entire category of "similarly situated waters," it will be necessary for interested parties, e.g., water utilities and conservation and conservancy districts, to monitor and actively participate in, each jurisdictional determination in each and every basin wherein they do business or may do business in the future. This is the case because though they may have no intent to ever engage in dredge and fill activities or point source discharge activities that impact the particular "other water" that may have precipitated the regional examination, once that determination is made, the entire region/basin will become "federalized" and they will bear the consequences of that determination at such time as one of their projects is ready to proceed. (p. 8)

Agency Response: **The preamble section describing case-specific significant nexus determinations under (a)(7) and (a)(8) waters provides information specific to these concerns including how "similarly situated" determinations are made for (a)(8) waters. A jurisdictional determination is made on a case-by-case basis when requested by a landowner. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed. However, although waters outside the landowner's review area may be considered in a**

significant nexus determination on a particular water body, the jurisdictional determination is only specific to waters on the landowner's review area.

Iowa League of Cities (Doc. #18823)

12.1052 Other organizations will likely provide substantial comments related to new housing and commercial development on greenfields and specifically on the Section 404 permitting program, but the League wants to make sure the Agency contemplates the impact from the city perspective in this area. Cities work in partnership with developers as they continue to expand and this rulemaking's impact varies across cities but the potential for delay and additional costs will impact the land use development surrounding cities. This issue is related to the initial issue of identification of new waters impacted. Cities and developers need a clearer understanding of the additional waters to be impacted by the rule and how the Agency anticipates processing increased PJDs. (p. 6)

Agency Response: The agencies will continue to provide a jurisdictional determination at a landowner's request. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. There is not expected to be a required timeframe for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

The agencies expect that the rule will provide for more efficient jurisdictional determinations for certain categories of waters jurisdictional by rule. See the Economic Analysis for additional information on changes in jurisdiction and anticipated costs and benefits of the rule.

12.1053 Request for EPA Response: Will the EPA provide additional information as to the new waters impacted surrounding urban areas? (p. 6)

Agency Response: No additional information is expected regarding waters in urban areas. The agencies only make jurisdictional determinations at the request of a landowner. The rule is applicable in the same manner between urban and rural areas.

12.1054 Request for EPA Response: How will the EPA process increased PJDs related to greenfield development surrounding urban areas? (p. 6)

Agency Response: The agencies will continue to provide a jurisdictional determination at a landowner's request. The agencies expect that the rule will provide for more efficient jurisdictional determinations for certain categories of waters determined to be jurisdictional by rule. Certain aspects of greenfield development regarding water features may be excluded under paragraph (b) of the final rule. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion.

ERO Resources Corporation (Doc. #14914)

12.1055 The proposed rule does not address the status of existing jurisdictional and no permit required determinations based on the non-jurisdictional status of the water or wetland if the proposed rule is adopted. Previously, the agencies addressed this issue in their 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act and stated "this guidance, once finalized, will supersede previously issued guidance on the scope of 'waters of the United States' (also 'waters of the U.S.') subject to CWA programs. However, it is not the agencies intention that previously issued jurisdictional determinations be re-opened as a result of this guidance" (76 Fed. Reg. 24479 (May 2, 2011)). The agencies need to include a similar statement in the final rule to avoid confusion among the regulated public regarding the status of current JDs. (p. 30)

Agency Response: The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

12.1056 Adoption of the proposed rule should not affect the Corps guidance regarding the use of Preliminary JDs (RGL No. 08-02). Under the proposed rule, the agencies would assess the combined effects of similarly situated "other waters" in the region on the chemical, physical, or biological integrity of (a)(l) through (a)(3) waters in conducting a SNA. This approach could be undertaken to determine the jurisdictional status of a single water or wetland in the "other water" category. The similarly situated SNA could affect the jurisdictional status of every similarly situated other water within the watershed. In many permitting situations, the permit applicant may wish to assume that the other water in question is jurisdictional for expediency. If adopted, the final rule needs to be clear that a permit applicant may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site without that assumption being coupled with the similarly situated definition to then assume that all similarly situated waters or wetlands in the watershed are jurisdictional for future permitting actions. (p. 30)

Agency Response: The agencies will continue to provide a jurisdictional determination at a landowner's request. The Corps will continue to provide the option to a landowner for both approved and preliminary jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set

aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act.

Although waters outside the landowner's review area may be considered in a significant nexus determination, a jurisdictional determination is only specific to waters in the landowner's review area. Previous approved jurisdictional determinations for (a)(7) and (a)(8) waters made in a single point of entry watershed may be used in future approved jurisdictional determinations in the same single point of entry watershed.

Teichert Materials (Doc. #18866)

12.1057 The proposed rule allows the Corps field staff to make jurisdictional determinations based on "desktop" studies without gathering site-specific information, which will likely lead to arbitrary and inconsistent determinations by Corps field staff. (p. 3)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

CEMEX (Doc. #19470)

12.1058 The proposed rule allows the Corps field staff to make jurisdictional determinations based on "desktop" studies without gathering site-specific information which will likely lead to arbitrary and inconsistent determinations by Corps field staff (p. 2)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data

from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency as they are currently available and accessible data sources.

National Association of Home Builders (Doc. #19540)

12.1059 The Proposed Rule Changes the Process by which a Jurisdictional Determination is Made and Shifts the Burden of Proof onto the Regulated Community

The proposed rule's categorical assertions of jurisdiction over all "tributaries" and all "adjacent waters" shift the burden of proof for permit decisions and jurisdictional determinations onto the regulated community. Under current practice, the Agencies must "document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus," including the physical indicators of flow and information regarding the functions of the tributary and any adjacent wetlands.[251] The Agencies must also "explain their basis" for finding a significant nexus.[252] Indeed, several courts have ruled that a positive jurisdictional determination of a water body requires some evidence of a nexus and its significance, "[o]therwise, it would be impossible to engage meaningfully in an examination of whether a wetland had 'significant' effects or merely 'speculative or insubstantial' effects on navigable waters."[253] Additionally, as described by Justice Kennedy in *Rapanos*, the significant nexus test only applies to adjacent wetlands and may only be applied on a case-by-case basis.[254]

But, under the proposed rule with its categories of *per se* jurisdictional waters, the Agencies no longer have to make a showing of evidence to prove a nexus is significant. What's more, they incorrectly apply Justice Kennedy's significant nexus test to all waters and show no regard for the test's case-by-case application. As a result, the proposed rule

[251] 2008 *Rapanos* Guidance at 11.
[252] *Id*.
[253] See *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 294 (4th Cir. 2011); *Benjamin v. Douglass Ridge Rifle Club*, 673 F.Supp.2d 1210, 1220 (D. Or. 2009); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp.2d 803, 823 (N.D. Cal. 2007).
[254] In *Rapanos*, Justice Kennedy opined 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." *Rapanos*, 547 U.S. at 779 (emphasis added). A nd, Justice Kennedy continued, "the Corps must establish significant nexus on a *case-by-case basis* when seeking to regulate *wetlands* based on *adjacency* to non-navigable tributaries, in order to avoid unreasonable applications of the [Clean Water] Act." *Id.* at 782 (emphasis added).

effectively shifts the burden of proof to the public to prove that the water or feature at issue *does not* meet the proposed rule's overbroad "tributary" or "adjacent water" definitions. As demonstrated by the numerous vagaries and uncertainties in the definitions and exclusions, this will not prove to be an easy task.

For example, a home builder who believes a ditch on her property is not a jurisdictional tributary will have to try to prove to the Agencies that the ditch qualifies for one of the narrow ditch exemptions. She will have to show, through historical evidence, such as photographs, prior delineations, or topographic maps, that her ditch was excavated wholly in uplands for its entire length, drains only uplands, and has less than perennial flow, or that the ditch does not contribute flow to a jurisdictional water. Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. And if a home builder believes an isolated wetland that happens to lie in the subjectively defined floodplain of a traditional navigable water does not have a significant nexus with that water, he would have to challenge the very Code of Federal Regulations itself. The Agencies do not acknowledge the massive burden this imposes on applicants. What's more, the Agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public. The Agencies must remain responsible for producing the evidence needed to make a positive "water of the United States" determination. Otherwise, many more cases will have to go through the administrative appeals process in order to have a wrongful jurisdictional determination removed. This will not increase efficiency or reduce delay as the Agencies claim. (p. 128-129)

Agency Response: **The agencies have revised the definition of "neighboring" under adjacent (a)(6) waters in an effort to provide more of a "bright line" to reduce the "burden of proof" on both the agencies and the regulated public. The agencies have made the determination that all tributaries and all adjacent waters have a significant nexus either alone or in combination with other similarly situated waters in the region such that they are jurisdictional by rule. Waters must meet the confines of the definitions in order to be jurisdictional by rule as the agencies have determined that such characteristics must be met in order to demonstrate that the waters have the required significant nexus.**

American Exploration & Mining Association (Doc. #13616)

12.1060 The scope of CWA jurisdiction is of fundamental importance to AEMA. Our members engage in activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Any change in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our members' ability to finance and develop new projects or perform maintenance to maintain existing infrastructure and facilities. Our members construction and operations often require various permits under the CWA and the agencies' proposed expansion of jurisdiction will result in additional permit obligations for all CWA programs. The agencies have failed to consider the significant implications on these programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, including stormwater and non-stormwater, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 311 oil spill prevention.

Agency Response: **The agencies recognize that the final rule will appropriately be applicable to all Clean Water Act programs. The agencies recognize that the final rule will impact all such programs. See the Economic Analysis for discussion on changes in jurisdiction and potential cost impacts to the various Clean Water Act programs.**

12.1061 In particular, our comments address the possibility that historically non-jurisdictional on-site stormwater and surface water management features will be deemed jurisdictional, and the complications surrounding distinguishing ephemeral tributaries from non-jurisdictional features, including increased delays, costs, and permitting requirements on mine operations. (p. 2)

Agency Response: **The rule contains clarifying language regarding which water features are and are not Waters of the US. Please see Section I- Water and Features that Are Not "Waters of the United States" for further clarification. In particular, paragraph (b) of the final rule regarding the exclusion for stormwater control features and the exclusion for erosional features and ephemeral features that don't meet the definition of "tributary." To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark which would distinguish them from non-jurisdictional features.**

Sinclair Oil Corporation (Doc. #15142)

12.1062 The proposed rule does not provide clarity to the term "waters of the United States." The ambiguity in the proposed rule also presents its practical short coming. The stated intent of the proposed rule is to "make the process of identifying 'waters of the United States' less complicated and more efficient ... by increasing CWA program transparency, predictability, and consistency." 79 Fed. Reg. 22,190. Because of the ambiguity noted above, the proposed rule does not accomplish this goal. By declining to limit the definition of "waters of the United States" using clear and readily perceptible standards that fall within the established bounds of the CWA, the proposed rule ensures that jurisdictional determinations will continue to be made on a case-by-case basis for all but the most obviously jurisdictional waters.

For example, because the defining characteristic of a "tributary'' in the proposed rule is that it contributes flow to a traditional navigable water, interstate water, or territorial sea, the Agencies will have to engage in a case-specific analysis of whether an individual water "contributes flow." See 79 Fed. Reg. 22,201. However, since the proposed rule does not articulate a clear standard for what it means for a water to "contribute flow" and since Justice Kennedy has already determined that "a mere hydrologic connection should not suffice in all cases" the Agencies will be forced to determine whether the evidence of hydrologic connectivity between the specific water in question is sufficient to establish the "required nexus with navigable waters as traditionally understood" before the water can be called a "tributary." Rapanos, 547 U.S. at 784-85. This analysis is not substantively different than the case-specific analysis currently being performed to determine whether a particular water has a significant enough nexus to traditional navigable waters so as to qualify as a "water of the United States." This does not decrease the complexity, nor increase the efficiency, of jurisdictional determinations.

Accordingly, the Agencies, simply have not proposed a rule that actually accomplishes the goals the set out for themselves in undertaking this rulemaking. (p. 9)

Agency Response: **See the preamble section on "Tributaries" for further discussion on the characteristics required to meet the definition of a tributary. All tributaries are jurisdictional by rule and have been determined to have a significant nexus to the (a)(1) to (a)(3) waters. Under the 2003 and 2008 guidance document the agencies had to determine whether a potential tributary connects to the downstream tributary network in order to determine to which water the tributary flows or whether the tributary is "isolated." The tributary characteristics required by the rule indicate sufficient volume, flow, and frequency of water such that the tributary would not have a "mere hydrologic connection" but rather would have a significant nexus to the (a)(1) to (a)(3) waters. All jurisdictional determinations are made on a case-by-case basis at the request of a landowner. However, only those waters that fall into the (a)(7) or (a)(8) categories would require a case-specific significant nexus determination.**

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

12.1063 Given the extensive water resources in Pennsylvania, costs and delays would be associated with evaluating the expanded view of jurisdictional waters to determine whether a jurisdictional water would be impacted by an activity. For example, the Proposed Rule considers jurisdictional streams to continue even though they have gone underground for an unspecified period of time.[255] Therefore, qualified professionals would need to evaluate a larger up gradient area to determine whether a connection to jurisdictional water exists. Similarly, water that is connected to a jurisdictional water by a non-jurisdictional water could still be considered to be jurisdictional. Therefore, professionals would need to evaluate not only water connected to the jurisdictional water, but also all waters up gradient and down gradient from it. In all, professionals would no longer be able to walk the limit of disturbance and reasonable buffer areas to identify jurisdictional resources and impacts. Instead, they will need to assess a much larger area to determine whether surface or subsurface hydrologic connections exist, whether a bed/bank exists upstream or downstream from a tributary or whether a significant nexus exists with an "other water" when considered in combination with similarly situated waters within the same region. (p. 5)

Agency Response: **As revised the final rule provides additional clarity regarding waters that are considered jurisdictional by rule and waters that may require a case-specific significant nexus determination. Those waters requiring a case-specific significant nexus evaluation are limited to two categories: (a)(7) and (a)(8), and to limited circumstances within those categories. The best available information will be used when making a determination. This may include watershed data that enable staff to use their best professional judgment with information provided by the landowner to make jurisdictional calls.**

[255] See 76 Fed Reg. 22199 for additional examples.

See the preamble section on "Tributaries" for further discussion on the characteristics required to meet the definition of a tributary. All tributaries are jurisdictional by rule and have been determined to have a significant nexus to the (a)(1) to (a)(3) waters. Under the 2003 and 2008 guidance documents, the agencies had to determine whether a potential tributary connects to the downstream tributary network in order to determine to which water the tributary flows or whether the tributary is "isolated." This aspect remains under this final rule with the requirement that the tributary contributes flow to the downstream (a)(1) to (a)(3) waters. In addition, tributaries could have sections that went underground and were connected via shallow subsurface flow under those guidance documents. The agencies are experienced in making such determinations and will continue the practice as described in the final rule.

Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.

Martin Marietta (Doc. #16356)

12.1064 At a December 12, 2013, meeting with representatives of the White House Office of Management and Budget, the EPA and Corps of Engineers, Steve Whitt presented information on a 2,700-acre green site being developed in Texas. The USGS maps for this area indicated that almost seven miles of blue line streams exist within the property boundary. A 2009 jurisdictional determination (confirmed by a full field review) indicated that there were no jurisdictional features within the project boundary. This specific type of situation is why Corps field staff should not be allowed to make jurisdictional determinations based on desk-top studies. This will lead to inaccurate and inconsistent determinations by Corps field staff. (p. 2)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

Oregon Cattlemen's Association (Doc. #5273)

12.1065 In addition to declining to employ absolute standards to aid in their determinations of the status of "other waters," the Agencies seek to decrease the number of field-based determinations, *Id.* at 22195. The Agencies instead plan to increase the use of technology and other means in order to make these "desktop" jurisdiction determinations. The Agencies do not explain how these methods will lead to better, more accurate jurisdictional determinations. Additionally, the Agencies do not indicate how they will communicate with landowners in the event that the Agencies determine through a "desktop" jurisdictional evaluation that their lands qualify as "waters of the U.S." (p. 6-7)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. The Corps will provide a landowner, permit applicant, or other "affected party" an approved jurisdictional determination when requested by name or otherwise has requested an official jurisdictional determination, whether or not it is referred to as an "approved JD." Jurisdictional determinations are not completed absent a request from a landowner.

Santa Barbara County Farm Bureau (Doc. #14966)

12.1066 Of further concern is the inconsistency that would be created by regional offices having discretion to interpret and apply the vague definitions in the proposed rule – "uplands," "floodplain," "subsurface connection," "waters" and "waste treatment." This would create confusion and additional burdens, require more federal permits, and increase possible litigation for both state permit programs and individual landowners. (p. 1-2)

Agency Response: The definitions in paragraph (c) of the final rule provide further clarification and the preamble contains additional discussion about the terms used in the final rule. The final rule has been revised to reflect concerns received about the proposed rule, including the use of terms such as "upland," and has provided additional clarity regarding the term "floodplain."

New York Farm Bureau (Doc. #15616)

12.1067 In response to (the) anticipated increase in determination needs, EPA and the Corps have provided no additional resources for NRCS or anyone else to handle this workload. In fact, NRCS in our state is already facing serious backlogs in many areas and unable to keep up with the current demand. One county reportedly has more than 1,000 determination requests in the queue.

Waiting for determinations in a system that is not prepared or equipped for this workload will undoubtedly cause great delays for farmers in conducting the normal and necessary farming activities needed to conduct their business. The agencies have provided no indication that they acknowledge this problem, let alone a plan or the financial commitment to address the problem?

Additionally, this increase in individual determinations will be done by the best professional judgment of staff. While NRCS officials are generally well respected in the farm community, it is inevitable that individuals will come to different conclusions on some of the confusing features on farms, especially those that seldom carry water. This will directly undermine the rule's stated goal of consistency by increasing subjectivity. We have already seen a range in determination decisions within our state and certainly within the country.

The agencies should only be developing rules that are clear, concise, and can be implemented consistently across the country, not rules that muddy the waters more and lead to more subjective enforcement. (p. 5-6)

Agency Response: There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act.

The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. Only the Corps and EPA determine if a water body is jurisdictional under sections 303, 311, 402, and 404 of the Clean Water Act. See the Economic Analysis for discussion on changes in jurisdiction and potential cost impacts to the various Clean Water Act programs. The agencies will continue to use desktop tools in making jurisdictional determinations which can improve efficiency in making such determinations. The majority of this information is available for the public's use; these tools can allow for greater consistency as they are currently available and accessible data sources. Guidance to facilitate implementation of the rule once it becomes effective is being developed, which will

provide for consistent determinations in an effective and efficient manner to the maximum extent practicable.

North Carolina Aggregates Association (Doc. #6938)

12.1068 The proposed rule allows the Corps field staff to make jurisdictional determinations based on "desktop" studies without gathering site-specific information which will likely lead to subjective and inconsistent determinations by Corps field staff. (p. 2)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. The Corps will provide a landowner, permit applicant, or other "affected party" an approved jurisdictional determination when requested by name or otherwise has requested an official jurisdictional determination, whether or not it is referred to as an "approved JD."

American Road and Transportation Builders Association (Doc. #15424)

12.1069 One method of establishing clarity would be to develop a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a "de minimis" level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A "de-minimis" standard for impacts would be particularly helpful for transportation projects and allow projects to avoid being delayed by minimal impacts to areas which are non-environmentally sensitive areas.

Furthermore the proposed rule does not recognize one of the biggest factors creating the confusion in defining federal jurisdiction – multiple agencies being involved in the jurisdictional determination process. ARTBA has repeatedly stated the involvement of multiple agencies in wetlands regulation hinders the overall efforts of the federal permitting program. One of the principal problems plaguing the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating "If one thing is clear, it is that

Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]."[256]

Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps, not the EPA, to take the lead and build a stronger, more predictable permitting program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program as its staff has the technical expertise and practical knowledge to ensure fair implementation of federal wetlands policy. The proposed rule should be amended to acknowledge the Corps' status as the sole intended decision-making agency in jurisdictional determinations and the EPA should be removed from the permitting process entirely. (p. 5-6)

Agency Response: **The final rule contains a definition of wetland that is consistent with the previous definition of wetland contained in agency regulation. It is important to note, however, that not all water bodies meeting the definition of wetland or those delineated by the agencies per the Corps 1987 Wetland Delineation Manual, will be jurisdictional under this final rule. Only those wetlands meeting the criteria outlined in paragraph (a)(1)-(8) are subject to Federal jurisdiction under the Clean Water Act.**

The agencies recognize that there are varying levels of degradation or impacts that are proposed by applicants to jurisdictional waters of the U.S. within the permit process however, this is a different inquiry than the inquiry related to whether a particular water is subject to Federal jurisdiction.

The 1979 Civiletti opinion made clear that EPA is the agency with the ultimate administrative authority to determine geographic jurisdiction under section 404 of the Clean Water Act.

Airports Council International – North America (Doc. #16370)

12.1070 On page 22241 of the Proposed Rule the text discussing significant nexus states:

"The agencies will determine whether the water they are evaluating, in combination with other similarly situated waters in the region, has a significant nexus to the nearest traditional navigable water, interstate water or the territorial seas."

The two agencies are not always in agreement on whether a water is jurisdictional, and the current proposal has not met its goal of providing clarity. Assuming the agencies can achieve that goal in a final rule, there is still the possibility of disagreement among parties as to "significant nexus." Many administrative and legal records show differences of opinions on the interpretation of scientific data among agencies or a stakeholder, who may disagree with an agency's decision. To address these situations we request that the Proposed Rule clarify:

[256] *Rapanos v. United States*, 547 U.S. 715 (2006).

- If both agencies must decide that a significant nexus exists, what happens if they disagree?
- If either the EPA or the Corps is responsible for making a significant nexus determination, and if only one agency makes the determination, how will it be decided which agency makes the determination?
- If a stakeholder may appeal a decision regarding a significant nexus.
- If a stakeholder must show no significant nexus exists. (p. 4-5)

Agency Response: **Corps District staff is responsible for completing jurisdictional determinations when requested by a landowner. If EPA does not agree with the Corps determination they can choose to elevate the determination as a special case under the 1989 Memorandum procedures, "Memorandum between the Department of the Army and the USEPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act."**

The Corps Administrative Appeals Process can be found at 33 CFR Part 331 and is applicable to approved jurisdictional determinations. At this time, approved jurisdictional determinations are not considered to be final agency actions; thus are not subject to judicial review. The preamble provides additional discussion on the factors that will be considered for (a)(7) and (a)(8) waters, which are the only waters for which a case-specific significant nexus determination can be made by the Corps under this final rule.

Clearwater Watershed District, et al. (Doc. #9560.1)

12.1071 Minnesota is located in the prairie pothole region of the United States. We are already hearing comments from the Army Corps regulatory branch office out of St. Paul, Minnesota that, under the new rule, all wetlands within the prairie pothole region are jurisdictional. The St. Paul District Office has a backlog of permit applications and jurisdictional determinations that presently requires a minimum of eight months to a year to complete each request. (p. 9-10)

Agency Response: **Under the rule, prairie potholes are a category of waters that are considered an (a)(7) water, and which require a significant nexus determination to evaluate jurisdictional status. In other words, though such waters have been determined by rule to be similarly situated, they still require a case-specific significant nexus analysis to determine whether they are jurisdictional. Other types of waters, including wetlands that may be in the prairie pothole region of the U.S. would need to be independently reviewed to determine whether they meet any of the exclusions or whether they meet one of the other categories of jurisdictional waters. The agencies do not make jurisdictional determinations without the landowner's request to do so.**

The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period jurisdictional determinations are expected to be more

efficient. Also, in the prairie pothole region, which includes Minnesota, the climate can create delays in completing jurisdictional determinations as field work cannot be completed during the winter. The agencies will continue to work with stakeholders in the section 404 program to provide for an effective jurisdictional determination process. Please refer to the language under paragraph (a)(7) of the rule and the preamble that discusses the case-specific analysis required for the waters identified in this paragraph, such as prairie potholes.

Minnesota Cities Stormwater Coalition (Doc. #14647)

12.1072 There is a great deal of concern about the timely review of permitting requests and jurisdictional status requests to the Corps. The current delays in responses from the Corps are already unacceptable. It seems unlikely that funding requests from the Corps for additional staff resources to expedite reviews and responses to requests will receive favorable response from Congress. Expanding the breadth of coverage under WOTUS and adding complex review standards such as "significant nexus" and "subsurface hydrologic connection" will only add to the Corps' workload and exacerbate the delays in responses. Please consider the proposed rule language in light of this problem. (p. 6-7)

Agency Response: The agencies will continue to use desktop tools in making jurisdictional determinations which can improve efficiency in making such determinations. The majority of this information is available for the public's use; these tools can allow for greater consistency as they are currently available and accessible data sources. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient.

Lake County Stormwater Management Commission (Doc. #16893)

12.1073 SMC works in close partnership with the USACE-Chicago District under an established interagency coordination agreement to assist with jurisdictional determinations ("JDs") in Lake County. Using the USACE's *Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007), hundreds of JDs have been processed in a prompt and consistent manner, with very few instances of complaints or appeals by applicants. This is clear evidence that the current system for JDs in Lake County is working efficiently and no change is warranted to the current JD guidance. (p. 2)

Agency Response: The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. This guidance will leverage to the maximum extent possible all applicable existing guidance. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient. The Corps will continue to work with stakeholders to identify efficient and effective tools to aid in making jurisdictional determinations.

Western States Water Council (Doc. #9842)

12.1074 While the rule and the related preamble are clear that other waters may be jurisdictional, the documents are less clear about how, when, or in which circumstances your agencies will perform case-by-case analyses to determine the jurisdictional status of these waters. This lack of clarity could be interpreted as implying that all other waters are potentially jurisdictional until EPA and the Corps determine otherwise at an indeterminate point in time. Such an implication has the potential to put landowners in limbo regarding the status of other waters located on their property and runs counter to the proposed rule's stated purposed of increased clarity. It also requires landowners to prove a negative should they desire to develop their land, or risk the possibility of incurring fines and other penalties if your agencies subsequently determine that the water is jurisdictional.

Instead, the rule should ensure that the applicable permitting agency, such as the Corps for Section 404 jurisdictional determinations in most states, bears the burden of determining the jurisdictional status of other waters in a timely manner. To help achieve this goal, the rule should provide a specific deadline by which the applicable agency must make a jurisdictional determination for other waters after it receives a jurisdictional determination request from a landowner.

The WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to determine a reasonable timeframe for jurisdictional determinations regarding other waters and to address any other issues associated with this proposal, including possible consequences and remedies in those situations where the permitting agency does not meet the specified deadline. The WSWC also proposes 180 days as an initial, possible starting point for discussions regarding the time period for your agencies' other waters determinations. (p. 4)

Agency Response: **The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. All waters meeting the definition of (a) (1)-(6) waters do not require a case-specific significant nexus determination and are jurisdictional by rule. Only waters that fall into the (a)(7) or (a)(8) categories require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective.**

The agencies will continue to provide a jurisdictional determination at the request of a landowner. There are two types of jurisdictional determinations; preliminary jurisdictional determinations and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that

jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act.

The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. There is not expected to be a required metric for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

12.1075 As jurisdiction will now be established for an entire category of "similarly situated waters," it will be necessary for interested parties, e.g., water utilities and conservation and conservancy districts, to monitor and actively participate in, each jurisdictional determination in each and every basin wherein they do business or may do business in the future. This is the case because though they may have no intent to ever engage in dredge and fill activities or point source discharge activities that impact the particular "other water" that may have precipitated the regional examination, once that determination is made, the entire region/basin will become "federalized" and they will bear the consequences of that determination at such time as one of their projects is ready to proceed. (p. 5)

Agency Response: The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The preamble contains pertinent information on case-specific significant nexus determination discussions under (a)(7) and (a)(8) waters that is pertinent to the concerns mentioned here. A jurisdictional determination is made on a case-by-case basis when requested by a landowner; the agencies do not complete determinations absent a request. Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is specific only to waters in the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.

Utility Water Act Group (Doc. #15016)

12.1076 The Proposed Rule leaves key terms of art like "floodplain," "riparian area" and "hydrologic connection" to the Agencies' best professional judgment. *Id.* at 22,208 col. 3. This continuation of the use of agency discretion to designate WOTUS and lack of clarity increase the chance that, if a project proponent makes a good faith determination on its own, it could be opening itself up to later re-evaluation of the determination by the Agencies, or even citizen suits.[257] The Agencies have not even identified what the due

[257] The risk of Agency flip-flopping on the jurisdictional status of given features is not a hypothetical threat, but an established reality. *See supra* pp. 25-26. [p. 35-36]

diligence standard would be for an applicant, short of going to the Agencies for the "best professional judgment" to avoid enforcement. (p. 89)

Agency Response: **The agencies have revised the definition of "neighboring" under adjacent (a)(6) waters in an effort to provide more of a "bright line" to reduce the "burden of proof" on both the agencies and the regulated public. Waters must meet the confines of the definitions in order to be jurisdictional by rule as the agencies have determined that such characteristics must be met in order to demonstrate that the waters have the required significant nexus. See the definitions in paragraph (c) of the final rule for further clarification and the preamble for additional discussion about the terms used in the final rule. The final rule has been revised to reflect concerns received about the proposed rule, including the use of terms such as "floodplain."**

American Electric Power, Inc. (Doc. #15079)

12.1077 Application of the significant nexus test under the proposal serves only to expand the universe of case-by-case determinations that the agencies would be required to make. AEP's experience, as is that of most of the regulated community, is that the Corps of Engineers is severely understaffed and unable to make timely determinations of jurisdiction, much less process resulting individual permit applications, under the current regulatory guidance. The proposed rule only serves to add scenarios which will require case-by-case, on-site surveys and reviews in order to determine whether the water feature is jurisdictional. Any potential "clarification" will not offset this increase in workload associated with significant nexus determinations for adjacent waters and other waters that would now be subject to this test. (p. 5)

Agency Response: **The final rule has been modified from the proposed rule to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional by rule. Additionally, the rule has been changed to reduce the waters upon which a case-specific significant nexus determination can be required; thus, reducing the circumstances under which such evaluations will occur.**

The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. Additionally, the Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

12.1078 The Proposed Rule would increase the efforts needed to delineate potential waters of the United States, resulting in increased costs and delays for nearly every project involving earth disturbance. Given the extensive water resources in Pennsylvania, costs and delays would be associated with evaluating the expanded view of jurisdictional waters to determine whether a jurisdictional water would be impacted by an activity. For example, the Proposed Rule considers jurisdictional streams to continue even though they

have gone underground for an unspecified period of time.[258] Therefore, qualified professionals would need to evaluate a larger up gradient area to determine whether a connection to jurisdictional water exists. Similarly, water that is connected to a jurisdictional water by a non-jurisdictional water could still be considered to be jurisdictional because of EPA's new notion of "significant nexus" under the Proposed Rule. Therefore, professionals would need to evaluate not only water connected to the jurisdictional water but also all waters up gradient and down gradient from it. In addition, wetlands that are physically isolated (i.e., currently non-jurisdictional) could be considered to be jurisdictional under the Proposed Rule because they are within the riparian area of a PADEP-designated stream. In all, professionals would no longer be able to walk the limit of disturbance and reasonable buffer areas to identify jurisdictional resources and impacts. Instead, they will need to assess a much larger area to determine whether surface or subsurface hydrologic connections exist, whether a bed/bank exists upstream or downstream from a tributary, or whether a significant nexus exists with an "other water" when considered in combination with similarly situated waters within the same region. (p. 8)

Agency Response: **As revised the final rule provides additional clarity regarding waters that are considered jurisdictional by rule and waters that may require a case-specific significant nexus determination. Those waters requiring a case-specific significant nexus evaluation are limited to two categories: (a)(7) and (a)(8), and to limited circumstances within those categories. The best available information will be used when making a determination. This may include watershed data that enable staff to use their best professional judgment with information provided by the landowner to make jurisdictional calls.**

See the preamble section on "Tributaries" for further discussion on the characteristics required to meet the definition of a tributary. All tributaries are jurisdictional by rule and have been determined to have a significant nexus to the (a)(1) to (a)(3) waters. Under the 2003 and 2008 guidance documents, the agencies had to determine whether a potential tributary connects to the downstream tributary network in order to determine to which water the tributary flows or whether the tributary is "isolated." This aspect remains under this final rule with the requirement that the tributary contributes flow to the downstream (a)(1) to (a)(3) waters. In addition, tributaries could have sections that went underground and were connected via shallow subsurface flow under those guidance documents. The agencies are experienced in making such determinations and will continue the practice as described in the final rule.

Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.

[258] See 79 Fed. Reg. 22199 for additional examples.

12.1079 PIOGA requests clarification and limitation of the water bodies that would be considered to be "other waters." (p. 17)

All waters meeting the definition of (a)(1)-(6) waters do not require a case-specific significant nexus determination. These waters are jurisdictional by rule. Only waters that fall into the (a)(7) or (a)(8) categories will require a case-specific significant nexus determination. Any water body not identified in (a)(1)-(8) is NOT a water of the U.S., even if there is not a specific exclusion in paragraph (b) that describes that particular water body. Please refer to rule text and preamble for the discussion of waters that require a case-specific significant nexus determination.

Humboldt River Basin Water Authority (Doc. #15229)

12.1080 The proposed rule allows the Corps of Engineers field staff to make jurisdictional determinations based on "desk-top" studies without gathering site-specific information, which will likely lead to arbitrary and inconsistent determinations by field staff. (p. 3)

Agency Response: Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

The agencies only complete jurisdictional determinations in response to a request from a landowner.

Washington County Water Conservancy District (Doc. #15536)

12.1081 Emergency Response Activities. The expanded scope of the Proposed Rule will result in delayed responses to emergency situations such as fire, floods, and drought. To minimize such delays, the Agencies should authorize an expedited review process for Jurisdictional Determinations associated with post-fire repair and replacement and with emergency activities undertaken in response to drought or floods. (p. 32)

Agency Response: The Corps regulations at 33 CFR part 325.2(3)(4) define an "emergency" as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures." In emergency situations, Corps Division Engineers, in coordination

with the Corps District Engineers, are authorized to approve special processing procedures to expedite permit decisions. The Corps also uses alternative permitting procedures, such as general permits and letters of permission, when appropriate, to expedite processing of permit applications for emergencies. Certain nationwide permits do not require pre-construction notification and such activities can be completed without notification as long as they comply with the terms and conditions of such permits. In addition, certain discharges of dredged and/or fill material are exempt from regulation under section 404(f)(1)(b) under the Clean Water Act that are "for the purpose of maintenance, including emergency reconstruction." An important note is that all permit applications do not require jurisdictional determinations, and Regulatory Guidance Letter 08-02 provides for Preliminary Jurisdictional Determinations, which are generally more expeditious than Approved Jurisdictional Determinations.

East Kentucky Power Cooperative (Doc. #15402)

12.1082 EKPC is concerned that case-by-case basis floodplain determinations based upon the agencies best professional judgment for significant nexus evaluations only brings greater confusion to application of jurisdiction. EKPC recommends continued use of the FEMA 100-year floodplain designations in performing significant nexus determinations. (p. 1)

Agency Response: The preamble section on "Adjacent Waters" includes a discussion on the term "floodplain" and the use of the FEMA 100-year floodplain in implementing the definition of "neighboring." See the rule text under paragraph (c) for the definition of "significant nexus" and the preamble section on the "Case-Specific" waters requiring a case-specific significant nexus determinations and the factors to be used in making such determination.

Tucson Electric Power Company, UNS Energy Corporation (Doc. #19561)

12.1083 Include a process flow chart, agency processing time-line, and standard operating procedures for completing a jurisdictional determination of WUS in the final rule. (p. 4)

Agency Response: The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective; this may include flow-charts of the process. There is not expected to be a required metric for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.

12.1084 Include a process flow chart and agency processing time-line, list of information requirements and/or standard operation procedures for completing a "significant nexus" evaluation in the final rule. (p. 4)

Agency Response: **The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during in the implementation of the final rule to make the process predictable, efficient, and effective. There is not expected to be a required metric for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns.**

12.1085 Include in the final rule a directive that directs the agencies to implement a comprehensive, practical (hands-on), training program for agency regulatory personnel, consultants, and stakeholders, so they all know exactly how to identify and delineate WUS and apply the rule consistently. (p. 4)

Agency Response: **The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The Corps intends to provide field-based training for their districts and is investigating joint agency training opportunities with EPA and NRCS. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective.**

12.1086 Define a 'bright line" or regionally-specific metrics that identify the limit of CWA jurisdiction over surface water resources. (p. 4)

Agency Response: **The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. Similar to other regulations, the rule is derived from science and judicial positions and ultimately reflective of Administration policy decisions.**

The agencies recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training will necessarily include

regionally-based components to ensure consistent and efficient implementation of the rule appropriately tailored to reflect the natural environment of a specific ecoregion.

12.1087 Provide a list of waters that are jurisdictional and a list of waters that are not jurisdictional. (p. 4)

Agency Response: **All jurisdictional determinations are made on a case-by-case basis when requested by a landowner. The Corps does not complete a jurisdictional determination absent such a request, nor does it have the resources to determine which waters are jurisdictional and not jurisdictional in the entire United States. Moreover, the Corps does not have the authority to trespass on private lands to determine jurisdiction if not requested by that landowner. Most Corps Districts maintain a list of waters that are considered navigable waters under Section 10 of the Rivers and Harbors Act, which may be informative with respect to identifying traditionally navigable waters.**

Ducks Unlimited (Doc. #11014)

12.1088 At the intersection of our comments above with respect to "clarity, certainty, and predictability" and the encouragement to broadly apply a "weight of evidence" approach, is the issue of predictability. In the end, a rule will only be effective if it is not only clear, founded in science, and consistent with the existing judicial record, but it must also be realistic from the standpoint of what can be pragmatically accomplished, both administratively and scientifically.

Many of the strongest pieces of research that provide the strongest and most compelling evidence regarding significant connectivity took years to conduct. That is the nature of science. Most studies involved a relatively few wetlands, or were otherwise limited in their geographic scope while nevertheless providing some important, broadly applicable information, useful and applicable within the "weight of evidence" approach.

Against those scientific realities as a backdrop, the net result of the proposed rule is that it seems to place a heavy reliance on the "case-specific analyses" of "other waters." In the proposed rule's current form, it appears the vast majority of the surface area of the U.S. would fall within watersheds that would require case-specific analyses to determine jurisdiction for the multitude of wetlands occurring within these areas. Therefore, being aware of the staffing, budget, and other administrative constraints and realities that the agencies face today and anticipate for the foreseeable future, we must seriously question the pragmatism of some aspects of the proposed rule, particularly those related to "other waters." And in a related way, although science-based case-specific analyses may sound appealing in terms of their ability to be focused on specific wetlands, watersheds, and/or ecoregions, such science is both expensive and time-consuming, sometimes requiring years to conduct a scientifically sound and accurate analysis of a situation. We must again, therefore, question the practicality of a rule that would place an increasing emphasis on requiring these kinds of costly, time-consuming analyses for a high proportion of the Nation's waters within a regulatory framework that desires certainty, predictability, and administrative efficiency and timeliness. Thus, as the agencies evaluate comments and develop the final rule, we strongly encourage them to place greater weight on this criterion of administrative and scientific "pragmatism." Later in

our comments we will offer suggestions, such as *a priori* analysis based on existing science and using a "weight of the evidence" approach of major categories of "other waters" and ecoregions, that we believe will be not only more pragmatic to apply and administer, but will also go a long way toward providing significantly increased clarity and certainty for all stakeholders. (p. 9-10)

Agency Response: **The agencies acknowledge the author's comments concerning scientific and administrative approach. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. Similar to other regulations, the rule is derived from science and judicial positions and ultimately reflective of Administration policy decisions.**

The agencies recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training will necessarily include regionally-based components to ensure consistent and efficient implementation of the rule appropriately tailored to reflect the natural environment of a specific ecoregion.

The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The Corps intends to provide field-based training for their districts and is investigating joint agency training opportunities with EPA and NRCS. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective.

See the preamble for additional discussion on the case-specific significant nexus determinations and the factors to consider in making such determinations.

12.1089 *Is it scientifically and administratively efficient and pragmatic?* While providing certainty and clarity and seeking to provide a science-based limit to jurisdiction, the final rule must also be pragmatic from both administrative and scientific perspectives. We suggest that this will be greatly aided by using a "weight of the evidence" approach to the science and processes incorporated within the final rule. (p. 74)

Agency Response: **See response above. The agencies acknowledge the author's comments concerning scientific and administrative approach. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. Similar to other regulations, the rule is derived from science and judicial positions and ultimately reflective of Administration policy decisions.**

Western Resource Advocates (Doc. #16460)

12.1090 With the rule making clear jurisdictional determinations for (a)(5) and (6) waters, WRA believes that both the agencies and regulated entities will have to devote fewer resources to jurisdictional determinations over-all and therefore have a relatively greater capacity to address this more limited group of jurisdictional questions with the warranted thoroughness. (p. 21)

Agency Response: The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. See the preamble for additional discussion on the case-specific significant nexus determinations and the factors to consider in making such determinations.

Association of State Floodplain Managers (Doc. #19452)

12.1091 In order to minimize regulatory delays associated with a significant nexus determination, or with distinguishing between regulated tributaries and unregulated ditches where such a distinction is unclear, we recommended continued use of preliminary jurisdictional determinations (JD's). This process allows a landowner to assume that jurisdictional waters "may be" present on a site, and to move directly to a permitting process and avoid the delays involved with obtaining a formal JD, especially where general permits are applicable. (p. 8)

Agency Response: There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary.

Not every permit application requires a jurisdictional determination. The Corps will continue to provide the option to the landowner for both approved and preliminary jurisdictional determinations.

Committee on Space, Science, and Technology (Doc. #16386)

12.1092 Many constituents claim that the proposed rule adds vague terms and undefined concepts to the Clean Water Act regulations. You claim the rule improves clarity and certainty.

a. Do you believe that it is less likely that businesses will seek jurisdictional determinations for all potential activities as your economic analysis appears to assume?

b. If it is less likely, is that because fewer areas or covered? Or is it because under this rule more places are automatically covered? (p. 11)

Agency Response: **The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" covered by the Act. Many definitions for the first time are clarified. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion regarding changes in jurisdiction.**

12.4.3 Field Indicators

Specific Comments

ERO Resources Corporation (Doc. #14914)

12.1093 The arid West (as defined by the Corps and adopted for these comments) consists of all or portions of 12 states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming (Corps 2008). The Corps uses the same description for the arid West in their manual on delineating the OHWM in the arid West (Lichvar and McColley 2008). The Corps has obviously spent considerable time, research, and funds to provide guidance on determining the jurisdictional features of waters and wetlands in the arid West, recognizing how different these resources are in the arid West relative to other parts of the U.S. The proposed rule also needs to recognize these differences. (p. 12)

Agency Response: **The proposed rule does not change the use or interpretation of the important technical resources cited in the comment. The agencies will continue to use the identified manuals for delineating wetlands and OHWM in the arid west.**

12.1094 It is also important to note that drainages in the arid West can have a mix of ephemeral and intermittent characteristics, which further add to their variability and the need for a case-by-case assessment to determine their jurisdictional status. Many intermittent drainages have reaches with shallow ground water levels that seasonally contribute flow to only a reach of the drainage, which can then be separated by a dry ephemeral reach. In the arid West, it is not uncommon to have intermittent drainages with scattered reaches of seasonal or sometimes perennial pools of water and/or wetlands fed by ground water seeps separated by dry ephemeral reaches. As the lengths of dry ephemeral reaches increase between the intermittent reaches, the potential decreases for seasonal flows to connect with a WUS and/or for affecting the chemical, physical, or biological integrity of a WUS, as discussed above for discontinuous features. (p. 13)

Agency Response: **As further discussed in the Agency summary response of the Tributaries -- Relevance of Flow Regime section 8.1.1 of this Response To Comments document, the proposed rule defined "tributary" as a water physically**

characterized by the presence of a bed and banks and an ordinary high water mark, which contributes flow either directly or through another water to a traditional navigable water, interstate water, or territorial sea. The proposed definition relied on these physical characteristics rather than a particular flow regime to identify tributaries with a significant nexus. The final rule is similar to the proposal, and its preamble indicates that the scientific literature supports a conclusion that waters meeting the definition of "tributary," either individually or in combination have a significant nexus or thus are jurisdictional *per se*. Furthermore the agencies have determined that the presence of sufficient flow to form bed and banks and another indicator of OHWM is also sufficient to support status as a similarly situated class of waters with a significant nexus.

12.1095 Physical Characteristics. Several physical characteristics distinguish ephemeral and intermittent drainages in the arid West in addition to the Corps' definitions above. The most obvious visible difference that frequently distinguishes ephemeral drainages in the arid West is the lack of difference in vegetation associated with the drainage compared with the surrounding landscape (Photos 1, 3, 4, and 6, Appendix A). Vegetation in the arid West responds dramatically to moisture. However, because there is rarely reliable moisture associated with ephemeral drainages in the arid West, there are typically no or few differences in species composition or plant density associated with ephemeral drainages. Differences in plant species composition and density in the arid uplands and along ephemeral drainages are typically more a function of differences in geology, soil type, aspect, and elevation rather than the location of vegetation in relation to the ephemeral drainage.

Beds and banks and OHWMs can be difficult to discern, are often discontinuous, and can be almost meaningless (e.g., an OHWM a few inches deep and a bed and banks along a drainage a few feet wide). The Corps manual on delineating the OHWM in the arid West (Lichvar and McColley 2008) notes that in the arid West region of the U.S., waters are variable and include ephemeral/intermittent and perennial channel forms. The most problematic OHWM delineations are associated with the commonly occurring ephemeral/intermittent channel forms that dominate the arid West landscape. Other than the topographic feature of the drainage, there is frequently little to distinguish an ephemeral drainage from the surrounding landscape in the arid West, particularly erosional features. Intermittent drainages in the arid West have ground water levels that are shallow enough to support vegetation (e.g., phreatophytes) that differs from and/or occurs more densely than the surrounding landscape (Photos 9 and 10, Appendix A). However, other physical features can be similar to ephemeral drainages because ground water rarely contributes sufficient flow to form an OHWM and/or a bed and banks; therefore, as with ephemeral drainages, these features are still formed by infrequent precipitation events. (p. 13-14)

Agency Response: **The final rule does not change the use or interpretation of the important technical resources cited in the comment. The agencies will continue to use the identified manuals for delineating wetlands and OHWM in the arid west. Furthermore the agencies have determined that the presence of sufficient flow to form bed and banks and another indicator of OHWM is also sufficient to support status as a similarly situated class of waters with a significant nexus.**

12.1096 Hydrological Characteristics. The hydrology associated with ephemeral and intermittent drainages was previously described as part of the Corps' definition of ephemeral and intermittent streams. Hydrology differentiates ephemeral and intermittent drainages from rivers and perennial streams and determines the resources associated with these drainage types. In the arid West, infrequent and inconsistent precipitation events and lack of shallow ground water associated with ephemeral drainages typically do not support wetlands within or adjacent to the drainage. (p. 14)

Agency Response: Please see summary response 8.1.1.

Iowa Farm Bureau Federation and American Farm Bureau Federation (Doc. #7633)

12.1097 The proposed rule would define a "tributary" as "a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a[traditional navigable water or impoundment]...." Although the rule would describe a tributary as "a water," the actual water flow may be only "ephemeral" – i.e., only when it rains. EPA explains that: "A bed and banks and ordinary high water mark (OHWM) generally are physical indicators of water flow. These physical indicators can be created by ephemeral, intermittent, and perennial flows."

EPA also says: "A tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of OHWM." An "ordinary high water mark," according to EPA, is a line "established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

Turning to the feature on my land, shown on the photograph, a subtle channel is clearly visible, where water flows in response to rainfall, leaving marks on the land created by flowing water. My concern is that while to me, this is just a low area in my farm field – this feature appears to fit the description of a "tributary" in the proposed rule. You looked at the photo, however, and indicated that the feature looks like an "erosional feature" that would not be regulated under the rule.

While I am pleased to hear that you do not see the low area in my field as a "tributary," I am concerned that staff and enforcement officials implementing the rule may see it differently. I am also concerned that features such as these exist on thousands of farm fields across the countryside. The farmers who own and work these lands would be hard pressed to determine whether features like these are "tributaries," as described by EPA, or "erosional features." The preamble to the proposed rule itself points out the difficulty of distinguishing between non jurisdictional "erosional features" and jurisdictional "ephemeral tributaries." See 79 Fed. Reg. at 22,218-19 (describing gullies, rills, ephemeral streams, and swales). The difference seems to be in the eye of the beholder – leaving farmers and other landowners vulnerable to enormous penalties if an agency inspector, citizen enforcer, or judge later sees it differently. This is not "certainty" or "clarity" from the farmer's perspective – it is doubt, ambiguity, and risk. (p. 1-2)

Agency Response: **Jurisdictional determinations must be done on a case by case basis and can be requested from your local Corps District Office. The final rule has been developed to provide clarity to the public and help increase the consistency of the regulatory community when identifying "Waters of the United States." The final rule continues the practice of using the OHWM to identify the lateral extent of jurisdiction for tributaries but also provides additional clarity by defining tributaries. To qualify as a tributary a feature must have both a bed and banks and another indicator of OHWM. Given the long history of identifying OHWM in the field and continued efforts to provide more technical tools for identifying OHWM, including bed and banks, the consistency of identifying tributaries will continue to improve.**

Michigan Farm Bureau (Doc. #10196)

12.1098 EPA and USACE's assurance that they will exclude gullies and rills from regulation means little in the field. Staff has wide latitude to view features on the landscape as having a "bed, bank and ordinary high water mark" and therefore qualifying as tributaries under the Act, regardless of those features' appearance due only to flood events that create the excluded gullies and rills. The extension of jurisdiction to so many additional "tributaries" by virtue of their tenuous connectivity to jurisdictional waters creates this dilemma by putting field staff much further up the landscape than previously allowed under actual regulatory authority. (p. 9)

Agency Response: **Jurisdictional determinations must be done on a case by case basis and can be requested from your local Corps District Office. The final rule has been developed to provide clarity to the public and help increase the consistency of the regulatory community when identifying "Waters of the United States." The final rule continues the practice of using the OHWM to identify the lateral extent of jurisdiction for tributaries but also provides additional clarity by defining tributaries. To qualify as a tributary a feature must have both a bed and banks and another indicator of OHWM. Given the long history of identifying OHWM in the field and continued efforts to provide more technical tools for identifying OHWM, including bed and banks, the consistency of identifying tributaries will continue to improve.**

Coalition of Renewable Energy Landowner Associations (Doc. #14626)

12.1099 These rules will be enforced and monitored by field agents who in most cases are not hydrologists or registered professional engineers. Without protocols and standards of practice to determine if a "significant nexus" exists that places the water under federal jurisdiction, and thus subject to permitting, there exists the potential for abuse of power and outright civil rights violations. (p. 8)

Agency Response: **The final rule provides additional clarity to the public and regulators by specifically identifying the functions to be considered when evaluating significant nexus. They can be found in 33 CFR 328.3(c)(5).**

National Council for Air and Stream Improvement, Inc. (Doc. #13627)

12.1100 Approaches to quantifying physical, chemical and biological connectivity are complex due to the diversity of hydrologic systems and therefore *"careful attention must*

be given to identifying the most appropriate techniques" when determining connectivity (EPA-SAB-15-001, page 15). While the SAB has identified several potential approaches to demonstrate connectivity, we caution the Agencies about relying on complex and data intensive "graph-theory based" models and indices (e.g., Integral Index of Connectivity, Directional Connectivity Index, etc.) to assess the degree of connectivity. Outside of academic circles, the practicality, usability, applicability and cost-effectiveness (e.g., for data acquisition) of these models are unclear. Furthermore, such complex models and indices do not provide much certainty or clarity to regulators in the field or the regulated community. Undoubtedly, more basic and applied methodological approaches to assessing connectivity are available or could be developed.

Development of delineation methods and criteria could begin with a focus on practical indicators of connectivity such as: (1) distance from a wetland or waterbody to the nearest traditional navigable water; and (2) magnitude and duration of water flow from a tributary or wetland to the nearest traditional navigable water. Such a practical approach would require some effort to define, identify, and delineate the nation's waters, traditional navigable waters, and adjacent wetlands but would be consistent with the decades old approach used by the Corps for jurisdictional wetland determinations. (p. 4)

Agency Response: **As further discussed in Section 5 of the Response to Comments document, the final rule does not establish or adopt specific models or indices for evaluating waters subject to a case-specific significant nexus analysis. The agencies believe that a determination of the relationship of these waters to traditional navigable water, interstate waters, and the territorial seas, and consequently their significance to these waters, requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide. The case-specific analysis called for by paragraphs (a)(7) and (a)(8) recognizes geographic and hydrologic variability in determining whether one of these waters, or a group of these waters, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. While the final rule does not establish quantitative metrics, it does now identify the specific functions that waters can provide that can significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies believe that creating a definitive list of functions to be evaluated provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered. The final rule also clarifies that a water may have a significant nexus based on a single function alone so long as that function contributes significantly to the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or the territorial seas.**

Waterkeeper Alliance et al. (Doc. #16413)

12.1101 In addition to the fact that there is no sound legal or scientific basis for adding the requirement for an OHWM to the jurisdictional requirements, it is important to note there have been extensive problems with interpretation and implementation of the OHWM requirement in the CWA Section 404 Program. This issue also demonstrates why the OHWM requirement should not be included in the definition of tributary. For example,

the U.S. General Accounting Office ("GAO") has noted that the Corps' definition of OHWM is ambiguous, and may be reasonably interpreted differently by competent staff.[259] For example:

- The Portland District reported that it was difficult to identify the OHWM, even in portions of the Columbia River and that three different staff would likely make three different jurisdictional determinations.
- The Philadelphia District reported that identifying OHWMs in the upper reaches of watersheds was one of its most difficult challenges, as one progresses upstream, the depth of the bed and bank diminishes, and the key indicators of an ordinary high water mark gradually disappear.

The GAO also noted that "officials from the Chicago District said that because their district was heavily urbanized many channels had been manipulated and contained, often in ways that obscured the ordinary high water mark" and that identifying the OHWM in the arid West was particularly difficult due to intermittent flow and flooding. There is no valid scientific or legal basis for excluding channelized streams, the upper reaches of tributaries, or streams in arid regions that lack an OHWM from the definition of "waters of the United States." To the contrary, the need to include and protect these waters is well documented through the Connectivity Report and is supported by the SAB Report. (p. 33-34)

Agency Response: **The final rule continues the longstanding use of OHWM to define the lateral extent of jurisdiction, however provides the additional clarity of explicitly stating the requirements for identifying the upstream extent of jurisdiction as well, see 33 CFR 328.3(c)(3). The Corps and EPA recognize the concerns raised in the 2004 GAO report and also the recognize the more than a decade of effort spent improving the consistency and rigor of OHWM identifications since that report, see http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx.**

The final rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. The agencies have determined that the presence of sufficient flow to form bed and banks and another indicator of OHWM is also sufficient to support status as a similarly situated class of waters with a significant nexus. Features not meeting the legal and scientific tests are not jurisdictional under this rule.

Society of American Foresters (Doc. #15075)

12.1102 The Proposal should also include an expanded discussion of the methods that could be used to define, identify, and delineate waters, traditional navigable waters, and adjacent wetlands. This explanation should be supported by a substantive review of: (1) methods that could be developed to quantify connectivity among wetlands, waters, and

[259] U.S. General Accounting Office. (Feb. 2004). WATERS AND WETLANDS Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction. (GAO Publication No. 04--297) (hereinafter "GAO Report") *available at* http://www.gao.gov/new.items/d04297.pdf

traditional navigable waters; and (2) criteria that policymakers might select for distinguishing significant connections from other de minimis connections. These methods and criteria are critical because they are prerequisites for measuring the connections among wetlands, waters, and traditional navigable waters that are relevant to determining the extent of WOTUS. (p. 4)

Agency Response: **The final rule provides additional clarity to the public and regulators by specifically identifying the functions to be considered when evaluating significant nexus which is supported by the Connectivity report including the supporting SAB review.**

As further discussed in Section 5 of the Response to Comments document, the final rule does not establish or adopt specific models or indices for evaluating waters subject to a case-specific significant nexus analysis. The agencies believe that a determination of the relationship of these waters to traditional navigable water, interstate waters, and the territorial seas, and consequently their significance to these waters, requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide. The case-specific analysis called for by paragraphs (a)(7) and (a)(8) recognizes geographic and hydrologic variability in determining whether one of these waters, or a group of these waters, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. While the final rule does not establish quantitative metrics, it does now identify the specific functions that waters can provide that can significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies believe that creating a definitive list of functions to be evaluated provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated public over which factors will be considered. The final rule also clarifies that a water may have a significant nexus based on a single function alone so long as that function contributes significantly to the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or the territorial seas.

12.1103 Water quality standards have been largely established based on expectations and needs for larger streams. But smaller headwater streams and other waterbodies, which can comprise the majority length of a stream networks, often have very different processes and water quality conditions (Ice and Binkley 2003). Therefore, expansion of per se WOTUS to include ephemeral headwater streams could confuse existing water pollution control measures like state BMP programs.

For example, dissolved oxygen (DO) concentrations in stream water tends to be high for cold streams and rivers (solubility of DO inversely related to water temperature), especially if not exposed to high biochemical oxygen demand (BOD) or bottom sediment oxygen demand (SOD). But recent research in forest streams finds that, during low flow periods, some headwater reaches can exhibit low DO concentrations even with cold water temperatures. This is probably due to a preponderance of recently emerged hyporheic or groundwater comprising the flow. Natural conditions, such as low gradient and high SOD, can also lead to low DO concentrations (Ice and Sugden 2006). These

conditions are not currently fully recognized in water quality standards, and the extension of categorical WOTUS to include ephemeral streams and wetlands has the potential to not only expand jurisdictional waters but also lead to inappropriate classification of watersheds as impaired. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See summary response 12.2 above.**

12.5. 311 – OIL SPILL PREVENTION PLANS

Summary Response

This action does not change an owner/operator's ability to determine whether there is a reasonable expectation that an oil discharge from a facility could reach waters of the U.S. or adjoining shorelines, as part an applicability evaluation if the facility's aggregate oil storage capacity exceeds the applicable thresholds in Spill Prevention, Control and Countermeasure (SPCC) rule at 40 CFR part 112. This determination is a site-specific evaluation by the owner/operator and is important consideration in determining whether a facility is subject to the SPCC rule. However this determination must exclude man-made features such as existing secondary containment structures (dikes or remote impoundments) that may serve to restrain, hinder, contain or otherwise prevent an oil discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). The owner/operator should consider the potential oil pathways once discharged oil has left the facility, including an evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters. A rain event facilitating this transport pathway may be an appropriate consideration. A facility subject to the SPCC rule must prepare a plan that addresses: 1) the type of oils and containers at the site; 2) discharge prevention measures; 3) discharge and drainage controls, including secondary containment features; 4) countermeasures for discharge discovery, response and cleanup; 5) methods for disposal or recovered materials; and 6) an appropriate contact/notification list. See 40 CFR part 112.7(a)(3).

Specific Comments

Allen Boone Humphries Robinson LLP (Doc. #19614)

12.1104 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 section402. (p. 6)

Agency Response: **This action would not necessarily require facilities that have prepared SPCC plans to update these plans outside of the normal 5-year review cycle or complete a technical amendment to the plan unless there is a change in facility configuration, etc. that affects its potential for an oil discharge to waters to the U.S. or adjoining shorelines. See 40 CFR part 112.5 in the SPCC rule. The owner/operator of a facility that has an SPCC plan in place has already determined**

that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).

Missouri Association of Municipal Utilities (Doc. #7931)

12.1105 Expansion of requirements for Spill Prevention, Control and Counter Measures: Municipal governments often have fleet management services, and in some cases fueling facilities which may require the adoption of Spill Prevention, Control and Counter Measures (SPCCM). The jurisdictional trigger for these plans is whether oil "could reasonably be expected" to discharge into navigable waters. The proposed language would leave no doubt that virtually every facility in the state, no matter how far from current jurisdictional waters, would be required to implement their own local SPCCM plan. (p. 5)

Agency Response: This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a non-farm facility could reach waters of the U.S. or adjoining shorelines, if the non-farm facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. The applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters.

County Commissioners Association of Pennsylvania (Doc. #14579)

12.1106 There are at least 13 different places in federal regulations that reference Waters of the U.S., either directly or through the definition of "navigable waters". For instance, Part 120 of the CFR, oil spill prevention regulations, requires a permit anytime an individual uses equipment or tanks around navigable waters; that permit includes requirements for spill prevention kits, training and emergency plans. The term is also referenced regarding oil pollution prevention under Part 112, which applies to homeowners that have oil tanks near navigable waters, and Part 116 related to hazardous substance and planning. CWA Section 311 covers oil spill prevention and preparedness, reporting obligations, and response planning requirements that apply to facilities engaged in production or storage of oil products based on total volume. In particular, inland non-transportation oil facilities of a certain size that have potential to discharge to navigable waters must prepare and implement Spill Prevention, Control, and Countermeasure (SPCC) plans.

While these are all important elements of protecting water quality, it does not appear the agencies have fully reviewed the far-reaching implications of the proposed definition and what the uncertainty it provides will mean in the broader picture. And with the potential for civil suits and civil penalties of $7,000 per day for violations of the Clean Water Act for individual homeowners, businesses, farmers, governments and others, it is critical that the agencies get this definition right and that it is clear and explicit. (p. 8-9)

Agency Response: This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a non-farm facility could reach waters of the U.S. or adjoining shorelines, if the non-farm facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. Residential heating oil tanks are exempted from the SPCC rule, so homeowners would not be

subject to the SPCC rule, unless they exceed the 1,320-gallon capacity threshold for other oils, such as gasoline or diesel fuel. For farms, including farms with a residence, the oil capacity threshold has changed; farms should consult the EPA factsheet at http://www.epa.gov/emergencies/docs/oil/spcc/spcc_wrrda.pdf. No permit is required under the SPCC rule. An owner/operator of a facility subject to the SPCC rule is required to prepare and implement an SPCC plan, but the rule does not require the plan to be submitted to EPA. Further, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

U.S. Chamber of Commerce (Doc. #14115)

12.1107 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). (p. 10)

Agency Response: The SPCC regulation at 40 CFR part 112 is facility-based, so the determination of applicability is based on the aggregate storage capacity of oil storage containers located at the facility and whether there is a reasonable expectation that an oil discharge from the facility would reach waters of the U.S. or adjoining shorelines. The existence of waters of the U.S. near the facility is an important part of applicability consideration under the SPCC rule, but it is a site-specific determination. The owner/operator of a facility potentially subject to the SPCC rule should evaluate the potential pathways for an oil discharge to reach waters of the U.S. or adjoining shorelines. Some of these pathways could include ditches that may be excluded from the definition (i.e., non-jurisdictional) but otherwise serve as a conduit to waters of the U.S. In addition, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

12.1108 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. (p. 16)

Agency Response: This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a non-farm facility could reach waters of the U.S. or adjoining shorelines, if the non-farm facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. The applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g.,

ditches or other features) and reaching jurisdictional waters. The owner/operator may also want to consider the potential for flooding of the facility in the applicability determination. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Cooperative Network (Doc. #15184)

12.1109 A vast expansion of the Clean Water Act that will surely result in greater compliance obligations. For example, nearly all of our agricultural cooperatives, many farmers served by cooperatives, and most of our utility cooperative members store quantities of oil that many be subject to 40 CFR 112. As a result of the proposed definition of a WOTUS, many more facilities that store oil will become subject to the oil pollution prevention regulation. Yet very little will be achieved through greater expenditures required to protect intermittent ditches that are not much different than the containment and diversionary structures that can be used to contain spilled oil. (p. 2)

Agency Response: This action does not change an owner/operator's ability to determine if there is a reasonable expectation of oil to waters of the U.S. or adjoining shorelines. For farmers, Section 1049 of the Water Resources Reform and Development Act (WRRDA) changed the SPCC threshold in June 2014. This change may reduce the number of farmers subject to the SPCC rule. Utility cooperatives would still use the 1,320-gallonthreshold, since they may not meet the definition of a "farm". Farm owner/operators should consult the farm factsheet at http://www.epa.gov/emergencies/docs/oil/spcc/spcc_wrrda.pdf for more information. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Water Advocacy Coalition (Doc. #17921.1)

12.1110 Under section 311, facilities with oil storage capacity that, due to their location, have a potential to discharge to waters of the United States must prepare and implement a Spill Prevention, Control, and Countermeasures ("SPCC") Plan.[260] The proposed rule's increased scope to cover ditches and manmade impoundments, as well as all features in floodplain and riparian areas, many facilities, particularly in the arid West, would require SPCC Plans that were not required before. Facilities that already have SPCC Plans also would be affected because many have plans that rely on the use of on-site ditches or impoundments to collect spilled oil and prevent it from reaching waters of the United States. The proposed rule's classification of those ditches and impoundments as waters of the United States would undermine current spill control plans and vastly expand planning, compliance, and cleanup costs. For example, in the western United States, one

[260] 40 C.F.R. § 112.

major petroleum company predicts that the proposed rule would require a 1,000-fold increase in SPCC plans.

The agencies concede that under the proposed rule there will be an increase in facilities subject to section 311.[261] Yet, to calculate the potential impacts of the proposed rule, they simply suppose that perhaps 1,000 facilities that previously questioned CWA jurisdiction would now require SPCC plans, and conclude that the cost of that compliance would be $11.7 million. They further state that, despite costs, most facilities simply chose to comply without regard to whether they otherwise would be required to do so. The benefits of this compliance, the agencies state, outweigh any costs.[262] The agencies' suggestion that the cost of the proposed rule on the section 311 program can be estimated based on a supposed number of facilities that previously may have questioned CWA jurisdiction is wrong. It is unreasonable to assume that there is any reliable correlation between the scope of CWA jurisdiction under the expanded definition of waters of the United States and operators that may have, in the past, determined, based on any number of business factors, to assert that they were not subject to the section 311 program. As with the other CWA programs, the agencies have not given adequate consideration to the proposed rule's impacts on the section 311 spill protection program. (p. 81-82)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Certain ditches and man-made impoundments may not be considered waters of the U.S. in this final action. An owner/operator of a non-farm facility that stores more than 1,320 gallons of oil in aggregate would need to determine if there is a reasonable expectation of a discharge oil to waters of the U.S. or adjoining shorelines, and this determination should must exclude man-made features such as existing secondary containment structures (dikes or remote impoundments) that may serve to restrain, hinder, contain or otherwise prevent an oil discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). The Agency included a reasonable estimation of the increase in the affected universe and associated costs in the RIA for this action. A detailed survey to determine a range of the affected universe is beyond the scope of this action.**

National Association of Home Builders (Doc. #19540)

12.1111 The Proposed Rule will Result in Increased Clean Water Act Section 311 Spill Protection Requirements.

Under CWA Section 311, facilities with oil storage capacity that, due to their location, have a potential to discharge to "waters of the United States" must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) Plan.[263] Due to the proposed rule's increased jurisdictional scope covering most ditches and manmade impoundments, as well as all features in floodplains and riparian areas, many facilities,

[261] Economic Analysis at 29.
[262] *Id*. at 30.
[263] 40 C.F.R. § 112.

particularly in the arid West, will need SPCC Plans that did not need them before. Facilities that already have SPCC Plans also would be affected because many have plans that rely on the use of on-site ditches or impoundments to collect spilled oil and prevent it from reaching "waters of the United States." The proposed rule's classification of those ditches and impoundments as "waters of the United States" would undermine current spill control plans and vastly expand planning, compliance, and cleanup costs.

The Agencies concede that the proposed rule will increase the number of facilities subject to CWA Section 311.[264] Yet, to calculate the potential impacts, they simply suppose that perhaps 1,000 facilities that previously questioned CWA jurisdiction would now require SPCC plans, and conclude that the cost of that compliance would be $11.7 million. They further state that despite costs, most facilities simply chose to comply without regard to whether they otherwise would be required to do so. The benefits of this compliance, the Agencies state, outweigh any costs.[265] The Agencies' suggestion that the cost of the proposed rule on the Section 311 program can be estimated based on a supposed number of facilities that previously may have questioned CWA jurisdiction is wrong. It is unreasonable to assume that there is any reliable correlation between the scope of CWA jurisdiction under the expanded definition of "waters of the United States" and operators that may have, in the past, determined, based on any number of business factors, to assert that they were not subject to the Section 311 program. As with the other CWA programs, the Agencies have not given adequate consideration to the proposed rule's impacts on the Section 311 spill protection program. (p. 127-128)

Agency Response: **Please see Response to Comment 12.1106.**

Kansas Independent Oil & Gas Association (Doc. #12249)

12.1112 Keeping in mind that EPA's proposal represents a change to the regulatory definition beyond traditional navigable waters ("TNW"), [waters used in interstate for foreign commerce, interstate waters and wetlands, and territorial seas] to include: tributaries, waters adjacent to TNWs, and "other waters" [wetlands, similarly situated waters located in the same region that have a significant nexus to a TNW, ditches, ephemeral streams, ponds], wet weather streams, certain ditches, certain basins, depressions in the soil, series of ponds or wetlands within a regions, etc., KIOGA has researched the particulars of the definitional change relative to common regulatory programs to the oil and gas exploration and production industry. The following is a description of the conclusions from that research which highlight the agencies' failure to represent the important impacts from this proposal.

(…) SPCC – Taking into consideration new proposed emphasis upon adjacent waters, and natural or manmade ditches KIOGA assessed whether, there are operations, pursuant to the proposal, that will now be required to maintain a SPCC plan which previously mandated no such duty. Undiked 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. With the proposed rule, if such catchment basins are within areas subject to periodic flooding causing those facilities now to be adjacent to an "other water," SPCC plans

[264] EPA Economic Analysis at 29.
[265] *Id*. at 30.

would be required to be implemented or renewed. Such areas impacted by rain events may be deemed a water of the United States and become a protected ephemeral stream/tributary. (p. 3)

Agency Response: **Oil production facilities that process and store more than 1,320 gallons of oil and have a reasonable expectation of oil discharge per 40 CFR part 112.1(b) are required to prepare and implement an SPCC plan. If subject to the SPCC rule, these facilities need to comply with secondary containment and drainage requirements in 40 CFR part 112.9. The owner/operator of facility may need to consider whether oil could be discharged as result of rain events, including flooding as part of this determination.**

Continental Resources, Inc. (Doc. #14655)

12.1113 Section 311 addresses oil spill prevention and preparedness, spill reporting obligations and response planning. The discharge of oil to any water or feature that would be jurisdictional under the Proposed Rule is 'prohibited, Section 311's requirements are applied to facilities engaged in the production or storage of oil. If the facility meets the threshold volume requirement and has the potential to discharge into a jurisdictional water, it must prepare a Spill Prevention, Control, and Countermeasure (SPCC) Plan. In addition to the preparation and maintenance of an SPCC Plan, a number of additional requirements are triggered, including secondary containment, integrity testing, drainage, routine inspections, security, and training. Some facilities that meet the threshold volume requirement may not currently fall under Section 311 because they do not have the potential to discharge into a jurisdictional water. The broad expansion of what is considered to be jurisdictional under the Proposed Rule will demand that facilities-particularly those in arid (western) areas-revise existing SPCC plans. For Continental, most, if not all, of its existing SPCC plans will require revisions based on the Proposed Rule. And, if a spill does occur in the future, there will be more reporting requirements both at the federal and the state level. More important, some Continental facilities may require the preparation of FRPs for the first time. FRPs are required if a facility could be reasonably expected to cause substantial harm to the environment by discharging oil into or on navigable waters. Were the Proposed Rule finalized, EPA Regional Administrators might start requiring facilities to prepare FRPs given their proximity to newly jurisdictional waters. An FRP is a complex document that would require Continental to expend significant effort to prepare the plan and to comply with it. See generally 40 C.F.R. §§ 112.20, .21, Appendix F (describing FRP components, including: discussion of small, medium, and worst-case discharge scenarios and response actions; a description of discharge detection procedures and equipment; and detailed implementation plan for response, containment, and disposal). (p. 19-20)

Agency Response: **This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a facility could reach waters of the U.S., if the facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. A facility owner/operator may need consider the potential for oil to travel overland via sheet flow or via an earthen or concrete channel or enter a storm drain and reach waters of the U.S. To be subject to the Facility Response Plan (FRP) rule in Subpart D of 40 CFR part 112, an owner/operator would need consider higher oil capacity thresholds than the SPCC rule (either 42,000 gallons**

and transfer to/from a vessel or one million gallons or more and meet one or more of the substantial harm factors at 40 CFR part 112.20(f)(1)). Once subject to the FRP rule, a facility is considered a "substantial harm" facility, and an owner/operator would need to prepare and submit an FRP to EPA that details the response actions to be implemented in the event of a small, medium or worst case discharge to waters of the U.S. or adjoining shorelines from the facility.

Permian Basin Petroleum Association (Doc. #15378)

12.1114 Spill Prevention, Control and Countermeasure Plans (SPCC) have long been part of the federal framework. They are part of the federal regulatory framework that cannot be delegated to a State. However, it must be noted that in Texas, the dramatic increase in production over the past two decades has been matched by a focused effort of key state regulators to fund, prevent, and respond to oil spills. This makes the federal proposal superfluous. (p. 3)

Agency Response: As noted, SPCC rule implementation cannot be delegated to the States, so any changes to definition of waters of the U.S. would need to be reflected in the SPCC rule by EPA.

12.1115 EPA's proposal would unnecessarily focus oil and gas operators and other industries attention on a federal plan when compliance with state regulations would better serve the environment, the public, and the State of Texas as a whole. Consider the following arguments.

First, most observers recognize that when a federal agency delegates primacy to the State, the State must meet or exceed the federal requirements. However, in Texas, the State regulatory framework already exceeds the requirements for spill response and cleanup, even without delegation being a possibility.

Second, the Railroad Commission of Texas has authority and statutory responsibility for preventing, responding, and ensuring the cleanup of oil spills on land. Along the extensive and sensitive coastline of Texas, the General Land Office (GLO) has jurisdiction over oil spill prevention and response. For refined products the Texas Commission on Environmental Quality (TCEQ) has the responsibility. All three agencies have significant resources, rules, and personnel already doing the work of protecting the Texas waterways. Memorandums and rules link and coordinate the three state agencies with each other, as well as local and other state government entities.

Third, oil spill reporting in Texas goes to a statewide hotline, with additional 24/7 district office phone calls. Crude oil spills of five barrels or more on land, and an oil spill of any amount in water, is required to be immediately reported by the operator. All oils spills on land or water of any size must be cleaned up to standards prescribe by State regulations. This contrasts sharply and exceeds the federal regulations that are only designed and require reporting of spills into water.

Fourth, the State of Texas has a multi-million dollar, renewable oil field cleanup Regulatory Fund, supported completely by regulatory fees on the operators of oil and gas facilities in the State. This has allowed the state regulator to plug tens of thousands of orphaned wells and cleaned up over 4,000 abandoned oil field sites in the State. These same funds have been used to clean up hundreds of oil spills whenever a responsible

party is unidentified, unable, or unwilling to conduct the cleanup as required by the State of Texas.

Lastly, the Railroad Commission of Texas, especially when combined with the GLO and the TCEQ staff, provide a broad and comprehensive state prevention and response regulatory framework that fields hundreds of inspectors daily to ensure spills are prevented, and any spills that occur are reported, responded to and cleaned up to regulatory standards. No federal agency or federal plan can supplant or improve on this presence. (p. 3)

Agency Response: **As noted, implementation of the SPCC rule cannot be delegated to the States. States may have a similar oil spill prevention regulation, but facility owner/operators would still need to comply with EPA's SPCC rule, if subject.**

Dominion Resources Services (Doc. #16338)

12.1116 Spill Prevention, Control and Countermeasures (SPCC) plans are required for oil storage facilities that have the potential to discharge to WOTUS. We maintain SPCC plans and associated response plans for oil storage facilities across our operations. If ditches or ephemeral features on or adjacent to an existing site that does have an SPCC Plan became WOTUS as a result of the proposed rule and were not otherwise exempt, the SPCC actions and associated plans could need to account not only for the potential spill to reach currently regulated features, but also for the spill to reach internal ditches. Updating existing plans and response resources would result in potential changes to existing equipment and procedures and associated expenses. The proposed rule could also mean that more facilities that would not currently need an SPCC plan because they do not have the potential to discharge to WOTUS, now would need an SPCC plan. Beyond existing federal programs, many of the states we operate in have their own oil spill prevention and response requirements that cover features beyond those required federally. Oil storage facilities are currently adequately regulated and any associated risk is adequately managed through existing regulations and associated requirements. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Certain ditches and man-made impoundments may not considered waters of the U.S. in this final action. An owner/operator that is subject to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b). Ditches or man-made impoundments may serve as pathways for an oil discharge to reach waters of the U.S. The owner/operator subject to the SPCC rule should consider these pathways when addressing the requirements in 40 CFR part 112.7(b), even though these ditches or man-made impoundments may considered non-jurisdictional.**

Gas Processors Association (Doc. #16340)

12.1117 The Proposed Rule Would Significantly Expand the Scope of the Spill Prevention, Control, and Countermeasure Rule

The Spill Prevention, Control, and Countermeasure (SPCC) Rule, 40 C.F.R. § 112, provides requirements for oil spill prevention, preparedness, and response to prevent oil discharges to navigable waters and adjoining shorelines. The SPCC Rule is part the EPA's oil spill prevention program and was published under the authority of Section 311(j)(1)(C) of the Clean Water Act. The SPCC Rule requires specific facilities to prepare, amend, and implement SPCC Plans. The mid-stream sector of the oil and gas industry is heavily regulated under the SPCC Rule since the rule applies to most types of facilities with an aboveground oil storage capacity greater than 1,320 U.S. gallons or an underground storage capacity greater than 42,000 U.S. gallons that "*could reasonably be expected* to discharge oil in quantities that may be harmful … into or upon the *navigable waters* of the United States or adjoining shorelines…." 40 C.F.R § 112.1(b) (emphasis added).

The proposed rule adds to the list of "waters of the United States" a broad definition of tributaries of these waters. EPA and the Corps define "tributary" as any water that is "physically characterized by the presence of a bed and banks and ordinary high water mark" or any wetland, lake, or pond regardless of its physical characteristics – that "contributes flow, either directly or through another water" to a traditionally navigable water, interstate water, or the territorial sea. 79 Fed. Reg. at 22199. Many features, like dry arroyos and mountain channels, have bed and bank even though they only flow when it rains or the snow melts. The rule then continues, adding to the list of jurisdictional waters all waters that are adjacent to the initial waters and their tributaries. *Id*. Further, as stated above, EPA and the Corps have significantly expanded the concept of "adjacent" by giving new definitions to the meaning of the term.

Because the jurisdictional trigger for the SPCC Rule is whether oil "could reasonably be expected" to discharge to navigable water, any rule that changes the meaning of "waters of the United States" will expand the scope of the SPCC jurisdiction significantly. Since GPA members operate facilities without SPCC plans based on previous conclusions that a release could not reasonably impact "waters of the United States" at those locations, the proposed rule expanding the scope of these waters would warrant a review of those prior conclusions. The proposed changes could require numerous facilities that have never been subject to SPCC requirements to prepare SPCC Plans or Facility Response Plans (FRPs) and comply with new regulatory requirements even though no physical changes have occurred to the facility or the environment. This will create an unnecessary financial and compliance burden on industry as well as substantially increasing the workload of EPA SPCC and FRP inspectors nationwide. GPA strongly suggests that EPA conduct a review of the impacts the proposed rule changes will have on EPA's SPCC and FRP programs and the personnel and financial resources allocated to oversee compliance and enforcement activities in those programs. (p. 5-6)

Agency Response: **This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a facility could reach waters of the U.S., if the non-farm facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. This applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters. A facility owner/operator may need to consider the potential for oil to travel overland via sheet flow or via an earthen or concrete channel or enter a storm drain and reach waters of the U.S. once discharged oil has traveled outside the confines of a facility. To be subject to the Facility Response Plan (FRP) rule in Subpart D of 40 CFR part 112, an owner/operator would need to be subject to the SPCC rule and meet higher oil capacity thresholds and other factors (either 42,000 gallons and transfer to/from a vessel or one million gallons or more and meet one or more of the substantial harm factors at 40 CFR part 112.20(f)(1) and Appendix C to this part for more information on FRP applicability, including overland transport of oil considerations).**

Petroleum Association of Wyoming (Doc. #18815)

12.1118 PAW has significant concerns with the potential effect of the proposed rule in the context of the Section 311 Spill Prevention Control and Countermeasure ("SPCC") program. To apply the requirements of the SPCC program to many facilities sited in areas that are not presently jurisdictional, but which could become so under the proposed rule is excessive and unwarranted. It would also create an unjustified burden on both the regulated community and the USEPA, where current state laws provide comprehensive protection of waters of the state, including those waters that have historically been deemed non-jurisdictional.

As with many of PAW's concerns, SPCC concerns relate to what the proposed rule would deem to be WOTUS under the "tributary," "adjacent" or "other" definitions. As proposed, many facilities currently exist in locations that are not currently deemed jurisdictional but could become jurisdictional. These facilities are not currently regulated under the SPCC program. However, they could unwittingly become enforcement targets by virtue of their not having an SPCC plan in place when and if the proposed rule is promulgated. If the rule is promulgated as proposed, there are facilities that would be in immediate non-compliance with the SPCC program. As with other facilities described above, in some cases, facilities that operators have concluded are not jurisdictional, and which EPA has agreed are non-jurisdictional, could become jurisdictional under the new definition. With respect to such facilities, to allow a categorical inclusion by rule to trump a site-specific finding of non-jurisdiction is arbitrary and capricious.

Agency Response: **This action does not change an owner/operator's ability to determine whether there is a reasonable expectation that an oil discharge from a non-farm facility could reach waters of the U.S., if the non-farm facility's aggregate oil storage capacity exceeds 1,320 gallons of oil. This applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters.**

12.1119 Second, preparing SPCC plans and complying with SPCC requirements for facilities in locations that are not (or should not be) jurisdictional, unnecessarily increases the regulatory and compliance burden on industry and the inspection and enforcement burden on the agencies. The proposal also greatly expands the number of facilities that could then be subject to the SPCC regulation as virtually any facility could be deemed to have a reasonable likelihood to reach a WOTUS, simply by its existence with a watershed, a continuum of which drape the Wyoming landscape. It also results in unnecessary duplication of state exercise of jurisdiction.

For example, in Wyoming, a spill of a reportable quantity from an oil storage facility to land in or adjacent to an ephemeral tributary, or to an area "adjacent" to such a tributary, must be reported to the state and remediated under state law. Such a spill should not also fall within the purview of 40 CFR § 112.1 (b), which regulates a facility "which due to its location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines .... "Instead, as a practical matter, such a discharge would occur on dry land or to a dry drainage and while being appropriately remediated it would not reasonably be expected to affect any TNW. Nonetheless, the categorical inclusion of certain drainages by rule could bring facilities that should not be subject to SPCC regulation into the ambit of the program. The aggregation of minor drainage features (classified as "tributaries" or "adjacent" waters under the proposed rule) could result in an expansion of the SPCC program's reach beyond any reasonable limits. A spill to one isolated drainage feature cannot be deemed to be "reasonably expected" to discharge oil in harmful quantities to traditional navigable waters, but by including dry drainage features (and aggregating them) in the definition of WOTUS, the agencies appear to have brought such "waters" within the scope of the SPCC program and the meaning of "navigable waters" under CWA Section 311. Indeed, this seems to be the agencies' intent as expressed in the proposed rule. 79 FR 22191. These provisions thus could result in unwarranted conversion of a traditionally state-lead enforcement issue into a federal case.[266]

Agency Response: **Please see Response to Comment 12.1114.**

12.1120 Third, the requirement to report spills to the National Response Center under the SPCC program would become illogical and confusing. With the overbroad definitions in the proposed rule potentially rendering many dry drainage features jurisdictional, PAW questions whether EPA would intend that a spill in a dry drainage feature would require National Response Center reporting and whether Corps dredge and fill permitting would be required to aggressively remediate and reclaim the impacted area or repair a flowline leak. Such a spill could, by definition, be to WOTUS and could potentially also constitute a violation of the spill prohibition in 40 CFR § 110. PAW contends that such a result is not only unwarranted from an environmental enforcement perspective, but is also in excess of the agencies' authority. If such a spill becomes a matter for reporting to EPA through the National Response Center, PAW suggests that the agencies are effectively

[266] As with the potential increased scope of SPCC coverage, the proposed rule could also increase the number of facilities subject to Facility Response Plan ("FRP") requirements that apply to large storage facilities for the same reasons.

giving nothing more than lip service in reciting the clear Congressional intent under the CWA to recognize, preserve and protect the primarily responsibilities and rights of states to prevent, reduce and eliminate pollution within their borders. 79 FR 22191. (p. 10-11)

Agency Response: **Certain drainage features may not be considered waters of the U.S. in this final action. An owner/operator that is subject to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b). Ditches or man-made impoundments may serve as pathways for an oil discharge to reach waters of the U.S. or adjoining shorelines. The owner/operator should consider these pathways when addressing the requirements in 40 CFR part 112.7(b). Also, this action does not change the requirement under 40 CFR part 110 for a facility owner/operator to notify the National Response Center when an oil discharge to waters of the U.S. or adjoining shorelines has occurred, even if the facility is not subject to the SPCC regulation.**

Independent Petroleum Association of America (Doc. #18864)

12.1121 (…) as the proposed rule has the potential to greatly expand the presence of waters of the United States, the regulatory impact on industry will be expanded multifold. The presence of waters of the United States indicates the connection to navigable waters. As a result, several regulatory requirements are invoked under the CWA. These include SPCC plans, permitting for the discharge of dredge or fill material, and NPDES permitting. In response to these requirements and the expansion of waters of the United States, industry must conduct investigations to determine the extent of waters of the United States, plan accordingly in an effort to avoid or minimize impacts to the extent practicable, and meet various additional regulatory requirements. SPCC planning is designed to avoid or prevent oil pollution. SPCC plans are required when oil could possibly be discharged to or pollute navigable waters or their tributaries. As waters of the United States expand due to the proposed rule, existing facilities for which this regulation was not applicable may be required to meet this standard as waters of the United States are identified in proximity to the site. Further, facilities often use ponds, catchment basins, diked areas, etc. to reduce the potential for discharge of oil to navigable waters or their tributaries. Under this proposed rule, these features may become waters of the United States. (p. 9)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Certain ditches and man-made impoundments may not be considered waters of the U.S. in this final action. However, for SPCC applicability determinations, the owner/operator must determine if there is a reasonable expectation of an oil discharge to reach waters of the U.S. or adjoining shorelines, and this determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to waters of the U.S. or adjoining shorelines, land contour, drainage, etc.) and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain or otherwise prevent a discharge to waters of the U.S.**

Once subject to the SPCC rule, an owner/operator to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b). Man-made features such as dikes or man-made impoundments may serve to prevent an oil discharge from reaching waters of the U.S. and could be described in the SPCC plan, where appropriate.

Kentucky Oil and Gas Association (Doc. #16527)

12.1122 (…) as the proposed rule has the potential to greatly expand the presence of waters of the United States, the regulatory impact on industry will be expanded multifold. The presence of waters of the United States indicates the connection to navigable waters. As a result, several regulatory requirements are invoked under the Clean Water Act. These include Spill Prevention, Control, and Countermeasures (SPCC) plans, permitting for the discharge of dredge or fill material, and NPDES permitting. In response to these requirements and the expansion of waters of the United States, industry must conduct investigations to determine the extent of waters of the United States, plan accordingly in an effort to avoid or minimize impacts to the extent practicable, and meet various additional regulatory requirements.

SPCC planning is designed to avoid or prevent oil pollution. SPCC plans are required when oil could possibly be discharged to or pollute navigable waters or their tributaries. As waters of the United States expand due to the proposed rule, existing facilities for which this regulation was not applicable may be required to meet this standard as waters of the United States are identified in proximity to the site. Further, facilities often use ponds, catchment basins, diked areas, etc. to reduce the potential for discharge of oil to navigable waters or their tributaries. Under this proposed rule, these features may become waters of the United States. (p. 6)

Agency Response: Please see Response to Comment 12.1117.

Nebraska Cattlemen (Doc. #13018)

12.1123 Another significant concern of Nebraska Cattlemen is the effect of the proposed rule on the §311 oil spill program. Due to the expanded jurisdiction to include tributaries and water adjacent to tributaries and other waters, there will be more instances of the need to prepare a Spill Prevention, Control, and Countermeasures Plan (SPCC) plan. Currently, the EPA Fact Sheet advises producers to determine if a spill would "reasonably" reach water to decide if the operation needs a plan. With the blanket categories of jurisdictional waters that would be subject to CWA jurisdiction, that rule of thumb would surely change. Many producers would have to assume that they would need a SPCC plan since the jurisdictional question would be so far reaching and unpredictable. Nebraska Cattlemen comment that this change will place an additional burden on producers and create additional liability exposure without additional benefits to water quality. (p. 16)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as

tributaries. However, this action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge from a farm facility could reach waters of the U.S. or adjoining shorelines, if the farm facility's aggregate oil storage capacity exceeds certain thresholds or the farm has recently experienced an oil discharge. The applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters. See response to Comment 12.1105 for more information related to farm facilities.

Airports Council International – North America (Doc. #16370)

12.1124 In an effort to further understand the jurisdictional reach and related impacts of the Proposed Rule the following question need(s) to be answered:

How would this rule affect spill reporting and response? (p. 6)

Agency Response: This action does not change the oil spill reporting requirements under 40 CFR part 110 if oil is discharged in "harmful quantities" to waters of the U.S. or adjoining shorelines. The owner/operator of a facility may need to consider that oil may travel along non-jurisdictional pathways (e.g., ditches or other features) and reach jurisdictional waters. Once oil reaches jurisdictional waters in quantities that may be harmful, notification requirements under 40 CFR part 110 are triggered.

Wabash Valley Power Association (Doc. #16336)

12.1125 If (…) a roadside ditch or other feature is a considered a water of the US, would the placement of absorbent [as a measure to contain a release of hazardous material from a vehicle] constitute a 'fill' and would removal of contaminated media constitute 'dredging,' thus absurdly result in triggering a 404 permit? The current Spill Prevention Countermeasure and Control (SPCC) program is not designed to address spills such as these. (p. 2)

Agency Response: The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. Certain ditches and man-made impoundments may not be considered waters of the U.S. in this final action. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. If a facility is subject to the SPCC rule, an owner/operator is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b) and provide active or passive secondary containment per 40 CFR part 112.7(c). Sorbent materials are an example of an active measure that could be placed in a ditch to prevent an oil discharge from reaching waters of the U.S. and is not expected to trigger a permitting requirement under Section 404.

Duke Energy (Doc. #13029)

12.1126 Duke Energy requests that the agencies clarify that the review of existing SPCC plans will continue on their five-year cycle, as currently scheduled, and that the proposed

rule will not trigger an expedited review of any of these plans due to the potential reclassification of waters that were previously not considered "waters of the United States". (p. 56-57)

Agency Response: **This action would not require a separate review of a facility's SPCC plan outside of the 5-year cycle or an amendment to the plan unless there is a change in facility design, construction, operation or maintenance that materially affects its potential for a discharge to waters of the U.S. or adjoining shorelines per 40 CFR part 112.5.**

U.S. Chamber of Commerce (Doc. #14115)

12.1127 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. (p. 8)

Agency Response: **Please see Response to Comment 12.1122.**

Oglethorpe Power Corporation (Doc. #14618)

12.1128 The unclear scope of the Proposed Rule will cause severe ambiguity regarding the jurisdictional reach of the Agencies, leading to inconsistent enforcement of the Proposed Rule. Under the Proposed Rule, it is unclear which types of water bodies will constitute jurisdictional tributaries, adjacent waters, or other waters. Thus, facilities will struggle to discern and comply with their regulatory obligations. Oglethorpe Power requests EPA's clarification about reporting obligations under the following circumstances, as interpreted under EPA's current *and* proposed interpretations of "waters of the United States:"

A facility has a retention or detention pond located entirely on the facility's property. The pond discharges to a dry ditch off-site, and the dry ditch leads to an unnamed tributary. If oil is spilled at the facility and travels to the pond and cleaned up there, would such an oil spill be reportable to the National Response Center ("NRC")? (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Further, certain ditches and man-made impoundments associated with facility drainage may not be considered waters of the U.S. in this final action. An owner/operator that is subject to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b). Ditches or man-made impoundments may serve as pathways for an oil discharge to reach waters of the U.S. or adjoining shorelines. The owner/operator should consider these pathways when addressing the requirements in 40 CFR part 112.7(b). Also, this action does not change the requirement under 40 CFR part 110 for a facility owner/operator to notify the National Response Center when an oil discharge to waters of the U.S. or adjoining shorelines in harmful quantities has occurred, even if the facility is not subject to the SPCC regulation.**

12.1129 A facility has a retention pond located entirely on the facility's property, and the pond has an under-flow outlet. The pond discharges to a dry ditch off-site, and the dry

ditch leads to an unnamed tributary. If oil is spilled at the facility and travels to the pond, is the spill reportable to the NRC? Does the answer remain the same if the spilled oil is cleaned up from the surface of the pond? (p. 2)

Agency Response: **Please see Response to Comment 12.1124.**

12.1130 A facility has a retention pond located entirely on the facility's property, and the pond has an outlet valve that can be closed to prevent a discharge. Whenever the pond's outlet valve is open, the pond discharges to a dry ditch off-site, and the dry ditch leads to an unnamed tributary. If oil is spilled at the facility and travels to the pond while the pond's outlet valve is closed, is the spill reportable to the NRC? If the facility cleans up the oil spill while the pond's outlet valve is closed, is the spill reportable to the NRC once the pond's outlet valve is opened? (p. 3)

Agency Response: **Please see Response to Comment 12.1124.**

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

12.1131 Changing the regulatory status of roadside ditches and MS4's from point sources to jurisdictional waters would create significant challenges for SRP and other utilities. The electric distribution system of SRP alone has over 400,000 individual pole top or pad mount oil-filled transformers-many of which are in service within municipality rights-of-way and are adjacent to dry ditches or MS4 systems. When these transformers experience an electrical fault, or are damaged by severe weather or an accident, oil may be discharged to the dry ditch or MS4. Most MS4s within SRP's electric service area are man-made conveyances that divert stormwater flows from city streets, parking lots, and urbanized areas directly to public or private retention basins.

The agencies' proposed definition of a tributary would broadly include all dry roadside ditches and MS4s, whether they can discharge to navigable waters or not. As such, any discharge of oil in any quantity to a dry roadside ditch or MS4 would meet the definition of a discharge under §311 of the CWA and would have to be reported the National Response Center (NRC). This change would not only affect SRP, but would likely generate hundreds-of-thousands of additional spill reports nationwide.

SRP strongly encourages the agencies to investigate the scope and magnitude of this potential impact of the proposed rule and the unnecessary burden it will place not only on utilities but also on the NRC and the EPA Regional Offices that must review and investigate every spill reported. (p. 10-11)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. Certain ditches and man-made impoundments may not be considered waters of the U.S. in this final action. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. While an individual pole-mounted or**

pad-mounted oil-filled transformer may not exceed the SPCC oil capacity threshold, this action does not change the requirement under 40 CFR part 110 for a facility owner/operator to notify the National Response Center when an oil discharge reaches waters of the U.S. or adjoining shorelines in harmful quantities has occurred, even if the facility is not subject to the SPCC regulation.

Utility Water Act Group (Doc. #15016)

12.1132 An SPCC plan is needed for facilities that have the potential to discharge into WOTUS.[267] The Proposed Rule would mean that more plans would be needed because more facilities would have the potential to discharge to WOTUS. For example, if ditches crossing a site or treatment ponds on the site become WOTUS as a result of the Proposed Rule, the SPCC would need to account not only for the potential for a spill to reach currently regulated features, but also for the spill to reach only those internal features as well, even though such features are currently often used as part of the spill management process itself. As a practical matter, if a ditch became jurisdictional as a result of the Proposed Rule, a response to a spill that reached the ditch would convert from (1) a containment action under the current regulations (e.g., taking action such as the placement of a dam and the use of removal equipment to contain and remove the spill in order to prevent it from reaching WOTUS) to (2) a response action in which the facility would be required to comply with all notification, response, and other applicable requirements of its SPCC plan governing spills into WOTUS, and would face greater costs, delays, and restrictions in responding to the spill – e.g., awaiting permission to place containment structures and equipment in the ditch. Accordingly, existing plans and spill response resources would need to be expanded, if even feasible, at substantial expense and with no clear environmental benefit. (p. 27-28)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Certain ditches and man-made impoundments may not considered waters of the U.S. in this final action. However, for applicability determinations, the owner/operator must determine if there is a reasonable expectation of an oil discharge to waters of the U.S. or adjoining shorelines, and this determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to waters of the U.S. or adjoining shorelines, land contour, drainage, etc.) and must exclude consideration of man-made features such as dikes, equipment or other structures, which may serve to restrain, hinder,**

[267] The SPCC rule applies to owners or operators of non-transportation-related facilities that drill, produce, store, process, refine, transfer, distribute, use, or consume oil or oil products that could reasonably be expected to discharge oil to navigable waters or adjoining shorelines in quantities that could be harmful. See CWA § 311(j)(1)(C) and 40 C.F.R. § 112.1. Facilities are subject to the rule if they meet at least one of two capacity thresholds: (1) aboveground oil storage capacity greater than 1,320 U.S. gallons, or (2) completely buried oil storage capacity greater than 42,000 U.S. gallons (not including completely buried tanks that are subject to existing underground storage regulations). 40 C.F.R. § 112.1(d)(2). Regulated facilities must develop and implement SPCC plans that establish procedures and equipment requirements to help prevent oil discharges from reaching navigable waters. See 40 C.F.R. § 112.7.

contain or otherwise prevent a discharge to waters of the U.S. See 40 CFR part 112.1(d)(1)(i). Once subject to the SPCC rule, an owner/operator to the SPCC rule is required to provide a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of major equipment failure per 40 CFR part 112.7(b) and provide active or passive secondary containment per 40 CFR part 112.7(c). An underflow dam is an example of a containment measure that could be placed in a ditch to prevent an oil discharge from reaching waters of the U.S. Other man-made features such as dikes or man-made impoundments may serve to prevent an oil discharge from reaching waters of the U.S. or adjoining shorelines and should be described in the SPCC plan, where appropriate. The SPCC plan must also address countermeasures for oil spill response and cleanup (both the facility's capability and those that might be required of a contractor) per 40 CFR part 112.7(a)(3)(iv). Appropriate containment and countermeasures provisions for an SPCC facility are site-specific based on the facility type and configuration as well as the type of water body that could be impacted by an oil discharge (e.g. creek, river, or lake). The type of and quantity oil that could be discharged (e.g., persistent oil vs. non-persistent oil; 1000 gallons vs. 10,000 gallons) would also affect the type and quantity of response resources identified in the SPCC plan.

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

12.1133 The Proposed Rule would cause unnecessary increases in costs and efforts regarding spills. The identification of additional jurisdictional waters would increase the likelihood that spills on oil and gas sites would be federally reportable, raising the costs and complexity of spill response. In particular, the reclassification of diversion ditches as jurisdictional waters would significantly increase the likelihood that a spill would reach a "water of the United States," and therefore, could require federal reporting to EPA and/or the National Response Center. When agencies, such as the EPA, become involved in spill response that is currently managed under Pennsylvania law, the cost and complexity for reporting such spills increases, even though the spill response measures generally do not change. (p. 15)

Agency Response: Oil production facilities that have an oil storage capacity greater than 1,320 gallons and have a reasonable expectation of an oil discharge to waters of the U.S. and adjoining shorelines are required to prepare and implement an SPCC plan. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Certain ditches and man-made impoundments may not considered waters of the U.S. in this final action. This action does not change an owner/operator's ability to determine if there is a reasonable expectation that an oil discharge could reach waters of the U.S. or adjoining shorelines. The applicability determination is a site-specific evaluation by the owner/operator and may include the evaluation of oil traveling along non-jurisdictional pathways (e.g., ditches or other features) and reaching jurisdictional waters. Also, this action does not change the requirement under 40 CFR part 110 for a facility owner/operator to notify the National Response

Center when an oil discharge to waters of the U.S. or adjoining shorelines in harmful quantities has occurred, even if the facility is not subject to the SPCC regulation (i.e., the oil production facility's aggregate oil storage capacity is 1,320 gallons or less).

12.6. TRAINING NEEDS

Specific Comments

State of Washington Department of Ecology (Doc. #13957)

12.1134 Washington strongly recommends that EPA, and the Corps work with their state partners to develop regional manuals, definitions, and guidance to implement the rule. We recognize the difficulty in providing clear definitions and standards nationwide due to the diversity of climate, landforms and ecosystems across the country. Because of this diversity, the rule is understandably vague which makes it imperative that the agencies develop regional definitions and guidance. With the states as eco-regulators, the agencies should work directly with the states as they develop implementation guidance in their region. (p. 6)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

State of Oklahoma (Doc. #14773)

12.1135 Oklahomans understand the current WOTUS system, and because of our strong relationship with the Tulsa District of USACE, there have been very few administrative challenges to the current rule and no judicial challenges to a jurisdictional determination. Any new definitions of WOTUS should clearly delineate what is and what is not subject to federal permitting requirements. If the Agencies are unable to provide clarity for landowners and developers, the current rule and guidance should remain in place. While we understand recent U.S. Supreme Court decisions have raised concerns about the definition of WOTUS, under this proposal the Agencies have simply moved the already unclear line, rather than providing true clarity or consistency. Instead of issuing a new unclear rule, the Agencies should consider issuing updated guidance to the USACE Districts to ensure fair and consistent implementation of the current rule between districts. At a minimum, the Agencies should work collaboratively with the states to develop regional solutions. With the proposed WOTUS rule, I believe state water management primacy is being eroded with no gain in the management of our water resources. (p. 2)

Agency Response: **In response to Supreme Court opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

State of Idaho (Doc. #16597)

12.1136 Idaho recognizes further discussion between the states and federal agencies is needed to develop the specifics of such [quantifiable] measures and the process for applying them, particularly with the variation in hydrologic and geologic conditions existing across the nation. As such, Idaho urges EPA and the Corps to utilize a state-federal workgroup to identify and develop specific, quantifiable measure(s) for determining "significance" consistent with the rebuttable presumption concept. (p. 3)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.**

Colorado Clean Water Coalition (Doc. #1231)

12.1137 We appreciate the outline list of exclusions identified in the proposed rule such as artificial lakes, ponds created by excavating, water filled depressions created incidental to construction activity, and ditches; however, we are concerned with the inconsistency of language when referring to "All Tributaries" and "Nexus" as these examples listed in the proposal could unclearly be considered tributary waters. Industry education is a very important aspect of successful regulation and such language not considered industry standard or scientific will pose confusion to the implementation of new regulation. (p. 1)

Agency Response: **All existing exclusions from the definition of "waters of the United States" are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time. Existing exclusions for prior**

converted cropland and waste treatment systems remain substantively and operationally unchanged. The agencies added exclusions for waters and features previously identified as generally exempt in preamble language from Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

Catawba County North Carolina Board of Commissioners (Doc. #1763)

12.1138 The ambiguity in the rule as drafted does not provide explicit guidance to Federal and local regulators which results in inconsistent interpretation and oversight of the rules. (p. 1)

Agency Response: In the final rule, EPA and the Corps clarify the scope of "waters of the United States" that are protected under the Clean Water Act, using the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources.

Board of County Commissioners, Huerfano County, Colorado (Doc. #1771)

12.1139 Changing the rule without specific definitions and boundaries give latitude in enforcement that often results in an uneven playing field. "Best professional judgment and experience of agency staff" varies throughout any organization and should not be the foundation for enforcement when the definitions of a rule are not based on strict and proven science. (p. 1)

Agency Response: The final rule is intended to provide greater clarity and consistency regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities need to make jurisdictional determinations on a case-specific basis. In order to accomplish this aim, the final rule includes a number of key improvements including, but not limited to, the following. In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. In order to add clarity to the definition of significant nexus, the agencies have listed in the definition the functions that will be considered in a significant nexus analysis.

The preamble also includes a definition of bed and banks adapted largely from longstanding agencies' practice as well as input from commenters. To provide additional clarity and for ease of use for the public, the agencies are including the Corps' existing definitions of ordinary high water mark and high tide line in EPA's regulations as well.

Tennessee Association of Conservation Districts (Doc. #10162)

12.1140 Taking additional time to help us understand the many difficult terms used and how they will be implemented will benefit water quality improvement. Additionally, making sure we see you and your field staff in agreement on the interpretation and how it will be implemented in the real world will help with making this a success. (p. 3)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

County of Henry, Collinsville, Virginia (Doc. #10949)

12.1141 In general, the Rule may place too much reliance on the Corps' best professional judgment when making jurisdictional determination. Henry County has experienced a lack of consistency among different regulators within the Norfolk District. The County is concerned that the Rule will provide too much opportunity for interpretation by local Corps staff in the field which may lead to less clarity, certainty and predictability for the regulated public, possibly leading to resource demanding case-specific analyses. (p. 3)

Agency Response: As you point out, many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Association of California Water Agencies (Doc. #12978)

12.1142 Regulatory guidance and field manuals related to delineating the "ordinary highwater mark" should be released for public review prior to use.

Agency Response: **Please see the Technical Support Document for additional information related to delineating the ordinary high water mark.**

Missouri Association of Municipal Utilities (Doc. #7931)

12.1143 Additional Resources for EPA/USACOE/State Environmental Agencies: Finally, as a former senior administrator at MDNR, it is my experience that it does little good to make rules when there are no resources to implement the rules. It appears that this rule may well double the number of miles of 'navigable waters' under the jurisdiction of both EPA and DNR. Do both agencies have the financial and human resources to manage their expanded environmental responsibilities? Does the USACOE have the necessary resources to manage the significant influx of applications for permits for tasks within newly regulated but dry jurisdictional Waters of the United States? Which agencies will be responsible for the massive outreach to the stakeholder community to educate them about the application of this rule when it is formalized? (p. 6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The final rule is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Clean Water Act. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.**

California State Association of Counties (Doc. #9692)

12.1144 The proposed rule does not discuss the interrelationship of WOUS and municipal separate storm sewer systems (MS4). The interconnected nature of storm drain systems regulated under MS4 permits and the broad nature of the definitions in the proposed rule could lead to legal uncertainty, regulatory confusion and conflicts in regulations. It is especially important for the agencies to provide clear guidance on where an MS4 ends and WOUS begins for counties in the Southwest, where engineered drainage systems have mostly rep laced the natural drainage patterns in urbanized watersheds. The current definition of "tributary" (79 Fed. Reg. at 22263) states "a water that otherwise qualifies as a tributary does not lose its status *if, for any length* , there are one or more manmade breaks (such as bridges, culverts, pipes, or dams) so long as a bed and bank with an ordinary high water mark can be identified upstream of the break." Los Angeles County, for example, contains many storm drains with upstream man-made open channels with a bed, bank, and high water mark. The proposed rule would render a number of open channels per se jurisdictional under this broad definition of tributary and subject local agencies to further regulation. In addition, due to the proximity of WOUS channels, it is possible that MS4 channels could be considered "adjacent" waters and therefore jurisdictional. (p. 9)

Agency Response: **Please see summary response 7.4.4.**

Association of Clean Water Administrators (Doc. #13069)

12.1145 A national rule is a difficult vehicle for addressing regional variations in geohydrology, therefore additional regional guidance on how to apply the rule's

definitions is another way that clarity can be provided. For example, states need greater detail on how to identify beds, banks and ordinary high water marks for the purpose of identifying tributaries. Guidance on this is currently in place in some regions, but not others. States also need greater detail on how to determine if a wetland "contributes flow, either directly or through another water" to one of the (a)(1)-(a)(3) waters. Without clear terms and guidance, states will be left to interpret this rule on their own, which undermines its intent to create national consistency. (p. 3-4)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Montana Association of Conservation Districts (Doc. #18628)

12.1146 When the rule is adopted, we expect to see the number of inquiries to local offices increase. While providing farmers and ranchers information is part of our role, we are concerned that we will not be prepared to answer the wide variety of questions that we may have to field. Will EPA provide some sort of support in an outreach program? (p. 2)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

CalPortland Company (Doc. #14590)

12.1147 Any new requirements lead to a long learning curve for both the regulators and the regulated. Just getting a jurisdictional determination can take months. Permits can take years. How much longer will it take to break ground with the many vague and undefined terms in this proposed rule? (p. 3)

Agency Response: The final rule is intended to provide greater clarity and consistency regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities need to make jurisdictional determinations on a case-specific basis. In order to accomplish this aim, the final rule includes a number of key improvements including, but not limited to, the following. In response to comments and to provide greater clarity and consistency,

in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. In order to add clarity to the definition of significant nexus, the agencies have listed in the definition the functions that will be considered in a significant nexus analysis. The preamble also includes a definition of bed and banks adapted largely from longstanding agencies' practice as well as input from commenters. To provide additional clarity and for ease of use for the public, the agencies are including the Corps' existing definitions of ordinary high water mark and high tide line in EPA's regulations as well.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

12.1148 The use of the "significant nexus" test needs to be better defined and follow the limits articulated in the Rapanos case. (p. 2)

Agency Response: The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion in Rapanos. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. In the final rule, the agencies determine that tributaries, as defined ("covered tributaries"), and adjacent waters, as defined ("covered adjacent waters"), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are "waters of the United States." In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) five types of waters that the agencies conclude are "similarly situated" and therefore must be analyzed "in combination" in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The final rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.

Kentucky Oil and Gas Association (Doc. #16527)

12.1149 The proposed rule relies heavily on Justice Kennedy's "significant nexus" term. In the Rapanos decision, Justice Kennedy indicated that the relationship of a water feature with a navigable water must be more than "speculative or insubstantial." Rather, the relationship must be significant. As part of the justification of this rule, EPA and USACE have gone to great lengths to explain why headwater streams (i.e., intermittent and ephemeral streams), such as those located extensively throughout Central

Appalachia, have a significant impact on traditional navigable waters that may be located hundreds of miles downstream. Following the Rapanos decision, USACE attempted to apply the decision to jurisdictional determinations. USACE staff relied on the significant nexus term to include features of the landscape that clearly had no significance on downstream navigable waters. For instance, jurisdiction began to extend to depressions that may be filled with leaves or tree branches. It was clear that water had not passed through these depressions. However, because there was the potential for water to move through the area and detritus could be transported downstream, there was a significant nexus. In short, USACE exploited the term and expanded jurisdiction to features that clearly have no significance to downstream physical, chemical, or biological processes. If EPA and USACE are planning to rely on this term to assert jurisdiction, the proposed rule should provide a series of examples or standards that must be met in order to rise to significance. A term used loosely without clarity is ripe for misuse as was observed in the months and years following the Rapanos decision. (p. 5-6)

Agency Response: **The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science – particularly as that science informs the policy judgments and legal interpretations as to which waters have a "significant nexus" with traditional navigable waters, interstate waters, and the territorial seas. The agencies' interpretive task in this rule – determining which waters have a "significant nexus" – requires the integration of this science with policy judgment and legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate. In the final rule, the agencies determine that tributaries, as defined ("covered tributaries"), and adjacent waters, as defined ("covered adjacent waters"), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are "waters of the United States." In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) five types of waters that the agencies conclude are "similarly situated" and therefore must be analyzed "in combination" in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The final rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.**

Pike and Scott County Farm Bureaus (Doc. #5519)

12.1150 We are concerned with how enforcement inspectors will know the difference between a water filled area on a crop field and a seasonal pond or wetland or ephemeral stream; any of which can be regulated? The rule says that *even* small and temporary waters can be regulated. In the rule, isolated waters are categorically regulated if they are in floodplains or nearby ditches. (p. 2)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Wyoming Farm Bureau Federation (Doc. #14406)

12.1151 Using "best professional judgment" is setting up decisions to be made by regulators which may be widely varied. Opinions can vary widely from person to person. Not having valid scientific bases to make decisions will likely be to the detriment of the landowner. As stated previously, decision makers will likely err on the side of caution. Since these decisions to declare will not be black and white decisions, any decision in the grey area will likely be added into the "yes it is adjacent", resulting in more lands under the jurisdiction of the EPA, more costs to land owners, and fewer options to manage land. (p. 3)

Agency Response: In response to Supreme Court opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts'

concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

North Dakota Soybean Growers Association (Doc. #14594)

12.1152 Consistency: Consistency is largely a measure of predictability. Consistency in an agency, or across agencies, is rooted in the idea that one can query and explore options at different times and locations, with similar circumstances, while getting similar responses. We believe that there is strong evidence that these proposals are lacking effective preparation, implementation planning, accurate economic benefit analysis, and the strategic leadership within and across agencies to effectively implement the proposed rules. We simply have no confidence that similar situations to be treated effectively or that local differences and nuances will be get appropriate action or attention. (p. 13)

Agency Response: In response to Supreme Court opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

12.1153 Clarity: There is opportunity for clarity. When citizens are required to seek permission from the Agencies to take any action regarding water or land use activities, there is clearly increased opportunity for clarity. However, we believe that the potential for consistency is remote beyond a single implementing entity (small office) that gains in clarity will be rendered moot. (p. 13)

Agency Response: In response to Supreme Court opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. Members of Congress, developers, farmers, state and local governments, energy companies, and

many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Iowa Farmers Union (Doc. #15007)

12.1154 A significant share of the concerns circulating within the farming community around the proposed rule derive from a lack of clarity and understanding of the on-the-ground logistics of enforcing the rule. Many farmers are picturing an EPA agent coming onto each farm in the state of Iowa, performing an inspection, and then telling the farmer how to run the farming operation. As part of alleviating these concerns, it is vital that EPA and the Corps provide clear guidance for farmers to help them understand:

- who would be responsible for enforcing the rule on the local level;
- what the process would be for enforcing the rule and making a jurisdictional determination on the local level, including illustrative examples of what types of circumstances or activities would trigger a closer look at on-farm waters;
- what the process would be for a farmer seeking an agency opinion as to whether an on-farm water is jurisdictional;
- what assistance would be available for a farmer dealing with a jurisdictional water as part of an active farming operation.

Most farmers have lengthy experience interacting with federal government agencies and complex federal regulations. Local field offices operated by the U.S. Department of Agriculture routinely work with farmers to ensure compliance with federal farm programs, including rules for program enrollment, conservation compliance requirements for commodity subsidy programs, and technical requirements for participation in federal conservation programs. Farmers know the staff in their local Farm Service Agency and NRCS offices; they know where to go when they have questions about the rules; they know what to expect from those offices in terms of enforcement. Much of the fear and distrust in the farming community related to this proposed rule derives from a general lack of familiarity with the enforcing agencies and a lack of clarity on the basics of the regulatory process.

EPA has indicated that the Corps is the principal federal agency responsible for conducting jurisdictional determinations under the Clean Water Act, generally performed via Corps District offices. Any additional specifics related to logistics and process that could be provided in the form of guidance accompanying the final rule could help to increase basic comfort levels and avoid future episodes of the sort of dysfunctional showdown that has occurred within the farming community in the context of the current proposed rule. (p. 7-8)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean

Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Ducks Unlimited (Doc. #11014)

12.1155 Is it consistent with the agencies' public statements that the new rule would not be an expansion of jurisdiction relative to existing regulations, and that the agricultural and ranching sectors, in particular, would not be subject to increased permitting requirements? It seems clear from the content of the proposed rule, the issuance of the special "interpretive rule" addressing conservation practices, the fact sheets released by the agencies, and the public comments made by the EPA Administrator and other top officials of the EPA and Corps of Engineers, that the desire of both agencies and the intent of the proposed rule is to preserve and even strengthen the statutory exemptions for normal farming, ranching, and silvicultural practices. Public statements have been made to the effect of, "if you didn't need a permit for your farming activities before, you won't need one under the proposed rule." Nevertheless, despite the agencies' efforts, it is clear that much of the agricultural community remains concerned that the new rule does not increase their level of clarity and certainty, would expand jurisdiction compared to the existing regulations, and could burden them with new or additional permitting requirements.

Relative to agriculture and ranching, this situation indicates the need for at least two things in the final rule. First, there is apparently a need for increased clarity to alleviate the concerns of the agricultural and ranching communities that the rule represents an expansion of jurisdiction and associated regulatory burdens. Similarly, the clear meaning of the rule must also be apparent to the thousands of individuals who work within the regulating agencies. Many farmers and ranchers are concerned that if not stated with sufficient precision, they may be subjected to a wide variety of interpretations of the new rule across the many Corp of Engineers districts and EPA regions.

For example, the production of rice is critical to the future of migratory populations of North American waterfowl, and plays an important role in contributing habitat needed by many other species. Approximately 3 million acres of rice is planted annually, primarily in the Lower Mississippi Valley, Central Valley of California, and Gulf coastal prairie regions. In the latter two regions, waste rice provides over 40% of the nutritional requirements of wintering waterfowl populations (Petrie et al. 2014). Without these food resources, important waterfowl and other wildlife conservation objectives would be unattainable.

Statements have been made by representatives of the agencies that the activities and jurisdictional issues related to rice producers would be completely unaffected by the rule. Nevertheless, some specific language of the proposed rule causes some concern among rice producers that, regardless of intent, potential interpretation of the wording could

potentially bring what are currently non-jurisdictional rice fields and related infrastructure under the new definition of "waters of the U.S." These language issues must be resolved so that it is clear that those producers would not be subject to new or additional permitting or other restrictions associated with jurisdiction as "waters of the U.S." Therefore, in light of statements and commitments made by the agencies that the new rule would impose no new jurisdiction or permitting requirements that would affect the longstanding statutory exemptions related to normal farming, ranching, and silvicultural practices, a criterion for finalizing the rule must be that they uphold and are fully consistent with the agencies' related public statements. (p. 10-11)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. In addition, paragraph (b)(4) of the final rule identifies features and waters that the agencies have identified as generally not "waters of the United States" in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The Agencies' 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be "waters of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction. Specifically, the following features are not "waters of the United States": artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds. To the extent the comment is referring to the interpretive rule, that rule has been withdrawn.**

12.1156 Related Agricultural Issues: The above comments notwithstanding, it should be made more clear that, as a result of the longstanding exclusions of rice fields from jurisdiction, the interpretation of adjacency will not result in the extension of jurisdiction to rice fields. While we sometimes refer to rice fields as "surrogate wetlands" in recognition of their wetland-related ecological functions, ranging from habitat for waterfowl and other migratory birds to improvements of water quality, that they often provide, rice fields are nevertheless not "wetlands" and therefore should not be regulated as such. Although a science-based case for adjacency could be argued in some cases, the

longstanding exemption of rice fields must be clearly preserved by the final language of the rule. (p. 20-21)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. In addition, paragraph (b)(4) of the final rule identifies features and waters that the agencies have identified as generally not "waters of the United States" in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The Agencies' 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be "waters of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction. Specifically, the following features are not "waters of the United States": artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds.**

12.1157 Is it consistent with the agencies' public statements that the new rule would not be an expansion of jurisdiction relative to the existing regulations, and that the agricultural and ranching sectors, in particular, would not be subject to increased permitting requirements? The language of the proposed rule has caused some concern, particularly among the farming and ranching communities, about how the final rule could affect their normal activities. The final rule must support the statements of agency representatives that the longstanding exemptions for normal agricultural and ranching activities will be preserved, and that no new permitting requirements will be imposed upon farmers and ranchers in relation to such activities. (p. 74-75)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water**

conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. In addition, paragraph (b)(4) of the final rule identifies features and waters that the agencies have identified as generally not "waters of the United States" in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The Agencies' 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be "waters of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction. Specifically, the following features are not "waters of the United States": artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds.

12.1158 It must be clear in the final rule that agricultural areas such as rice fields will not be captured within the terms of these definitions as jurisdictional waters. In addition, some of the exclusions for waters such as irrigation reservoirs can also benefit from additional clarity of language. (p. 76)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. In addition, paragraph (b)(4) of the final rule identifies features and waters that the agencies have identified as generally not "waters of the United States" in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies' goals of**

providing greater clarity, certainty, and predictability for the regulated public and the regulators. The Agencies' 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be "waters of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction. Specifically, the following features are not "waters of the United States": artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds.

Association of State Floodplain Managers (Doc. #19452)

12.1159 We also recommend that the federal agencies consult with the states to develop or revise field procedures for identifying streams on a regional basis. (p. 3)

Agency Response: State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

12.1160 ASFPM recommends development of implementation procedures and any necessary supporting rule language to allow for designation of categories of "other waters" found to have a significant nexus with downstream navigable waters as jurisdictional by rule on a state or regional basis.

(…) we support protection of "other waters" on a categorical basis where it is supported by science, but believe that designation of additional categories of protected "other waters" through a future national rulemaking will be cumbersome and is likely to overlook locally important types of wetlands. Therefore, we recommend that the proposed rule, along with implementing guidance, allow for a process that includes the following attributes:

- The process should provide for designation of categories of "other waters" having a significant nexus with navigable waters within a defined geographic region, in accordance with the provisions of the proposed rule regarding Waters of the United States, following gathering of appropriate documentation, public notice, and review. Such a list could be updated every fifth year, or at some other suitable interval. This would allow for identification, study, and designation or removal of categories of waters over time.
- The process for designating categories of other waters that are jurisdictional by rule should be a collaborative one, involving one or more states or tribes and Corps Districts, and the EPA, along with other stakeholders.

- The process should provide for public review and comment of any proposed designations, and define a process for timely approval of the designated categories by the federal agencies. (p. 5-6)

Agency Response: **In the proposal, the agencies solicited comment regarding a variety of approaches to the "other waters" category. In addition, the agencies solicited comment on additional scientific research and data that might further inform decisions about "other waters." In particular the agencies solicited information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of "other waters," either alone or in combination with similarly situated waters that can appropriately be identified as always lacking or always having a significant nexus. One of these alternate approaches in the preamble to the proposed rule was to determine by rule that certain additional subcategories of waters would be jurisdictional rather than addressed with a case-specific basis for determining significant nexus. Many commenters expressed support for the agencies' proposed approach to "other waters," included additional references to support "other waters" being protected by rule, and supported the treatment of certain categories of waters as similarly situated (that is, evaluating them in combination with similarly situated waters for the purposes of the significant nexus analysis). Some suggested the agencies establish jurisdiction over "other waters" by rule and provided detailed information in support of their position. Other commenters suggested additional subcategories of "other waters" be considered as jurisdictional or as similarly situated by rule, such as playa lakes, kettle lakes, and woodland vernal pools. However, there was a concern raised by other commenters about what was termed regulatory overreach and uncertainty created by the "other waters" category. Some commenters stated that the "other waters" category would allow the agencies to regulate virtually any water. To address this concern, the rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive and to reflect the consideration for the body of science that exists. The agencies also establish by rule subcategories of waters that are "similarly situated" for the purposes of a significant nexus analysis because science supports that the subcategory waters fall within a higher gradient of connectivity. By not determining that any one of the waters available for case-specific analysis is jurisdictional by rule, the agencies are recognizing the gradient of connectivity that exists and will assert jurisdiction only when that connection and the downstream effects are significant and more than speculative and insubstantial.**

12.1161 ASFPM suggests that the federal agencies coordinate with the states and tribes in development of guidance regarding implementation of the final rule. We recognize that details of on-the-ground implementation cannot be fully addressed in a rule, but these issues will be ripe for collaborative efforts upon publication of the final rule.

Development of guidance materials on the following topics by the federal agencies and state co-regulators would benefit the states, permit applicants, and the general public.

- Criteria and field/remote procedures[2268] for identifying streams – particularly ephemeral streams. This should be a joint effort by EPA/COE/States. Criteria should include not only bed and bank and OHWM, but also methods to determine that flow and biological or chemical processes are occurring that are important to downstream navigable waters.
- Criteria and field/remote procedures for the identification of ditches - jurisdictional and non-jurisdictional.

Guidance on how to develop a proposal as well as the review and decision-making process for a category of "other waters" that could be identified as jurisdictional (not requiring the significant nexus tests) on a regional basis. This will be needed if the recommendation discussed previously to develop a process for identifying categories of "other waters" is adopted. (p. 10)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.**

The Association of State Wetland Managers (Doc. #14131)

12.1162 Development of guidance materials on the following topics by the federal agencies and state co-regulators would benefit the states, permit applicants, and the general public.

- Criteria and field/remote procedures[269] for identifying streams – particularly ephemeral streams. This should be a joint effort by EPA/Corps/States. Criteria should include not only bed and bank and OHWM, but also methods to determine that flow and biological or chemical processes are occurring that are important to downstream navigable waters.
- Criteria and field/remote procedures for the identification of ditches – jurisdictional and non-jurisdictional.
- Criteria and field/remote procedures for identifying wastewater treatment systems exempt from the CWA and those waters regulated under the CWA particularly within MS4 boundaries and for the variety of stormwater treatment practices including structures that have are being installed in urban and urbanizing areas.

[268] [*Footnote not provided in comment letter*]
[269] The appropriate use of GIS and other remote information where possible is recommended and then a field visit only if needed.

- Clarification of the expectations of EPA with respect to the development of any new water quality standards for ephemeral streams that are not, because they are dry the great majority of the time, easily addressed by conventional standards for stream and rivers that run for sustained periods (intermittent) or continuously (perennial) throughout the year.
- Guidance on how to develop a proposal as well as the review and decision-making process for a category of "other waters" that could be identified as jurisdictional (not requiring the significant nexus tests) on a regional basis. This will be needed if the recommendation discussed previously to develop a process for identifying categories of "other waters" is adopted. (p. 9-10)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.**

Center for Rural Affairs (Doc. #15029)

12.1163 It is important for the two agencies proposing this rule to interact with NRCS and ensure all three organizations are confident and consistent in their communication with farmers. The rule's attempt to provide clarity will be futile if NRCS, the EPA, and Corps are communicating mixed messages to the regulated community due to inadequate coordination. Just increasing the profile of and communications surrounding the regulations, even without much additional regulatory action, will push farmers toward NRCS for technical assistance. EPA and the Corps must recognize this reality, and take appropriate steps to help NRCS maintain and build the necessary capacity to respond to increased requests for technical assistance. In March 2014, the agencies issued a Memorandum of Understanding (MOU) regarding implementation of the WOTUS Interpretive Rule. Moving forward, appropriate coordination might include an additional Memorandum of Understanding between the involved agencies outlining a framework for providing farmers and ranchers with appropriate technical assistance relating to the WOTUS proposed rule. Additionally, those in the agricultural community may be less hostile to the proposed rule knowing that there is a clear plan for implementation and that they have a voice through NRCS.

Recommendation: Facilitate ongoing interagency coordination between the EPA, the Corps, and the Natural Resources Conservation Service to deliver consistent information and technical assistance to those in the agricultural community. (p. 8)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily**

implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule. It is also important to note that the interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

12.1164 As previously stated, those in the agricultural community are likely to turn to NRCS for information and assistance on the WOTUS rule. Therefore, the EPA and Corps must not only coordinate with NRCS, but must also recognize the strain on NRCS resources associated with the rule. The Center for Rural Affairs is supportive of moving forward with the rulemaking process, but adequate resources must be available for NRCS to provide consistent and helpful service to farmers and ranchers.

For this reason, we have written a letter to the White House Office of Management and Budget to encourage additional funding for NRCS dedicated to providing technical assistance regarding the WOTUS rule. While NRCS will not have a regulatory responsibility, offering the agency adequate resources to provide technical assistance and educate farmers on the rule can result in smoother, more consistent implementation for the EPA and Corps and, ultimately, improved water quality. We urge the agencies to support this effort and come together in support for increased NRCS funding for WOTUS implementation.

Recommendation: Support efforts to provide additional funding for the Natural Resources Conservation Service to meet the predicted increase in requests for technical assistance regarding the WOTUS rule. (p. 9)

Agency Response: The agencies agree that NRCS has been and will continue to be a valued and helpful partner on issues relating to agricultural activities.

Western Landowners Alliance (Doc. #15380)

12.1165 Relationships with States – The Agencies should assure that individual states are prepared and not over-burdened as a result of the Proposed Rule, and that this proposal truly improves resource protection. The Agencies should provide assistance and resources for each state to assess their own statutory authorities over waters and wetlands, and whether this Rule or a related one affects or could improve protections of these resources in these states. For example, Wisconsin feels they are completely capable of protecting their resources irrespective of where CWA jurisdiction extends, while some feel Idaho needs more encouragement to protect water quality. Each state must assess their jurisdiction and its relation to the WOTUS definition and related protections. (p. 2)

Agency Response: There are a number of CWA programs that utilize the definition of "waters of the United States." States and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404. Additional CWA programs that are of importance to states and tribes include the

section 311 oil spill prevention and response program, the water quality standards and total maximum daily load (TMDL) programs under section 303, and the section 401 state water quality certification process. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

12.1166 Functional Equivalent and Deferral Period – Regulatory implementation should ensure a "functional equivalent" for states and/or localities that are implementing resource protections at or above CWA standards, and a deferral period where they are not, to encourage local jurisdiction. (p. 2-3)

Agency Response: States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

12.1167 Illustrate Benefits to Agriculture – There have been some strong concerns expressed about this proposal from some segments of the agricultural community, despite the broad exemptions granted to agriculture in the CWA. These perspectives would benefit from illustration of the number and effect on downstream waters of CWA-related actions. Many 404 permit actions related to development, oil and gas, and CAFO activities benefit downstream water quality, water supplies, and stream health. Broader and more specific examples of these benefits would beneficial to the dialogue on this proposal. (p. 3)

Agency Response: Thank you for this comment. As you point out, the environmental effects, both beneficial and adverse, of proposed activities can vary widely depending, in part, on the location, nature and scope of the activity. This additional context is indeed helpful.

12.1168 Get This Discussion Out of The Beltway – The Jurisdictional Rule had problems from the roll-out. The Corps and the EPA regional offices have not been sufficiently involved to make these proposals real and relevant to the varied geographies and resources across the nation. (p. 3)

Agency Response: The final rule reflects the judgment of the Corps and EPA when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. Since the Rapanos decision, the agencies have extensive experience making significant nexus determinations, and that experience and expertise has informed the judgment of the agencies as reflected in the

provisions of the final rule. The agencies, most often the Corps, have made more than 500,000 CWA jurisdictional determinations since 2008. Of those, approximately 250,000 have been case-specific significant nexus determinations. The agencies have made determinations in every state in the country, from the arid West to the tropics of Hawaii, from the Appalachian Mountains in the East to the lush forests of the Northwest. With field staff located across 38 Corps District offices and 10 EPA regional offices, the agencies have almost a decade of nationwide experience in making significant nexus determinations. Through this experience, the agencies developed wide-ranging technical expertise in assessing the hydrologic flowpaths along which water and materials are transported and transformed that determine the degree of chemical, physical, or biological connectivity, as well as the variations in climate, geology, and terrain within and among watersheds and over time that affect the functions performed by streams and wetlands for downstream traditional navigable waters, interstate waters or the territorial seas. In addition, the agencies have experience and expertise for decades prior to and since the SWANCC and Rapanos decisions with making jurisdictional determinations, and consider hydrology, ordinary high water mark, biota, and other technical factors in implementing Clean Water Act programs. This immersion in the science along with the practical expertise developed through case-specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn lines demarking where "waters of the United States" end.

Kansas Natural Resource Council (Doc. #14599)

12.1169 Whereas the EPA intends to streamline the regulatory process associated with the proposed rule by depending more upon desktop rather than field observation, the KNRC laments the absence of field personnel. Kansans will only see a mass of government red tape and overreach when a letter from the Corps of Engineers or the EPA lands on the desk. Of course no one wants to pay for case-by-case assessments, but the lack of boots in the field is a lost opportunity for educating the public and building cooperative relationships. (p. 2)

Agency Response: In response to Supreme Court opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, virtually all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this

final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

12.7. EMERGING TECHNOLOGIES OR APPROACHES THAT WOULD IMPROVE JD EFFICIENCY/ACCURACY

Specific Comments

Committee on Space, Science, and Technology (Doc. #16386)

12.1170 The preamble to the rule recommends that EPA and the Corps trace a tributary connection through direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information. Does this mean that if EPA, the Corps, or a third party can discern a flow path from an aerial photograph or remote sensing technology, then it could be covered by the CWA? (p. 16)

Agency Response: While the preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water, such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible.

12.1171 The June 5th Draft Report of the SAB on the Connectivity Study notes that light detection and ranging (LiDAR) digital elevation models are increasing the ability to see more features on the land. Some may identify these features as stream networks. *"Hence, the degree of connectivity will be determined in some part by in the database and/or data collection technology used for the analysis.*" Does EPA believe that CWA jurisdiction can expand as technology expands? (p. 16)

Agency Response: The agencies have been using remote sensing and desktop tools such as LiDAR to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. As agency budgets contract forcing field visits become less common greater use of remote sensing and desktop tools will have to fill in the gaps. However the use of remote sensing and desktop tools is based on studies and or experience showing that use of the remote sensing and desktop tools results in the same extent of jurisdiction as a field investigation.

Governor's Office – State of Utah (Doc. #16534)

12.1172 It is critical that the EPA and/or Army maintain a database that allows a graphical/visual representation of jurisdictional determinations. This would allow the public and other governmental agencies the ability to see what previous jurisdictional determinations have been made – perhaps on the same stream location. This recommendation is made knowing that the jurisdictional determinations are good for only five years. It is unreasonable for proponents of projects to be obligated to assume jurisdiction in every instance in order to move ahead with their projects. (p. 15)

Agency Response: The Corps and EPA are committed to an efficient and transparent regulatory program. The agencies intend to pursue implementation practices that allow for the tracking and evaluation of jurisdictional determinations to inform future decisions and the public of CWA jurisdiction.

State of Nevada Department of Conservation et al (Doc. #16932)

12.1173 To classify tributaries and other waters as jurisdictional on a per se basis, we suggest that EPA consider a different approach. Instead of trying to determine jurisdiction using categorical definitions of waters, EPA should utilize a more functional methodology.

The core waters, major interstate waterways, are easily determined and accepted as jurisdictional. Other waters considered per se jurisdictional should have a continuous surface connection to a core water, with perennial flow or at least consistent seasonal flow. The Corps has interpreted consistent seasonal flow as flowing at least three months each year.[270] This functional definition would ensure that only waters with significant impacts on core waters would be per se jurisdictional. Other waters could be evaluated on a case-by-case basis.

Waters that are not per se jurisdictional should have a rebuttable presumption that they are non-jurisdictional until proven otherwise. The burden should be on EPA and the Corps to determine jurisdiction in a timely manner after requests for jurisdictional determinations are made, and the agencies should work with states to develop appropriate time frames. (p. 4)

Agency Response: The agencies have provided additional clarity and certainty in the final rule, however have not changed the long standing practice of not assuming the jurisdictional status of a water by creating a reputable presumption. The agencies have determined that to meet the rule's definition of a "tributary" a water must flow directly or to another water or waters which eventually flow into a traditional navigable water, interstate water, or the territorial sea. Waters that are not part of the tributary system of a traditional navigable water, interstate water, or the territorial seas, do not meet the definition of "tributary" and are not jurisdictional under this provision of the rule. For example, an ephemeral stream that exists entirely within one state, is not itself a traditional navigable water, and whose surface or shallow subsurface flows eventually end without connecting to a

[270] *Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers*, 501 Fed. Appx. 268, 271 n.1 (4th Cir. 2012).

traditional navigable water, interstate water, or the territorial seas is not a "water of the United States" as a "tributary" for purposes of this rule. The agencies have also determined that a water that does not otherwise meet the definition of adjacency is evaluated on a case-specific basis for significant nexus where it is located within 4,000 feet of the high tide line or ordinary high water mark of an (a)(1) through (a)(5) water. Therefore, on a case-specific basis a water not otherwise meeting the definition of "tributary" may be subject to case specific nexus determination.

12.1174 Another current source of confusion is that jurisdictional determinations made by the Corps under section 404 include a disclaimer that the decision applies only to section 404, and not to the many other sections of the CWA. To provide certainty and clarity, waters should either be jurisdictional or not. EPA and the Corps should unify the process so there are no incomplete or conflicting determinations.

A very beneficial tool to add clarity would be a map of Waters of the United States in each state. This would go a long ways toward reducing uncertainty, which is a common goal of all parties, and would ease resistance against the Proposed Rule.

It would improve cooperation and acceptability if states were provided a role in the process as well. State regulators maintain a critical balance between broad federal requirements and specific regional conditions. Without some flexibility in the CWA, one-size-fits-all national requirements can complicate existing regulatory programs by not accounting for local climatic, hydrologic and legal factors. Unnecessary federal jurisdiction brings a host of problems for farmers, land developers and homeowners, since CWA permitting is time consuming, very expensive and legally complicated. Input from states during the jurisdictional determination process would provide valuable information and help avoid misinterpretations, delays and unintended consequences. (p. 5)

Agency Response: **The agencies anticipate that the clarity and certainty of the final rule will ensure that jurisdictional determinations will be consistent across CWA programs. Determinations of jurisdiction are done on a case by case basis based on the best information available and they are only valid for five years because environmental conditions which can shape the outcome can change over time. For example changes in ground and surface water levels due to changes in water usage and losses through evapotranspiration. The agencies welcome information from states and other parties that would help identify the extent of "Waters of the United States." Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

North Dakota Farmers Union (Doc. #16390.1)

12.1175 [Regarding inconsistencies among Agencies] One of the greatest sources of farmers' and ranchers' distrust of the Agencies is rooted in inaccurate mapping and the discrepancy among the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), the U.S. Fish and Wildlife Service (USFWS), and the Corps in wetlands delineation determinations and mitigation requirements. The impact is that farmers and

ranchers need to receive separate and time-consuming determinations and mitigation plans on the very same wetland.

First, the National Wetlands Inventory Maps, providing the starting point for wetlands determinations and assumed to be appropriate as the foundation for this rule, has inaccuracies. Not only do the inaccuracies breed distrust, but farmers and ranchers also bear costs of refuting the map. Second, the Agencies and NRCS base wetland determination decisions on the 1987 Corps Delineation Manual (the Manual), and its applicable regional supplements state-by-state. Generally, the Corps will recognize NRCS determinations of wetlands and farmed wetlands, and will recognize NRCS determinations of prior converted wetlands as exempt. However, in very common circumstances, the Corps will often find wetlands where NRCS has specifically found something to be "non-wetland." Third, we are aware of situations in which the Corps makes a determination without finding all three wetlands characteristics identified in the Manual: (1) hydric soils, (2) ability to support hydrophytic vegetation, and (3) sufficient hydrology to create conditions for making hydric soils and establishing hydrophytic vegetation.

Recommendation*:* We recommend a review of the National Wetlands Inventory Maps, the Manual and regional supplements. We recommend the Agencies specifically include this rule the acceptance of determinations by NRCS. We also recommend the Agencies enter into a Memorandum of Understanding with the NRCS and the USFWS to provide a one-stop-shop approach for farmers and ranchers. (p. 1-2)

Agency Response: The agencies are recognize the importance of agriculture and this rule does not affect the long standing exemptions provided in the Clean Water Act for normal farming and those for agricultural stormwater and irrigation return flow. The agencies believe this rule will make identifying jurisdictional and non-jurisdictional waters simpler and more efficient, which will be of benefit to the public and agencies alike.

There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Agribusiness Association of Kentucky (Doc. #18005)

12.1176 Although the text in the proposal provides more confusion than clarity, EPA rejects the one tool that could provide certainty to farmers and ranchers – maps. To identify how deep into the countryside the "tributary networks" would go, our consultants, Geosyntec Consultants, used the same U.S. Geological Survey (USGS) data employed by the Agencies to create maps of the nation's perennial, intermittent and some ephemeral streams.[271] Today's sophisticated technology allowed the map programs to zoom in closely on the ground to show exactly what streams and 100-year floodplains

[271] See www.tinyurl.com/epawaters and a selection of screen shots at Appendix B.

have been identified by USGS and what the surrounding landscape looks like. The Agencies apparently had the same datasets and maps in their records (supposedly without the zoom-in capability), but did not make them part of the public record for this rulemaking.[272] These maps should have been part of the public record.

Once the maps were made public, the Agencies disclaimed their usefulness and promised that the maps would not be used to determine jurisdiction.[273] The fine print in the proposed rule, however, indicates that the Agencies *do* intend to use USGS maps, among other tools, to identify jurisdictional tributaries. The proposal states that the Agencies have various tools at their disposal to trace whether a water eventually flows into a traditional navigable water, interstate water, territorial sea or jurisdictional impoundment, including "U.S. Geological Survey maps, aerial photographs or other reliable remote sensing information or other appropriate information."[274] The maps may not be legal determinations of jurisdiction, but the Agencies cannot disavow the influence of these USGS maps and their datasets on jurisdiction. In fact, EPA Administrator McCarthy testified that the EPA's maps would be used for jurisdictional determinations.[275] For farmers and ranchers who can see their farm with a highlighted line indicating an ephemeral stream running through it, the maps are a strong indication of just how far the reach of jurisdiction will extend into the countryside. (p. 4-5)

Agency Response: **While the preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water, such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. However determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of**

[272] The maps were first requested, obtained and publicly released by the House Science Committee, U.S. House of Representatives and can be found at http://science.house.gov/epamaps-state-2013#overlay-context.
[273] In EPA's official blog, Tom Reynolds claims "EPA has never and is not now relying on maps to determine jurisdiction under the Clean Water Act." EPA Connect, the Official Blog of EPA's Leadership, August 28, 2014 at 3:43 EDT "Mapping the Truth." http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth.
[274] 79 Fed. Reg. at 22,202.
[275] In a March 27, 2014 hearing before the House Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies, Administrator Gina McCarthy told Chairman Rogers that EPA has "some mapping in the docket associated with this rule that people can access at this point." Administrator McCarty went on to say: "There has been no mapping before, there has been no certainty so we are identifying the rivers and streams and tributaries and other water bodies that science tells us is really necessary to protect the chemical, physical, and biological integrity of navigable waters. We have taken the opportunity to map those; we are certain we will get comment on them."

different remote sensing and desktop tools and a field visit. It is beyond the scope of this rulemaking to make any specific jurisdictional determinations and beyond the resources of the agencies to make jurisdictional determinations for all waters within a state at any one time.

SD1 (Doc. #15140)

12.1177 It is our assessment that the publication of the proposed rule is premature at this time, and … a more extensive review of the consequences of expanding the definition of WOTUS on all aspects of the CWA program must be conducted before the full impact of this rule can be assessed. As such, we propose that the agencies: …

- Establish a definitive approach to establishing significant nexus that takes into account regional variability in hydrologic regimes of the United States;
- Develop a companion guidance document to determine significant nexus to accompany the proposed definition when reissued; …
- Develop specific exclusion language into the rule for storm water control measures and BMPs; (p. 8)

Agency Response: The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. In addition, the existing state programs implementing the CWA were developed under the prior regulatory definition of "Waters of the United States," the existing programs have in the past and can continue to address the scope of "Waters of the United States" under the final rule.

Clearwater Watershed District, et al (Doc. #9560.1)

12.1178 [The following was included under section II of comment letter – Recommendations to Improve Efficiency] The proposed rule's preface invites comment on identifying emerging technologies or approaches that would save time and money and improve efficiency for regulators and the regulated community.

We support a unified approach by all of federal agencies in recognition of each agency's wetland delineations, determinations, and mitigation requirements.

One of the greatest generators of distrust within the regulated community is failure of each agency of the federal government to recognize and support each other's wetland determinations and mitigation requirements. In Minnesota, local government units and landowners often deal with the Natural Resources Conservation Service under the provisions of the Food Security Act of 1985, the U.S. Fish and Wildlife Service under the National Wildlife Refuge System Administration and Duck Stamp Acts, and the U.S. EPA and Army Corps under the Clean Water Act. While the laws administered by each

agency are different and have different objectives, each agency uses the Corps of Engineers Wetlands Delineation Manual of 1987.276

The lack of communication, understanding, and agreement between the federal agencies on wetland delineation determinations adds time, cost, and undue burdens to the permitting process of each project. In Minnesota, it is common practice for the Army Corps to be the last agency to issue its wetland determination. It is evident that the internal policy of the office in our state is to "wait and see" what the other agencies do before issuing its own determination and delineation.

In addition, projects that require wetland mitigation and replacement are often delayed by years due to lack of communication and agreement between the agencies on mitigation ratios and requirements. Each agency issues a different mitigation requirement which makes it difficult for proponents of public drainage and water quality enhancement projects to plan and keep projects on schedule. Projects are often delayed years by this process and many projects which would improve the quality of water flowing through Minnesota's lakes, streams, and wetlands are abandoned.

A unified approach by all agencies of the federal government to wetland identification, delineation, and mitigation would decrease the burden on the regulatory agencies, save administrative costs to the agencies and the regulated community, and help bring clarity and trust back to the process.

Recommendation: We recommend that the agencies amend the definition of" wetlands" to include acceptance of wetland delineations conducted by the Department of Agriculture. We further encourage the U.S. EPA and the Department of the Army to enter into a Memorandum of Agreement with the Department of Agriculture and the Department of the Interior concerning delineation of wetlands for purposes of the Clean Water Act and the Food Security Act. (p. 5-6)

Agency Response: **The agencies believe this rule will make identifying jurisdictional and non-jurisdictional waters simpler and more efficient, which will be of benefit to the public and agencies alike. There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.**

[276] Prior to 1986, no manual existed for government agency reference to delineate wetlands. In 1987, the U.S. Army Corps of Engineers and in 1988, the U.S. Environmental Protection Agency, released their own versions of delineation manuals, each relying on the presently used parameters of (1) vegetation, (2) soils, and (3) hydrology to establish wetland boundaries. After several years of field-testing, a 1989 revised manual was released and agreed to by all four federal agencies: the NRCS, the Corps, the EPA, and the U.S. Fish and Wildlife Service. In 1991, public concerns that that 1989 manual resulted in over-delineation of wetlands led to review of the 1989 manual, with revisions proposed in August of 1991. In response to comments received during the public comment period, the EPA responded by withdrawing the proposed manual. In 1992, Congress appropriated funds to commission the National Academy of Science to study wetland delineation. Congress prohibited the Corps from using the 1989 manual during the interim study period. The Corps returned to use of the 1987 manual.

Western Landowners Alliance (Doc. #15380)

12.1179 Documentation – It would be helpful if, whatever jurisdictional extent is determined, if that could be mapped and made available online. Granted, there may be some ongoing determinations for certain waters, but the certainty for some would outweigh the uncertainty for others. And the online information could clearly instruct viewers to contact the Corps on jurisdiction for higher order or "other" waters, or include information such that landowners can do as much of a self-determination as possible. (p. 1)

Agency Response: The Corps and EPA are committed to an efficient and transparent regulatory program. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country. The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

12.1180 Relationship to Other Programs and Factors – The agencies should investigate the effects and potential of other programs and factors to be more protective or destructive of wetland resources than can be effected by a regulatory program. For example, ethanol mandates have driven up prices of commodities such that producers are being driven out of programs that protect wetlands and other habitat, as well as being incentivized to break into ground that previously produced other habitat, soil, and water benefits. (p. 2)

Agency Response: The investigation of the effects of other programs on wetland resources is outside the scope of this rulemaking.

12.1181 Regulatory Burden and Agency Resources – There is an important prohibition in the CWA against discharging pollutants into our waters and destroying valuable wetlands. It is appropriate for that to be illegal. Where it can't be avoided however, the permitting process should not be onerous, and staff should be sufficiently available and knowledgeable so as to not create an undue burden on permittees. (p. 2)

Agency Response: The Corps and EPA are committed to an efficient and transparent regulatory program.

12.1182 Opportunities for Incentives – The Agencies should evaluate where incentive programs, rather than regulatory programs can be effective in conserving habitats sought to be conserved through this proposal, including whether Sodbuster and Swampbuster programs are effective and could be enlisted (if not already) to protect "other" waters, including isolated wetlands. These are valuable resources, but may be more effectively managed through USDA programs. (p. 2)

Agency Response: **The investigation of the effects of other programs on wetland resources is outside the scope of this rulemaking.**

12.1183 Accommodate Multiple Uses for Operating Ranches – Management of many ranches in the West is moving toward diversification of income sources, meaning that some water features may no longer be "solely" used for agriculture. WLA suggests evaluating whether activities associated with a property taxed in agricultural status would provide needed water resource protection, while accommodating this increasing diversification of agricultural activities. (p. 3)

Agency Response: **The investigation of the effects of other programs on wetland resources is outside the scope of this rulemaking.**

12.1184 Encourage Innovation – Where possible, the rule should encourage innovation in water resource protection and conservation, including not tying funding or permitting to over-engineered practices that can harm resources rather than protect them. (p. 3)

Agency Response: **Funding and the review of specific practices in the permitting program are outside the scope of this rulemaking.**

Galveston Bay Foundation (Doc. #13835)

12.1185 Regarding implementation of the rule, we believe that when making "desktop" determinations of jurisdiction, the EPA and Corps should consult with those in our area who are familiar with the science of our unique watershed. (p. 3)

Agency Response: **The Corps and EPA are committed to an efficient and transparent regulatory program and welcome information from all sources to inform the jurisdictional determination process.**

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al. (Doc. #15123)

12.1186 Finally, we ask that the Corps make public both its jurisdictional and non-jurisdictional determinations for as long as the determinations are current and in force (up to five years). Although we have not undertaken a comprehensive study of all Corps districts, our experience in the Mississippi River Basin districts has shown us that the availability of this information is spotty at best. Being able to access jurisdictional determinations will make it easier to aggregate similarly situated waters for purposes of future determinations and will save time for landowners and Corps personnel alike by allowing them to refer to the previous determination instead of starting from scratch each time. (p. 2)

Agency Response: **The Corps and EPA are committed to an efficient and transparent regulatory program. The agencies intend to pursue implementation practices that allow for the tracking and evaluation of jurisdictional determinations to inform future decisions and the public of CWA jurisdiction.**

12.1187 It is critically important that the federal agencies, interested groups, and the public have ready access to as much information as possible and practicable about jurisdictional determinations. The agencies should learn from and correct numerous problems that developed in the last decade. Key to public participation is the regular posting by the

Corps districts of the jurisdictional determination forms. RGL 07-01 specifies that completed jurisdictional forms "shall be posted within 30-days of completion,"[277] but it is difficult to discern whether this is followed in practice without monitoring district websites regularly. The Corps and EPA headquarters should ensure that jurisdictional decisions are publicly available in a timely way. All districts should be required to post all completed determinations at least once a week.[278] Additionally, jurisdictional determinations should remain available on Corps websites for five years, that is, while they are in effect.[279] (p. 13)

Agency Response: **The Corps and EPA are committed to an efficient and transparent regulatory program. The agencies intend to pursue implementation practices that allow for the tracking and evaluation of jurisdictional determinations to inform future decisions and the public of CWA jurisdiction.**

12.1188 Moreover, the proposed rule should include a process by which case-by-case determinations of significant nexus are recorded and used in future decisions. The rule should include a requirement that districts compile and publicize such determinations in order to assist in identifying other similarly situated waters with the region.

> The Corps' district personnel (and EPA field staff) should be required to use a common, publicly accessible, database for JDs. Such a tool will enable concerned citizens, resource managers, and others to assess whether similar waters are being treated similarly across the country, track the amount of resources found non-jurisdictional and consider whether to make policy or regulatory changes to adequately protect important resources. (p. 14)

Agency Response: **The Corps and EPA are committed to an efficient and transparent regulatory program. The agencies intend to pursue implementation practices that allow for the tracking and evaluation of jurisdictional determinations to inform future decisions and the public of CWA jurisdiction.**

Center for Water Advocacy et al. (Doc. #15225)

12.1189 Interpreting the definition of WOTUS broadly as originally intended could further protect water and fishery resources in the United States by encouraging federal agencies to: 1) develop a transboundary treaty that will primarily regulate mining and other development activity affecting and maintaining and protecting healthy wild salmon

[277] U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 07-01, Practices for Documenting Jurisdiction under Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA), at 7 (June 5, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07- 01.pdf. Although some aspects of this RGL were updated by RGL 08-02, this website posting provision was not. See U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf.

[278] Some districts seem to have no problem posting JD forms promptly. See, e.g. U.S. Army Corps of Eng'rs, Seattle District, Jurisdictional Determinations, available at http://www.nws.usace.army.mil/Missions/CivilWorks/Regulatory/JurisdictionalDeterminations.aspx (as of November 7, most recent determination dated October 23).

[279] This should not be difficult, and some districts do so already. See, e.g., U.S. Army Corps of Eng'rs, Vicksburg District, Approved Jurisdictional Determinations, available at http://www.mvk.usace.army.mil/Missions/Regulatory/JurisdictionalDeterminations/ApprovedJDs.aspx.

populations in Alaska/Canada transboundary waters. Specifically, the signatories to the treaty would: 1) agree to share information and seek opportunities for collaboration to address these issues, promote methods to protect these vital rivers form harm, and seek to facilitate and promote methods to protect these vital rivers from harm, and seek to facilitate and promote meaningful dialog and engagement at the federal, state, provincial and local levels to assure protection of this resource on both sides of the border; 2) address and make integral to any transboundary watershed development decision making, the concerns of Alaska Native Tribes, BC First Nations, local communities, individuals and user groups downstream from the mining projects in question; or 3) develop report and other documentation meant to inform the U.S. and Canadian, respective federal governments and other sovereigns of the elements of the tribes' and First Nations' proposal for integrating fish habitat protection as an essential element of the Treaty including a bilateral effort that will require international actions. (p. 5-6)

Agency Response: The final rule clarifies the scope of "waters of the United States," the other recommendations in the above comment are outside the scope of this rulemaking.

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

12.1190 SMC works in close partnership with the USACE-Chicago District under an established interagency coordination agreement to assist with jurisdictional determinations ("JDs") in Lake County. Using the USACE's *Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007), hundreds of JDs have been processed in a prompt and consistent manner, with very few instances of complaints or appeals by applicants. This is clear evidence that the current system for JDs in Lake County is working efficiently and no change is warranted to the current JD guidance. (p. 2)

Agency Response: The final rule provides additional clarity to the regulated public and should help make the past practices discussed even more clear to the public.

Red River Waterway Commission (Doc. #15445)

12.1191 …we are deeply concerned that this rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this proposed rule seeks to cover through federal jurisdiction are not unprotected. They are currently protected as state waters. Surely, a better approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps to work with states to improve their water quality programs. Assertion of federal jurisdiction over these waters should be a last resort and not the first course of action. (p. 2)

Agency Response: The final rule represents a narrowing of jurisdiction from the prior regulations. Along with a narrowing of jurisdiction, the rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. As has been the case, nothing in this rule restricts the ability of states to start or continue to more broadly protect state waters.

12.8. COMMENTS ON PERMITTING EXEMPTIONS

Specific Comments

National Association of State Departments of Agriculture (Doc. #15389)

12.1192 (…) [W]e have significant concerns that, despite public agency statements to the contrary, well-established exemptions for prior converted cropland, agricultural return flows, nonpoint source stormwater flows, silviculture, and natural resource extraction may be threatened by the proposal. For example, the proposal states "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA."[280] (p. 5)

Agency Response: Recognizing the vital role of farmers in providing the nation with food and fiber, CWA section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying that the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." Also, prior converted cropland and waste treatment systems have been excluded from the definition of "waters of the United States" since 1992 and 1979, respectively, and they remain substantively and operationally unchanged in the final rule.

12.1193 Waste management systems designed and built to meet CWA standards would be exempted in the proposed rule, but with the broad expansion of "waters" definition proposed, many CAFO operations could find themselves in violation of the CWA. Processing of animal waste and land application for its nutrients is an important part of agriculture, both farming by conventional and organic methods. Restrictions in the proposed rule could alter well-managed state CAFO programs and expose livestock producers to third-party litigation. (p. 7)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

Skamania County Board of Commissioners (Doc. #2469)

12.1194 Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. We are concerned that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety

[280] 79 Fed. Reg. 76, 273. §401.11(2)(ii). General Definitions, "Prior converted cropland."

infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for our county. (p. 4)

Agency Response: **The final rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. However, the rule for the first time explicitly excludes certain ditches from the definition of waters of the United States. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. While the final rule does not include an explicit exclusion for roadside ditches, the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Permitting exemptions are beyond the scope of this rule.**

Hamilton County Engineer's Office (Doc. #8669)

12.1195 The CWA itself contains broad exemptions from regulation for the nation's agricultural sector. Farmers and ranchers currently do not need permits for normal practices like plowing or constructing farm roads. And stormwater runoff from farm fields is not subject to federal pollution limits. The agencies have said these exemptions would be carried forward under the proposed rule and issued an "interpretive rule" to explain dredge-and-fill exemptions for normal farming, silviculture, and ranching practices, listing 56 conservation practices approved by the U.S. Department of Agriculture – Natural Resources Conservation Service (USDA-NRCS) that would be exempt from permitting requirements under Section 404 of the CWA. Most agricultural groups claim that these exemptions do not protect farmers from requirements related to pollutant discharges and future permitting requirements under the CWA, and would actually narrow the exemptions for production agriculture under the CWA. The interpretive rule could also place the USDA-NRCS in a position of policing these practices under the CWA rather than their usual role of partnering with agriculture to ensure the adoption of best management practices important to the balance of productive farms and ranches and clean water.

It is believed the EPA should withdraw the interpretive rule and collaborate with the agricultural sector to ensure that all normal farming, silviculture, and ranching practices, including USDA-NRCS practices, continue to be exempt from CWA regulation. (p. 4-5)

Agency Response: **The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.**

Board of Supervisors, Imperial County (Doc. #10259)

12.1196 All told, the proposed rule could subject local agencies to the 404/401 permit process; result in high costs for repairing or upgrading infrastructure when it is already covered by the MS4 permit process; and, potentially expose local agencies to citizen suits. Accordingly, we believe that the Agencies should include language that exempts MS4 from CWA regulation even if it otherwise qualifies as a "tributary" under the proposed rule. The exemption language should explicitly address: stormwater conveyances, bioswales, green projects, and infiltration basins used to comply with an MS4 permit as these facilities are necessary to comply with the CWA. (p. 6)

Agency Response: Please see summary response 7.4.4.

Nebraska Association of Resources Districts (Doc. #11855)

12.1197 Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that all existing exemptions will be maintained,[281] and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.[282] However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule.[283] Instead, new qualifying language replaces the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule. (p. 9)

Agency Response: The final rule retains all existing exclusions from the definition of "waters of the United States" and adds several exclusions reflecting longstanding agency practice to the regulation for the first time. Specifically, the agencies for the first time establish by rule that certain ditches are excluded from jurisdiction. The rule also includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.

12.1198 Failure to explicitly affirm all existing exemptions within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for

[281] See http://www2.epa.gov/uswaters: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")
[282] 79 Fed. Reg. 22218.
[283] The Agencies have also recently adopted an interpretive rule imposing mandatory compliance with Natural Resources Conservation Service (NRCS) standards as the basis for qualifying for a number of agricultural exemptions. NARD opposes the Agencies' efforts to limit the exemptions for agricultural activities through the interpretive rule.

which will directly translate into higher costs for development activities, or avoidance of development altogether. (p. 9)

Agency Response: **The final rule retains all existing exclusions from the definition of "waters of the United States" and adds several exclusions reflecting longstanding agency practice to the regulation for the first time.**

National Association of Conservation Districts (Doc. #12349)

12.1199 In conclusion, while EPA's efforts to preserve the agricultural exemptions are critical and well-intentioned, the combined effect of the expansion of jurisdiction and the framework to implement the agricultural exemptions creates the following legal uncertainties and risks: (1) the potential that current non-jurisdictional features, such as on-farm wetlands, ditches and ponds will be deemed jurisdictional (*e.g.*, those located in natural streams or connected to downstream jurisdictional waters); (2) discharges or fill-and-dredge activities affecting such previously non-jurisdictional features may require a 402 or 404 CWA permit; and (3) failure to obtain a CWA permit may subject a farmer to CWA enforcement, including citizen suits. (p. 7-8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Further, the final rule clarifies that waters subject to established, normal farming, silviculture, and ranching activities under CWA section 404(f)(1) are not jurisdictional by rule as "adjacent." In addition, all existing exclusions from the definition of "waters of the United States" are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.**

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

12.1200 Under the proposal simple projects at our mill sites that disturb soils may require a CWA permit before the work can begin. The permitting process can be lengthy thereby resulting in significant project delays. A permit exemption for conducting maintenance work is needed. (p. 3)

Agency Response: **The issue of permitting exemptions for discharges to jurisdictional waters is beyond the scope of the final rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Furthermore, those activities, including maintenance, currently identified as exempt from regulation under CWA section 404(f)(1) continue to be exempt.**

Snell & Wilmer L.L.P. (Doc. #15206)

12.1201 The EPA claims that the actions of farmers and ranchers are protected by the NRCS Conservation Practice Standards Section 404 Exemptions. However, the uncertainty that the EPA sought to eliminate by categorically regulating virtually all canals in the Proposed Rule and forcing farmers and ranchers to rely on exemptions has simply shifted the uncertainty to the NRCS exemptions. Moreover, the regulatory burden is significantly higher for a farmer or rancher to determine if his activities fall within one of the exemptions than if the farmer or rancher is not subject to regulation in the first

instance. For example, it is far less burdensome for a farmer to know that his lateral ditch is not subject to regulation because it is not considered a "tributary," than it is for him to apply NRCS Conservation Practice Standard Code 320, where "a value of Manning's roughness coefficient 'n' no greater than 0.0 25 shall be used to check that velocities do not exceed permissible values." (p. 5)

Agency Response: Recognizing the vital role of farmers in providing the nation with food and fiber, CWA section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, while continuing the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. In addition, the final rule clarifies that waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Orange County Public Works, Orange County, California (Doc. #14994)

12.1202 The Agencies should provide specific exemptions:

Green infrastructure and other structural Best Management Practices (BMP) required by the CWA for water quality protection should be explicitly exempt for the purposes of maintenance. (p. 3)

Agency Response: The final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies received many comments, particularly from municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressing concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems.

12.1203 Roadside ditches, draining only roadway runoff, should be explicitly exempt. (p. 3)

Agency Response: **The final rule does not include an explicit exclusion for roadside ditches, but the agencies expect the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with all modes of transportation, such roadways, airports, and rail lines.**

12.1204 Constructed flood control channels, excavated in upland, should be considered part of the MS4 and explicitly exempted. Many such channels have been constructed in portions of Orange County (Stanley W. Trimble, Journal of Historical Geography, 29, 3 (2003) 422-444 Historical hydrographic and hydrologic changes in the San Diego creek watershed, Newport Bay, California) and have been inappropriately regulated as waters of the U.S. rather than part of the MS4, requiring Section 401/404 certifications/permits and being subject to Section 303 requirements (See 1.e above regarding Peters Canyon Channel). (p. 3)

Agency Response: **Please see summary response 7.4.4.**

12.1205 Routine maintenance of ditches should be explicitly exempt pursuant to CWA 3 404(f)(l)(b) and (c). To this end, the County supports the recommendation made by others to define the term "Fully Constructed Stormwater Control Measures" ("SCMs") as follows: "SCMs are human-made structures, devices, measures or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes." The County further supports modifications to the Rule's Preamble that defines an exclusion for stormwater that is as clear as that for agriculture. (p. 3)

Agency Response: **Exemptions from permitting for particular activities in jurisdictional waters is beyond the scope of this rule. The final rule includes a new exclusion from jurisdiction in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed. The agencies' longstanding practice is to view stormwater water control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.**

SD1 (Doc. #15140)

12.1206 An increase in WOTUS could affect the construction of storm water runoff control features for SD1, co-permittees, and developers. SD1 is also concerned that routine storm water maintenance, such as sediment removal from detention ponds and routine channel maintenance and debris removal, as well as green infrastructure practices, could also be inadvertently affected. These practices therefore need to be exempted from the rule and also need to be clearly stated in the rule so there isn't confusion as to which storm water practices are exempted. (p. 7)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies received many comments, particularly from municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressing concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems.

Clearwater Watershed District, et al. (Doc. #9560.1)

12.1207 The rule sets out only to define "waters of the United States." It does not, as the prefatory comments suggest, discuss types of "discharges" that are exempt or not exempt. We encourage the agencies, through further rulemaking and analysis, to evaluate the significance of the impact different types of discharges have on the chemical, physical, and biological integrity of waters of the United States. (p. 3-4)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation. As noted by the commenter, exemption from permitting for discharges to jurisdictional waters is beyond the scope of this rule.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

12.1208 What is the impact of the proposal on impoundments currently regulated under RCRA but for which no exemption exists[?] (should be exempt); (p. 7)

Agency Response: Consistent with existing regulations and the April 2014 proposed rule, the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule.

The Clean Energy Group Waters Initiative (Doc. #14616)

12.1209 Additionally, for existing linear infrastructure such as electrical and natural gas transmission and distribution, regular right-of-way maintenance is critical to safety and reliability. Maintenance activities include vegetation trimming, pole and line repair, and

erosion maintenance, and these activities should be expressly exempted similar to the exemption for agriculture maintenance.[284] (p. 9)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters and permitting requirements are beyond the scope of the final rule.

Metropolitan Water District of Southern California (Doc. #14637)

12.1210 Under the water transfers rule, water transfers are exempt from the requirements of obtaining a permit under section 402 unless pollutants are introduced by the water transfer activity itself to the water being transferred. (40 C.F.R. § 122.3(i).) "Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." (40 C.F.R. § 122.3(i).) Typical water transfers "route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration." (73 Fed. Reg. 33697, 33698 (June 13, 2008)). As EPA has noted, "Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law." (73 Fed. Reg. at 33702). In fact, "[m]any large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins." (Id., at 33698). Two examples are the cities of New York and Los Angeles which depend on water transfers from distant watersheds to meet their municipal demand. (Id.) Water transfers are administered by various federal, State, and local agencies and other entities. (Id.)

EPA concluded that water transfers do not require NPDES permits "because they do not result in the 'addition' of a pollutant." (73 Fed. Reg. at 33698). Furthermore, Congress did not intend to subject water transfers to the NPDES program. (73 Fed. Reg. at 33701). Instead, "Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities." (Id.) Although the water transfers rule has been challenged in federal court *(see Catskill Mountains Chapter of Trout Unlimited, Inc. v. US. EPA*, 8 F. Supp. 3d 500 (S.D.N.Y March 28, 2014) (vacating the water transfers rule)), and its status remains pending on appeal in the 2nd and 9th Circuits, Metropolitan fully supports the water transfers rule. Metropolitan urges the Agencies to continue to defend the rule, which is essential for the social and economic health of the arid West where water sources are often located far away from where the water is ultimately used. (p. 5)

Agency Response: Thank you for this input in regard to the water transfers rule.

Exxon Mobil Corporation (Doc. #15044)

12.1211 Finally, the Proposed Rule does provide continued exemptions for wastewater systems, which is an essential element for regulatory stability. However, other exemptions have been modified or eliminated ditches are a prime example-in ways that fail to contribute either to certainty or clarity. (p. 2)

[284] Vegetation trimming may involve deposition of chipped material, which should not be considered fill in any definition of WOTUS.

Agency Response: **The final rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. Many comments addressed ditches, and many of these comments are reflected in the approach to ditches articulated in the rule. The revised exclusions reflect the agencies' careful consideration of these comments. First, the agencies have deleted the term "uplands" in response to the confusion the term created. Second, the agencies have instead provided a clearer statement of the types of ditches that are subject to exclusion- ditches that are not excavated in or relocate a tributary and ditches that do not drain a wetland. Replacing "uplands" with this more straightforward description should improve clarity. Finally, the agencies have more clearly stated the flow regimes in ditches that are subject to the exclusions; these flow regimes are described earlier have been used by the agencies consistently and are readily understood by field staff and the public.**

Environmental Defense Fund (Doc. #15352)

12.1212 The draft rule does not overturn or diminish any of the existing agricultural Clean Water Act exemptions. To the contrary, part (b) of the draft rule actually broadens existing agricultural exemptions. (…)

EDF urges the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively referred to as the agencies) to: (…) Ensure the final rule, like the proposed rule, continues to maintain existing agricultural exemptions; (…). (p. 1-2)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, CWA section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The final rule reflects this framework by clarifying the waters subject to the activities Congress exempted under section 404(f)(1) are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be**

determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination.

12.1213 Like the draft rule, the final rule should continue to maintain the existing CWA statutory exemptions for agriculture. The draft rule does *not* cut back the existing Clean Water Act exemptions for agriculture. Statutory exemptions for agricultural *activities* – such as the exemption in CWA Section 404(f)(1) – and statutory exemptions for agricultural *discharges* – such as the exemptions for agricultural stormwater discharges and agricultural return flows in CWA Sections 502 and 402 – continue to apply under the draft rule whether the underlying waters are determined to be jurisdictional or not.[285] Similarly, "The rule …. does not change regulatory exclusions for … prior converted cropland."[286] Like the current regulations, the draft rule (328.3(b)(2)) expressly excludes prior converted cropland from the definition of waters of the U.S. (p. 5-6)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, CWA section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The final rule reflects this framework by clarifying the waters subject to the activities Congress exempted under section 404(f)(1) are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination. Also, as pointed out in your comments, the existing exclusion for prior converted cropland remains substantively and operationally unchanged in the final rule.**

[285] 79 Fed. Reg. 22189, 22193-4.
[286] Id. at 22193.

Western Landowners Alliance (Doc. #15380)

12.1214 Interpretive Assurances – EPA staff have informed us that they refer to preambles for guidance in other rule-making, and would likely do so here. The proposed definition itself is fairly short, but its implications are difficult to assess throughout all CWA programs. The assurances that EPA has provided should be documented in the preamble. If there is any potential for the preamble to not encapsulate regulatory intent in these regards, and usable as such in the future, it should be expanded to do so. That said, "normal practices" should not allow pollutant dumping associated with exempt activities. (p. 2)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination.**

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

12.1215 We believe the proposed rule should include an exemption for local jurisdictions like Lake County that already have established isolated wetland protection programs that meet or exceed the federal regulations. Since 2001, SMC has processed over 300 permits for developments that impacted "other waters" under our countywide Watershed Development Ordinance ("WDO"), and we have achieved a net gain of over 40 acres of wetlands through mitigation required for these impacts under the WDO. SMC's normal turnaround time for wetland permits is less than 30 days, compared to several months or more[,] normal turnaround time for USACE permit issuance in this district. Based on our experience over the last 13 years, the current county regulatory system is working efficiently to regulate the "other waters" and does not need to be changed by revising the definition to place "other waters" into WOUS status. If the rule is adopted as currently

proposed, we advocate issuance of a General Permit (GP) by the USACE-Chicago District to SMC authorizing our agency to efficiently process many of the routine permit actions normally performed by the USACE. (p. 2)

Agency Response: **The agencies received comments on the proposed rule expressing concern about uncertainty created by the "other waters" category. Some commenters stated that the "other waters" category would allow the agencies to regulate virtually any water. To address this concern, the rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive and to reflect the consideration for the body of science that exists. The agencies also establish by rule subcategories of waters that are "similarly situated" for the purposes of a significant nexus analysis because science supports that the subcategory waters fall within a higher gradient of connectivity. By not determining that any one of the waters available for case-specific analysis is jurisdictional by rule, the agencies are recognizing the gradient of connectivity that exists and will assert jurisdiction only when that connection and the downstream effects are significant and more than speculative and insubstantial.**

K. Mantay (Doc. #15192.1)

12.1216 EPA has repeatedly claimed that current agricultural exemptions will remain in place as a result of the *science-based Proposed Rule.* However, the previous sentence cannot be true, as a whole. Federal reports in the public domain contain numerous references to the fact that much, even "the majority" of surface water pollution originates on active farmland and rangeland. EPA itself has stated that the final frontier of unregulated surface water pollution is American agriculture. Therefore, to exempt current farming activities from future regulation eviscerates any claim that the New Rule is science based. Good reasons exist to exempt many current farming activities from CWA provisions, however, stream biology and aquatic chemistry are not among those reasons. This is in no way "science based." (p. 1-2)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The final rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical,**

or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination.

12.1217 1) Habitat creation, restoration, and enhancement projects must be exempted from "change of use" regulation or policy implemented at the national, regional, or district level by federal employees. Exemptions via documentation should exist under to maintain permit exemption, such as a provision that a net increase in habitat function and habitat acreage/footage occur as a result of the habitat project.

2) Provide a 1.0 acre exemption for "single and complete" projects requiring permanent (not temporary) conversion of cropped wetlands or farm ditches proposing a change of use, where no other federal resources (NHPA, ESA, etc.) would be impacted. Formally apply CWA Section 404 to permanent (not temporary) disturbances over 1.0 acres of WOTUS impacted as these disturbances apply to habitat projects that are not tied to a direct loss, like compensatory mitigation. (p. 2-3)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation. Congress also identified in section 404(f)(2) conditions under which exempted activities could be "recaptured" and subject to 404 permitting requirements. These conditions include circumstances in which the proposed discharge would result in a change in use of waters and impair flow or circulation or reduce the reach of waters. Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule.

12.1218 Remove federal permitting requirements for urban (>20% impervious in drainage area) stream enhancement activities that can demonstrate a net gain in natural resource function and permanent protection of the site from fills related to real property development. Require land and infrastructure development projects to improve urban stream beds to historic structural conditions and improved biological conditions. This will ensure that the New Rule's proposed stream connectivity is not only transporting urban waste and sediment down to lower reaches from degraded areas. (p. 4)

Agency Response: Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation.

12.1219 Add language to the New Rule exempting from Section 404 all pond basins and slopes in pond and stormwater facilities that are adhering to the state's and municipality's guidelines for pond management and maintenance. Abandoned stormwater ponds can be regulated as federal wetlands, as they have been for 20 years. (p. 5)

Agency Response: Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section

404(f)(1) of the Clean Water Act activities for which the discharge or dredged or fill material is exempt from regulation.

12.8.1 Current

Specific Comments

National Association of State Foresters (Doc. #14636)

12.1220 NASF members work to ensure the continued flow of benefits from the nation's forests; which include clean air, forest products and jobs, wildlife habitat, aesthetic values, and clean water. NASF appreciates the acknowledgement in the proposed rule that the longstanding permitting exemption in Section 404 of the CWA for silviculture is not affected by the proposed rule. The silviculture exemption is an important tool that supports sustainable forest management, which is critical to ensuring that private landowners have an incentive to retain forests. Conversion of forests to alternative land uses is the greatest threat our private forest lands face. (p. 1)

Agency Response: Comment noted.

Western States Water Council (Doc. #9842)

12.1221 The WSWC believes the CWA's current agricultural exemptions are operating properly and that the rule should not alter or create unnecessary uncertainty about these exemptions. The WSWC understands that the rule is intended to preserve these exemptions, but the Rule and the related interpretive rule regarding exempt activities under Section 404(f)(1)(a) have nevertheless created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions, as well as their interaction with state water quality programs.

Given this confusion, the rule should include language stating that:

> "Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3."

In addition, the interpretive rule has created a significant amount of uncertainty concerning its possible implications for "normal farming, ranching, and silvicultural" activities. To resolve this uncertainty and to ensure that the current exemptions remain unchanged, your agencies should withdraw the interpretive rule, as the WSWC requested in its attached letter dated August 11, 2014. Notwithstanding the WSWC's request that the rule be withdrawn, any effort to revise the rule should be done in joint partnership with the states, particularly to determine what constitutes exempt "normal farming, ranching or silvicultural activities." (p. 5)

Agency Response: Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive

Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Franconia Township (Doc. #8661)

12.1222 The CWA itself contains broad exemptions from regulation for the nation's agricultural sector. Farmers and ranchers currently do not need permits for normal practices like plowing or constructing farm roads. And stormwater runoff from farm fields is not subject to federal pollution limits. The agencies have said these exemptions would be carried forward under the proposed rule and issued an "interpretive rule" to explain dredge-and-fill exemptions for normal farming, silviculture, and ranching practices, listing 56 conservation practices approved by the U.S. Department of Agriculture - Natural Resources Conservation Service (USDA-NRCS) that would be exempt from permitting requirements under Section 404 of the CWA. Most agricultural groups claim that these exemptions do not protect farmers from requirements related to pollutant discharges and future permitting requirements under the CWA, and would actually narrow the exemptions for production agriculture under the CWA. The interpretive rule could also place the USDA-NRCS in a position of policing these practices under the CWA rather than their usual role of partnering with agriculture to ensure the adoption of best management practices important to the balance of productive farms and ranches and clean water. (p. 4)

Agency Response: Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this final rule. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Vulcan Materials Company (Doc. #14642)

12.1223 The proposed rule indicates that all exemptions under the existing CWA program are being included in the proposed rule. However, the language in the proposed rule is unclear regarding retention of the exemption for waters incidentally created from mining in uplands for aggregate mining operations. (p. 3)

Agency Response: The final rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity. It should be noted that these water-filled depressions created in dry land are often left on a site after construction or mining activity is complete in order to provide beneficial purposes, such as water retention, recreation, and animal habitat. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

Michigan Farm Bureau (Doc. #10196)

12.1224 The proposed rule will hurt farming in Michigan by making man-made ditches, tiny broken streams, and wet areas in fields subject to regulation as "waters of the United States" even if they hardly ever have water in them. This was not Congress' intention when it wrote the Clean Water Act. Agricultural exemptions under Section 404(f) do not cover all normal farming practices and do not apply to new lands. Farmers in Michigan could need permits for nutrient application, pest control, and earth moving in any location the new rule says could impact a newly expanded "water of the United States," meaning farming would not be able to operate or expand without much delay and cost. (p. 11)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, thereby appropriately reducing regulatory burdens. The final rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. In addition, the Clean Water Act in Section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water.

Fresno County Farm Bureau (Doc. #15085)

12.1225 While the Agencies have exempted 56 farming and ranching practices, as long as they meet the specific NRCS standards, any deviation from these standards can result in hefty fines. Further, the exemptions only apply to CWA Section 404 and do not provide any insulation from CWA Section 402 NPDES permitting requirements for waters that may become jurisdictional under the Proposed Waters of the U.S. Rule. For example, while the Interpretive Rule may allow a farmer to plant cover crops in jurisdictional waters without first seeking a CWA Section 404 permit, the Interpretive Rule will not prevent the need for a CWA Section 402 NPDES permit for other activities that may result in a discharge of pollutants. (p. 2)

Agency Response: The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

12.1226 …a number of existing exemptions (e.g., the exemption for artificial lakes and ponds) should be clarified to ensure that certain waters on manufacturing sites are not

subject to CWA jurisdiction. As described above, there is no environmental benefit in regulating such waters, and their regulation would subject owners and operators of manufacturing facilities to needless costs and resource expenditures. (p. 4)

Agency Response: **Paragraph (b)(4) of the final rule identifies features and waters that the agencies have identified as generally not "waters of the United States" in previous preambles or guidance documents. This specifically includes "Artificial lakes or ponds created by excavating and/or diking dry land and used primarily for such purposes as stock watering, irrigation, settling basins, or rice growing." Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The Agencies' 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be "waters of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction. Some of the exclusions have been modified slightly to address public comments and improve clarity. For example, in the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use.**

Richland Communities (Doc. #18793)

12.1227 Section 404 of the Clean Water Act provides important context for understanding why Richland seeks this clarification about prospective applicability. Under Section 404, "normal farming" activities have long been excluded from regulation of discharges of dredge or fill material into "waters of the United States." (33 U.S.C. § 1344, subd. (f) [exemption for "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices"].) By definition, rice growing is included in this exemption. In other words, rice growing activities already are exempt from Clean Water Act regulation for discharges of dredge or fill material.

In light of the already existing Section 404(f) exemption, the proposed rule should make clear that the jurisdictional exclusion for rice growing areas applies prospectively and cannot be revoked if land is taken out of rice production. Otherwise, the proposed rule provides little more than what is already provided by statute, and fails to provide the certainty and reliability that land owners need and deserve. Without the clarification sought by Richland, the exclusion under the proposed rule for rice growing would be tenuous because if a rice growing area changed usage, it could be vulnerable to the type of case-by-case jurisdictional determinations that the proposed rule clearly intends to eliminate. (p. 6)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, as you point out, the Clean Water Act in Section 404(f)(1) exempts many normal farming activities such as seeding, harvesting, cultivating,**

planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. The final rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." Congress also identified in section 404(f)(2) conditions under which exempted activities could be "recaptured" and subject to 404 permitting requirements. These conditions include circumstances in which the proposed discharge would result in a change in use of waters and impair flow or circulation or reduce the reach of waters. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Agribusiness Association of Kentucky (Doc. #18005)

12.1228 In the mid-1970s, when the Corps, for purposes of section 404 permitting, began to define "navigable waters" to include certain wetlands – so as to make farming, ranching and forestry practices within those wetlands potentially subject to CWA regulation – Congress amended the Act to specifically exempt "normal" farming, ranching and forestry from section 404 "dredge and fill" permit requirements.[287] Under this exemption, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are generally exempt from section 404 permitting requirements.[288] The Agencies have interpreted this exemption very narrowly to apply only where farming has been ongoing at the same location since 1977 (the year that the exemption and its implementing rules were adopted).[289] In addition, by statute, the exemption is inapplicable to any activity "having as its purpose bringing an area of navigable water into a use to which it was not previously subject, where the reach of navigable waters may be impaired or the reach of such waters be reduced" (i.e. converting wetland to non-wetland so as to make it amendable to a new use).[290] This limitation is often referred to as the "recapture" provision. (p. 14)

Agency Response: **Thank you for this input. As you point out, Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities. Congress also identified in section 404(f)(2) conditions under which exempted activities could be "recaptured" and subject to 404 permitting requirements. These conditions include circumstances in which the proposed discharge would result in a change in use of waters and impair flow or**

[287] 33 U.S.C. § 13440)(1).
[288] 33 U.S.C. § 1344(f)(1)(A).
[289] *See, e.g., United States v. Cumberland Farms of Conn., Inc.,* 647 F. Supp. 1166 (D. Mass. 1986), *aff'd* 826 F.2d 1151 (1st Cir. 1987).
[290] 33 U.S.C. § 1344(f)(2).

circulation or reduce the reach of waters. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Pike County Highway Department (Doc. #6857)

12.1229 In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined.

Additionally, ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. We are concerned that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for my counties. (p. 3)

Agency Response: The final rule has been crafted to reduce existing confusion and inconsistency regarding the regulation of ditches. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, counties and municipalities charged with maintaining the nation's roads. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

North Carolina Aggregates Association (Doc. #6938)

12.1230 The proposed rule lacks any "grandfathering" provision. Our mine plans often call for long-term, phased mining, which depend on regulatory certainty to make sound business decisions. Without clear grandfathering language, our mine plans are now at risk of being subject to new and expansive jurisdictional determinations. (p. 2)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Wisconsin Wildlife Federation (Doc. #5468)

12.1231 The Wisconsin Wildlife Federation is sensitive to the needs of Wisconsin farmers. Many of our members are farmers and agriculture is a major industry in this state. We have reviewed the rule carefully, its supporting documents and the extensive outreach efforts of the USEPA to the agricultural community and we are fully convinced that the rules do not adversely affect agriculture in Wisconsin and elsewhere in the US. The EPA has been very careful to assure the broad exemptions for agriculture from wetland regulations are maintained in the law. (p. 1-2)

Agency Response: Thank you for this input.

Western Resource Advocates (Doc. #16460)

12.1232 (…) it is worth remembering that whether or not (irrigation system ditches) are waters of the US, the majority of routine farming and ranching activities remain exempt from Clean Water Act regulation, even if they take place in waters of the US. (p. 15)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities and the construction or maintenance of irrigation ditches. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

12.1233 By its own terms,[291] as well as existing rules,[292] guidance and interpretative documents, the Clean Water Act exempts from regulation certain activities that may result in a discharge to waters of the US.[293] The definition of which WOTUS get Clean Water Act protection is a separate regulatory statement that neither amends nor otherwise changes the list of exempt activities. Therefore, while WRA supports maintaining the existing lists of exempt activities, along with guidance documents and other agency interpretations that further clarify these exemptions, WRA urges the agencies not to clutter the proposed rule, which defines WOTUS, with language about these exemptions. At most, the agencies could include a reference to the other provisions. If the agencies decide to include such a reference, they must then also make clear that the Clean Water Act requires a permit for non-exempt activities that result in either a section 402 point-source discharge of pollutants or a section 404 discharge of dredged and fill material to WOTUS, including when such actions occur initially in excluded waters. (p. 26)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities which are exempt from regulation. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

12.8.2 New

Specific Comments

Office of Advocacy, Small Business Administration (Doc. #7958)

12.1234 Small businesses have also provided specific examples of how this rule will directly impact them. For example, during a May hearing of the U.S. House of Representatives Committee on Small Business, Jack Field of the Lazy JF Cattle Co. testified that the rule would essentially eliminate an exemption for normal farming practices that he relies upon to do things such as building a fence to control his grazing

[291] 33 U.S.C. §§ 1344, 1342(a)(1), 1362(14) (2012).
[292] 40 C.F.R. §§ 122.2, 122.3, 232.3; *see also* 33 C.F.R. § 323.4.
[293] *See, e.g.,* U.S. Army Corps of Engineers, REGULATORY GUIDANCE LETTER 07-02, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-02.pdf.

cattle.[294] The proposed rule would eliminate the exemption for farmers whose actions do not comply with Natural Resources Conservation Services standards.[295]

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.**

Committee on Space, Science, and Technology (Doc. #16386)

12.1235 Has EPA provided any non-farming based exemptions for activities like maintaining private roads? (p. 12)

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

International Erosion Control Association (Doc. #13174)

12.1236 Better define the exemptions so that the contrary for each exemption is considered. (p. 2)

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

Department of Public Health and Environment – State of Colorado (Doc. #16342)

12.1237 Colorado is interested in promoting small hydropower projects. It is our interpretation that the proposed rule would not change which projects will or will not need a section 402 or 404 permit, and anticipate that the agencies agree. (p. 1)

Agency Response: **This rule clarifies the scope of "waters of the United States" protected under the Clean Water Act. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

12.1238 The agencies have proposed that some waters will be determined jurisdictional based on whether or not they have a "significant nexus" to traditionally navigable waters. It is critical that the agencies work with Colorado and all states to develop a consistent interpretation of "significant nexus" so that it is not applied inconsistently within Colorado or between different states. (p. 3)

[294] Testimony of Jack Field, Owner Lazy JF Cattle Co. at U.S. House of Representatives Committee on Small Business Hearing entitled "Will EPA's Waters of the United States Rule Drown Small Businesses?", May 29, 2014 at http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099.

[295] 79 Fed. Reg. at 22,194; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices,79 Fed. Reg. 22,276.

Agency Response: **The "significant nexus" standard articulated and refined in Supreme Court opinions is the touchstone for the agencies' interpretation of the CWA's jurisdictional scope. In response to these opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-Rapanos). However, these two guidance documents are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, virtually all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Office of the Governor, State of Montana (Doc. #16694)

12.1239 In order to address confusion between the rule and Section 404, the rule should include language stating that: "Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R.232.3." (p. 4)

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters under section 404(f)(1) of the Clean Water Act and EPA and Corps implementing regulations in regard to those activities which are exempted from regulation are beyond the scope of this rule.**

City of Aurora Water Department Administration Office (Doc. #8409)

12.1240 The proposed rule misses an opportunity to create exemptions that would incentivize improvements to watersheds and habitats. There are mining sites and placer tailings piles throughout the West that could be rehabilitated with adoption of incentives encouraging the restoration of streams and habitat through the project development process. For example, one of the future reservoir sites under consideration by Aurora is located in a drainage heavily damaged by previous placer mining. An exemption allowing local ACOE and EPA offices to approve projects under a national restoration program could expedite the clean-up of these areas and result in the creation additional high quality habitat and other environmental improvements or amenities.

Recommendation: Incentives for restoring mined or disturbed lands should be created within the rule. (p. 4)

Agency Response: **The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits developed at the national, regional or state level. Existing NWP 49 for Coal Remining Activities can be used to authorize remining of unreclaimed sites and abandoned mine land areas, provided that the overall mining plan results in a net increase in aquatic resource functions. However, current general permits such as NWP 49 or the future development of similar general permits consistent with CWA section 404(e) are beyond the scope of the final rule.**

San Bernadino County, California (Doc. #16489)

12.1241 The proposed Rule applies to CWA §402, but does not clearly exempt stormwater facilities from jurisdiction. A specific exemption is needed because of the concern that MS4 stormwater control measures and other man-made facilities (such as green infrastructure) that provide detention, infiltration and treatment of stormwater, and with connectivity to navigable waters, could now be classified as WoUS and subject to CWA §404 permitting requirements. (p. 4)

Agency Response: **The final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies received many comments, particularly from municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressing concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems.**

South Big Horn County Conservation District (Doc. #17264)

12.1242 Another concern is how multi-purpose activities will be treated. If a practice serves both exempt and regulated activities, will the exempt activity also be regulated? For example, if a drainage ditch within an irrigation system is exempt from a 404 permit as an agricultural practice, it will also commonly serve as a drainage ditch for roadways and for storm water control that appear to be subject to a 404 permit. Would maintenance on the drainage ditch be subject to a 404 permit or exempt? (p. 3)

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including the maintenance of drainage ditches. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

City of Slidell, Louisiana, Planning Department (Doc. #19451)

12.1243 The City recommends retention and added emphasis on the exclusion for "maintenance of drainage ditches" provided for in Section 404, paragraph (f)(l)(c) of the Federal Water Pollution Control Act. (p. 1-2)

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from**

regulation, including the maintenance of drainage ditches. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Wyoming County Commissioners Association (Doc. #15434)

12.1244 Because ditches will be automatically considered jurisdictional if the ditch meets the definition of tributary, the exclusions must be taken in the context of the broad definition of tributary discussed above. In contrast to agricultural ditches and canals, which may exist in uplands and drain in uplands to meet specific agricultural purposes, county owned and maintained ditches exist primarily to divert water away from roads and other structures, but may also serve a dual use. The specific purpose of a county-owned or maintained ditch is to convey water – particularly during heavy rain or snowmelt events - away to somewhere else. If these ditches carry water through a series of connected "tributaries," perhaps "considered in combination," and eventually drain in a water of the U.S., then the exclusion appears to no longer apply to the ditch. Quite plainly, for a county evaluating a road, bridge, or other infrastructure project, the exclusions provided in the proposed rule simply are not explicit enough to provide the assurance necessary to move ahead with these projects absent an on-the-ground "significant nexus" determination. (p. 7)

Agency Response: **In the final rule, the agencies for the first time establish by rule in paragraph (b)(3) an exclusion for all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. The jurisdictional status of upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch is excavated in or relocates a tributary. This approach reasonably balances the exclusion with the need to ensure that covered tributaries, and the significant functions they provide, are preserved. That portion of a ditch that relocates a stream is not an excluded ditch under paragraph (b)(3), and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. A ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream's aquatic character. The latter type of ditch may be excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b)(3). Like the proposed rule, the final rule does not include an explicit exclusion for roadside ditches, but the agencies believe the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with all modes of transportation, such roadways, airports, and rail lines.**

The United States Conference of Mayors et al. (Doc. #15784)

12.1245 Under the current regulatory program, ditches are regulated under CWA Section 404, both for construction and maintenance activities. There are a number of challenges under the current program that would be worsened by the proposed rule. For example, across the country, public safety ditches, both wet and dry, are being regulated under Section 404. While an exemption exists for ditch maintenance, Corps districts inconsistently apply it nationally. In some areas, local governments have a clear exemption, but in other areas, local governments must apply for a ditch maintenance exemption permit and provide surveys and data as part of the maintenance exemption request.

Beyond the inconsistency, many local governments have expressed concerns that the Section 404 permit process is time-consuming, cumbersome and expensive. Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches – road, drainage, stormwater conveyance and others – that are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. In Arreola v Monterey (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey, California liable for not maintaining a levee that failed due to overgrowth of vegetation.

The proposed rule does little to resolve the issues of uncertainty and inconsistency with the current exemption language or the amount of time, energy, and money that is involved in obtaining a Sec. 404 permit or an exemption for a public safety ditch. (p. 5)

Agency Response: The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies. Since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with all modes of transportation, such roadways, airports, and rail lines.

Washington State Water Resources Association (Doc. #16543)

12.1246 Despite the proposals stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty. Some of the unanswered questions have been alluded to above, e.g., what will be the effect of the proposal on the construction and operation of stormwater control facilities, or the repair and replacement of ditches. Other issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:

- What is the impact of the proposal on impoundments currently regulated under RCRA but for which no exemption exists?
- Who (the agencies or the project proponent) will determine if a subsurface connection exists (and) how will that determination be accomplished in practice? (p. 17)

Agency Response: **Consistent with existing regulations and the April 2014 proposed rule, the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule. In order to provide more certainty to the public, the final rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraph (a)(8), as appropriate. Tools to assess shallow subsurface flow include reviewing the soils information from the NRCS Soil Survey, which is available for nearly every county in the United States.**

Northwest Mississippi Delta Council (Doc. #5611)

12.1247 USDA data suggests that there are more than 106 million acres of wetlands across rural lands in the U.S. which are typically cropland, pasture land, conservation reserve lands, range land, forest and other agricultural land. We do not see anything in the proposed rule which would suggest that there is an exemption extended to these properties which are not currently under the jurisdiction of the Clean Water Act.

The existing Clean Water Act exempts "the discharge of dredge or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil and water conservation practices'' from Section 404 permitting. There are also exemptions for the construction or maintenance of farm or stock ponds or irrigation ditches, for the maintenance of drainage ditches as well as for the construction or maintenance of farm roads. Our interpretation is that these exemptions are certain to be impacted by your proposed rule. (p. 2-3)

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including those identified in your comment. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

North Carolina Water Quality Association (Doc. #12361)

12.1248 Ditches form the backbone of many MS4 systems. NCWQA is pleased that the proposed rule would clarify, for the first time, two common-sense exclusions for ditches. These proposed exclusions should be retained in their proposed form.

The first of the two ditch exclusions applies to ditches that are constructed in uplands, drain only uplands, and have less than perennial flow. 79 Fed. Reg. at 22263 (to be codified at 33 C.F.R. § 328.3(b)(3)). The proposal specifically requests comments on whether perennial flow is the appropriate flow regime to reference for this exclusion. We believe that it is, and precisely for the reason cited in the proposal: "Identifying upland

ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year." 79 Fed. Reg. at 22203. Upland ditches conveying stormwater may have extended periods of flow following rain events, especially in cases where they are situated at the outfall of a BMP designed to detain peak stormwater flows. Also, some excavated ditches may have stretches where water typically pools and may remain standing for extended periods of time after rain events. The less than perennial flow standard provides an easily applied reference to determine whether ditches with these characteristics would be jurisdictional. This standard appropriately would exclude nearly all stormwater conveyance ditches excavated in and draining uplands. NCWQA recommends that this exclusion be retained in its present form.

The second ditch exclusion applies to ditches that do not contribute flow directly or through another water to certain waters of the United States. 79 Fed. Reg. at 22263 (to be codified at 33 C.F.R. § 328.3(b)(3)). NCWQA agrees with this exclusion, but we believe its scope should be clarified in the final rule to cover ditches that connect non-jurisdictional waters.

On its face, this exclusion could be interpreted as only applying to ditches that do not contribute any flow directly or indirectly to a jurisdictional water. In other words, ditches with no hydrological connection to a jurisdictional water (and, therefore, not a jurisdictional water in any case). NCWQA does not believe that is the intent of the proposal. It appears that this exclusion is intended to apply to ditches that connect non-jurisdictional waters-an important exclusion for MS4s that use a series of ditches to convey water within the system. Such systems are appropriately regulated at their outfall with an NPDES permit-the ditches conveying water to the outfall should not be subject to regulation as a water of the United States, irrespective of the flow regime. It is imperative that EPA and the Corps confirm this understanding of this exclusion and include appropriate clarifying language in the final rule. (p. 2-3)

Agency Response: **The agencies have deleted the term "uplands" in response to comments indicating that the term created confusion. The agencies have instead provided a clearer statement of the types of ditches that are subject to exclusion – ephemeral and intermittent ditches that are not excavated in or relocate a tributary and intermittent ditches that do not drain a wetland. Replacing "uplands" with this more straightforward description should improve clarity. Finally, the agencies have more clearly stated the flow regimes in ditches that are subject to the exclusions. There is also a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies' longstanding practice is to view stormwater water control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice.**

John Deere & Company (Doc. #14136.1)

12.1249 The Proposed Definitions Expand the Agencies Geographic Reach Linder CWA section 404(1)(1) Thereby Creating Greater Uncertainty and Burdens for Agriculture

The agencies have asserted in the proposed rule that the definitional changes do not affect any of the exemptions from CWA section 404 permitting requirements, including those for normal farming, silviculture and ranching activities.[296] This assertion misses the mark. The normal farming, silviculture and ranching activities exemption set forth in Section 404(f) was enacted by Congress in response to concerns that the 1972 Federal Water Pollution Control Act Amendments would require farmers to obtain Section 404 permits very broadly on agricultural land. While intended by Congress to be interpreted broadly and reasonably, the application of the exemption has been narrowed and often only exempts a specific activity, rather than the land or the water in which the activity is conducted. Thus, under, the proposed WOTUS definition, additional land and water will become jurisdictional regardless of the normal farming, ranching and silviculture exemption. In addition, this exemption is not available to section 402 NPDES permits.

Section 404 establishes the permit program for discharges of "dredged or fill material" into waters of the United States. Without a section 404 permit, such discharges are prohibited by section 301(a) of the CWA into the waters of the United States.[297] This permit program is the central enforcement tool of the CWA. An unpermitted discharge is a CWA violation and subjects the discharger to strict liability.[298]

To qualify for the conditional exemption, a farmer, not the EPA or the Corps, has the burden to demonstrate that proposed activities satisfy the "normal farming, silviculture and ranching activities requirements of Section 404(1)(1)."[299] In many instances this burden may be difficult to meet since the term "normal" in section 404(1) applies to activities associated with the farm or land itself, not agriculture generally. The regulations do not specify the precise area to look at in determining whether there is an established farming operation. Nor are there minimum limits placed on the "area" being brought into farming use. Courts have held that the normal farming activity exemption is available only to activities that are part of an "established farming operation" at the site.[300]

The proposed definitions will expand the geographic reach of the agencies' jurisdiction under CWA section 404, thereby requiring farmers to prove, under a statute imposing strict liability, that current or proposed activities associated with a great deal of their farmland are "normal". This potential outcome will impose a great deal of uncertainty into agriculture, and will negatively impact productivity.

Finally, the interpretive rule issued by the EPA in connection with this rulemaking seeking to clarify section 404(f) normal farming and ranching activities exemption does not address the concerns associated with the proposed definitions. As outlined above, the proposed jurisdictional water definitions will now bring under the agencies' direct CWA jurisdiction farmland not previously subject to such jurisdiction. Moreover, by making the previously voluntary National Resources Conservation Service standards mandatory,

[296] 79 Fed. Reg. 22, 199 (April 21, 2014).
[297] 33 USC Secs. 1311(a), 1362(12)(2014).
[298] *United States v. Pozsgai*, 999 F.2d 724 (3'' Cir. 1993); *United States v. Brace*, 41 F. 3d 117 (3°' Cir. 1994).
[299] *United States v. Brace*, 41 F.3d 117. 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995), citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), cert. denied, 479 U.S. 828, 107 S.CL 107, 93 L.Ed.2d 56 (1986).
[300] *Brace*, 41 F.3d at 125.

the interpretative rule may narrow, rather than expand, the current exemption for normal agricultural activities on established operations. (p. 11-12)

Agency Response: Under section 404(f)(1) of the Clean Water Act, the discharge of dredged or fill material from those activities identified in that section are exempt from regulation under sections 301, 402 and 404 (except for effluent standards or prohibitions under section 307). The final rule clarifies that waters subject to established, normal farming, silviculture, and ranching activities under CWA section 404(f)(1) are not jurisdictional by rule as "adjacent." This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Also, the interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Vulcan Materials Company (Doc. #16566)

12.1250 The rule includes exemptions for rills and gullies from being considered waters; however, the inclusion of ditches combined with the bed and bank criteria creates uncertainty and confusion regarding the upper reach of jurisdiction that the agencies may pursue. In the case of aggregate mining operations, this extension is unnecessary as the mine sites are subject to National Pollutant Discharge Elimination System (NPDES) permitting for process and storm water discharges either under the federal program or federally delegated state permitting programs. These NPDES permits require aggregate mining sites to employ best management practices to control erosion and sediment discharges and to use water treatment systems with settling ponds and/or other treatment methods to ensure that discharges to surface waters are in compliance with applicable water quality criteria. (p. 2)

Agency Response: Ditches protected by the final Clean Water Rule must meet the definition of tributary, having a bed and banks and ordinary high water mark, and contributing flow directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas. The upper limit of the tributary is the point where a bed and banks and another indicator of ordinary high water mark cease to be identifiable. The ordinary high water mark establishes the lateral limits of a water, and its absence generally determines when a tributary's channel or bed and banks has ended, representing the upper limit of the tributary. Numerous commenters asked that the final rule define "bed and banks," which are physical characteristics called for under the definition of tributary. Such commenters emphasized the importance of a definition of "bed and banks," and some suggested definitional language. To increase clarity, the preamble explains that for purposes of this rule, "bed and banks" means the substrate and sides of a channel between which flow is confined. This largely reflects longstanding agencies' practice and views expressed in comments.

12.1251 Add language to the rule that clearly exempts from jurisdictional status water management systems, including associated collection, conveyance, and treatment systems that are permitted under NPDES or delegated state storm water and/or process water discharge permitting authority. Similarly, water management systems associated with zero discharge facilities should be clearly exempted from jurisdictional status. (p. 4)

Agency Response: The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA. Paragraph (b)(7) of the final rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA. Also, the agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Mississippi Farm Bureau Federation (Doc. #14464)

12.1252 The proposed role speaks often to the fact that the change to the definition of "waters of the United States" is necessary to address the perceived limitations placed upon it by SWANCC and Rapanos. Both of those cases arose from Section 404 of the CWA. EPA's attempt to clarify the scope of the CWA under Section 404 has "muddied the water" and confused the interpretation and implementation of Section 401 and 402 of the CWA. EPA should clearly state in its proposed rule that the agricultural exemptions within the CWA apply to all Sections and programs of the CWA. If EPA's interpretation is that the agricultural exemptions only apply to 404, agricultural operations will face a new and undue burden of applying for Section 402 NPDES for normal and routine agricultural practices such as applying fertilizer and pesticide applications. (p. 2)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities. The final rule reflects this framework by clarifying that waters subject to established, normal farming, silviculture, and ranching activities under CWA

section 404(f)(1) are not jurisdictional by rule as "adjacent." Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Florida Crystals Corporation (Doc. #16652)

12.1253 (…) from a CWA § 404 perspective, including most farm ditches within the definition of "navigable waters" will not increase the scope of environmental regulation. CWA § 404(f) already exempts most agricultural activities. Moreover, "prior converted croplands" are exempt from CWA jurisdiction, and most farm lands do not meet the definition of regulated "wetlands." Expanding CWA jurisdiction over farm ditches and ponds will not increase the actual regulatory criteria over those lands. (p. 9)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Prior converted cropland has been excluded from the definition of "waters of the United States" definition since 1992. This exclusion remains substantively and operationally unchanged in the final rule.

American Farm Bureau Federation (Doc. #16850)

12.1254 The "normal farming and ranching" exemption is extremely narrow. It only applies to one part of the CWA, the section 404 "dredge and fill" permit program. The rule provides no protection from permit requirements and enforcement actions under section 402. Any essential farm activities that use a conveyance (such as a nozzle) to apply *any* amount of other "pollutant," such as weed control or fertilizer, to ephemeral drains, ditches and wetlands will require a permit. (p. 2)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Montana Stockgrowers Association et al (Doc. #16937)

12.1255 We are concerned about the exemptions from Section 404 permitting under 33 U.S.C.A. 1344(f)(l) for "normal farming, silviculture, and ranching practices" as well as for "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and "construction or maintenance of farm roads or forest roads." Following the release of the interpretive rule/guidance document regarding the 56 NRCS conservation practices, it remains unclear whether the exemptions have been narrowed to just the 56 practices. (p. 5)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in Rapanos underscores the value of this rulemaking effort. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material into jurisdictional waters is exempt from regulation, including normal farming, silviculture and ranching activities. The final rule reflects this framework by

clarifying that waters subject to established, normal farming, silviculture, and ranching activities under CWA section 404(f)(1) are not jurisdictional by rule as "adjacent." Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

12.1256 The Clean Water Act defines "discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source" (33 U.S.C. § 1362(12)). Pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water" (33 U.S.C. § 1362(6)). Especially relevant to ranching in Montana would be "biological materials," "rock," "sand," and "agricultural waste." "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture" (33 U.S.C. § 1362(14)). Of special interest to our members are "ditch" and "channel" as well as "concentrated animal feeding operation." The exemption within the definition for "agricultural storm water discharges and return flows from irrigated agriculture" is also obviously applicable. (p. 5-6)

Agency Response: This comment concerns issues beyond the scope of this rule. The rule does not address the definitions of "discharge of a pollutant," "pollutant," or "point source."

Jensen Livestock and Land LLC (Doc. #15540)

12.1257 Our members will be directly hurt by the agencies lack of clarity with regards to their definition of "significant nexus." Isolated waters that may or may not satisfy this ill-defined [significant nexus] test crisscross livestock producers' pastures and fields. There are numerous activities that take place on these lands that do not qualify for any exemptions under the CWA, and because of the proposed rule's failure to adequately define these important terms, puts them at increased risk of violating the CWA. The agencies' replacement of the word "or" for "and" in the significant nexus test (emphasized in the definition provided above) makes the test even more confusing than Kennedy's own words. The agencies' have again only provided administrative convenience at the expense of the regulated community's liability. Justice Kennedy required a significant impact on the "chemical, physical, and biological integrity" of a TNW, but the agencies have provided themselves with a test that allows only one of the three connections to be satisfied. Justice Kennedy's test is much narrower than the agencies have defined, and as such, Jensen Livestock and Land LLC, believe the test goes beyond the agencies' authority under the CWA. Our members would suggest the agencies look to the plurality opinion in Rapanos for more clarity. (p. 21-22)

Agency Response: The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream

waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. In the final rule, the agencies determine that tributaries, as defined ("covered tributaries"), and adjacent waters, as defined ("covered adjacent waters"), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are "waters of the United States." In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) five types of waters that the agencies conclude are "similarly situated" and therefore must be analyzed "in combination" in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The final rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.

Agribusiness Association of Kentucky (Doc. #18005)

12.1258 Congress plainly expected that most activities on farmlands and pastures would be covered by state programs aimed at controlling nonpoint source pollution and would not be subject to federal permit requirements. Congress specifically included in the CWA several critical statutory exemptions for agriculture, each of which would be unlawfully undermined by the proposed rule:

- Section 404 exemption for "normal" farming and ranching activities;
- Section 404 exemption for construction of farm or stock ponds;
- Exclusion of agricultural stormwater discharges and return flows from irrigated agriculture from the definition of "point source" and hence, from Section 402 permitting. (p. 13)

Agency Response: As you point out, Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities. Exemptions from permitting requirements for discharges to jurisdictional waters are beyond the scope of this rule. Also, this rule does not address the definition of "point source;" this issue is also beyond the scope of this rule.

NW Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

12.1259 Because the proposed definition of tributary extends jurisdiction to man-made canals, the proposed rule should emphasize that it does not alter the Section 404(d) exemptions otherwise included in the Clean Water Act. (p. 5)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of

the United States" under the rule than under the existing regulations. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Southeast Florida Utility Council (Doc. #11879)

12.1260 Taking into consideration the complexities of Florida's landscape and utility operations, the DEP adopted by rule a number of exemptions from the definition of waters of the state and NPDES permitting requirements. However, the definitions contained in the Proposed Rule raise questions as to whether waters currently excluded or exempt from the NPDES permitting process will now be considered "waters of the United States," and thus overruling and subsequently eliminating the DEP exemptions. (p. 1-2)

Agency Response: The issue of whether Florida's approved NPDES permit program under section 402(b) of the Clean Water Act meets applicable statutory and regulatory requirements is beyond the scope of this rule. However, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

Upper Trinity Regional Water District (Doc. #15728)

12.1261 EPA and the USACE must clarify the regulatory exemption of such recycled water projects. (p. 3)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Waterkeeper Alliance et al. (Doc. #16413)

12.1262 It is (…) essential that the agencies avoid creating definitional limitations and categorical exclusions designed to protect particular sources of pollution from regulation under the CWA. For example, while everyone agrees that agriculture is essential to our way of life, everyone also agrees that clean water is essential to our way of life. Agriculture remains one of the largest unaddressed sources of water pollution in the United States.[301] As described in the National Enforcement Priorities document for FY 2008-2010:

States have consistently reported to EPA that agricultural activities, including CAFOs, are leading sources of pollutants such as nutrients (nitrogen and phosphorus), pathogens (bacteria), and organic enrichment (low dissolved oxygen) that are contributing to water quality impairment in U.S. surface waters. Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-

[301] EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control.

causing bacteria and parasites associated with food and waterborne diseases.[302] Agricultural pollution is a major contributor to well-documented, severe problems in key water resources like Lake Erie, the Chesapeake Bay, the Gulf of Mexico, North Carolina's coastal estuaries, and many other significant water resources across the country.[303] We believe that it is possible to protect and support both agricultural production and clean water, but we cannot protect water quality by grafting new exemptions for agriculture into the definition of "waters of the United States" under the CWA. (p. 6-7)

Agency Response: **Prior converted cropland has been excluded from this definition since 1992, and the exclusion remains substantively unchanged. Exemptions from permitting for discharges to jurisdictional waters under section 404(f)(1) of the Clean Water Act are beyond the scope of this rule.**

Agency Response: **Texas Agricultural Land Trust (Doc. #15188)**

12.1263 The agricultural exemptions provided by the proposed rule are wholly inadequate for Texas landowners. Management of land for the benefit of native wildlife is a significant, favored, and common use of private lands in Texas. This usage is encouraged in our state, and has been incentivized through the *ad valorem* property tax system in Texas. The hunting industry in Texas is a major component of our economy, employing many Texans, providing income to landowners, and providing recreational activity and enjoyment to our citizens. Landowners in Texas frequently construct ponds and lakes for wildlife, recreation and livestock; manage brush encroachment; and implement measures to prevent soil erosion and manage storm water runoff. Such projects benefit wildlife habitat and the environment generally. In order to protect these activities and encourage good land stewardship, wildlife management should be an

[302] http://www.epa.gov/compliance/data/planning/priorities/cwacafo.html [Webarchive]; See also, e.g., http://www.epa.gov/compliance/resources/publications/data/planning/priorities /fy2008priori tycwacafo.pdf.
[303] *See, e.g.*, (Utah) http://www.deq.utah.gov/FactSheets/docs/handouts/nutrients.pdf; (Ohio) http://epa.ohio.gov/Portals/35/visioning_workshop/Ohio%20Nutrient%20Fact%20Sheet.pdf; (Univ. of California) http://anrcatalog.ucdavis.edu/pdf/8055.pdf; (Illinois) http://www.epa.state.il.us/water/nutrient/; (Massachusetts) http://www.mass.gov/eea/docs/dep/water/drinking/alpha/i-thru-z/manure.pdf; (North Carolina) http://www.cals.ncsu.edu/wq/wqp/wqpollutants/nutrients/factsheets/FactsheetNM1.pdf; (Coastal Waters) http://moritz.botany.ut.ee/~olli/eutrsem/Howarth02.pdf; (EPA) http://water.epa.gov/polwaste/nps/agriculture_facts.cfm; (USGS) http://pubs.usgs.gov/fs/fs218-96/; (EPA) http://water.epa.gov/type/rsl/monitoring/upload/EPA-MARB-Fact-Sheet-112911_508.pdf; (Gulf) http://midwestadvocates.org/assets/resources/nutrient_pollution_factsheet.pdf; (EPA) http://www2.epa.gov/nutrientpollution/where-occurs--akes-and-rivers; (Iowa) http://www.iowapolicyproject.org/2010docs/100927-nutrients.pdf; (Neuse River) http://portal.ncdenr.org/c/document_library/get_file?uuid=e438d6bc---d147-4d7b-8224-08e5a7c74b86&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=48bc46d8-c344-4f07-a656-7a211157c985&groupId=38364; (Tar---Pamlico River) http://portal.ncdenr.org/c/document_library/get_file?uuid=b4f40c70-fc0f-4bd7-b4a1-b34dd7794f99&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=12436e58-83ba-41bf-bcac-d2fe4aa2b60c&groupId=38364; (Cape Fear River) http://portal.ncdenr.org/c/document_library/get_file?uuid=2eddbd59-b382-4b58-97ed-c4049bf4e8e4&groupId=38364; (California) http://ucanr.edu/sites/UCCE_LR/files/180590.pdf; (New York) http://www.nnyagdev.org/PDF/NNYPFacts1w.pdf

exempt practice. Without adequate exemptions, landowners will be discouraged from improving wildlife habitat, and from stewarding their land in a manner beneficial to the environment. (p. 2-3)

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

Iowa State University of Science and Technology (Doc. #7975)

12.1264 Exemption for normal farming, silviculture, and ranching activities in section 402:

Under the proposed rule, Prior Converted Cropland (PCC) and Farmed Wetlands (FW) that are within agricultural fields and that have been actively farmed for generations could suddenly be deemed jurisdictional. *("Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.')* Section 404 provides an exemption for normal farming, silviculture and ranching activities in these areas. However, section 402 does not provide a similar exemption, and normal farming practices could now be prohibited. How can farmers be sure actions they take as part of a normal practice, such as pesticide application, will not later be deemed a federal violation? It is inconsistent for a typical farming operation with Prior Converted Cropland (PCC) and Farmed Wetlands (FW) to receive an exemption under Section 404, but not under Section 402.

Action: We ask that an agricultural exemption for Prior Converted Cropland (PCCJ and Farmed Wetlands (FWJ be developed under Section 402 that parallels the exemption that currently exists in Section 404. This will provide consistency and reduce uncertainty for farmers. (p.1-2)

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters under section 404(f)(1) of the Clean Water Act are beyond the scope of this rule. Prior converted cropland been excluded from this definition since 1992 and the exemption remains substantively and operationally unchanged.**

12.1265 **Normal farming practices**: The definition of normal farming practices in the proposed rule and the accompanying interpretive rule refers to the exemptions in Section 404(f). 404(f)(a) states the following activities are exempt, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

Action: Two key practices missing from this list of normal farming practices are nutrient management and pest management. Rather than assume these important practices are included or implied, we request these two items be explicitly included in the list of approved activities, thus: "...such as plowing, seeding, cultivating, nutrient management, pest management, minor drainage ...." (p. 2)

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities.**

Exemptions from permitting for discharges to jurisdictional waters under section 404(f)(1) are beyond the scope of this rule. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

U. S. House of Representatives (Doc. #17474)

12.1266 Will the proposed rule limit or in any way impact existing CWA statutory exemptions for normal farming or ranching activities? Would the proposed rule have any impact on existing grazing operations on Federal land? Would the propose rule require ranchers to enclose, fence, or restrict grazing at areas that are not already required under the 2008 guidance? (p. 1)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Committee on Transportation and Infrastructure, U.S. House of Representatives (Doc. #18018)

12.1267 Subcommittee members and stakeholders questioned whether the proposed rule and the accompanying interpretive rule between the Department of the Army and EPA (dated March 25, 2014) and memorandum of understanding among the Department of the Army, EPA, and the U.S. Department of Agriculture might negatively impact existing agricultural practices currently used by farmers throughout the nation. For example, two separate witnesses have suggested that the proposed rule somehow narrows the scope of 404(f)(1) exemptions for normal farming and ranching activities to include only those that have occurred "continuously at the same location since 1977."[304] More specifically, the written testimony of Mr. Stallman references two Federal court cases (U.S. vs. *Cumberland Farms of Connecticut, Inc.,* 647 F. Supp. 1166 (D. Mass. 1986) and *Borden Ranch Partnership v. U.S. Army Corps of Engineers,* 261 F. 3d 810 (91h Cir. 2001)) as evidence that the proposed rule narrows the scope of 404(l) exemptions. (p. 1)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

12.1268 (…) does anything in the proposed rule, or the accompanying documents, limit the existing statutory or regulatory exemptions that apply today for agricultural or ranching related activities, such as those related to normal farming activities or those related to agricultural return flows? (p. 2)

[304] Written testimony of Thomas Nagle (PFB), dated April 28, 2014, and Mr. Stallman (AFBF), dated June 9, 2014).

Agency Response: **Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge or dredged or fill material is exempt from regulation, including normal farming, silviculture and ranching activities. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.**

12.1269 (…) there was some debate in the Subcommittee hearing about whether the normal farming activities exemption only applied to specific individuals who have been engaged in these activities since 1977. Therefore, with respect to the continuity of normal farming activities for the purposes of section 404(f)(1), does the same person need to be carrying out these activities for the exemption to apply, or does the exemption apply if the same type of activities occur at the site (i.e., not converting the land to a use to which it was not previously subject)? Does anything in the proposed rule, or the accompanying documents, change the application of this exemption? (p. 2)

Agency Response: **Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.**

O'Neill LLP (Doc. #16559)

12.1270 Should the Agencies decide to adopt a new rule to define the scope of waters regulated under the CWA, it is imperative that the Agencies clearly provide for a grandfathering system whereby: (1) all development associated with an application for a Section 404 permit filed prior to the effective date of the final Rule is exempt from the new definition of "waters" and the new Rule, and (2) all development associated with a Preliminary JD or an approved JD issued prior to the effective date of the final Rule is exempt from the new definition of "waters" and the new Rule.

Project applicants expend substantial time and financial resources on environmental consultant work, biological studies, project planning and design, project land-use entitlement, and the like prior to submitting an application to the ACOE for a Section 404 permit. It is common for applicants to spend years and many tens of thousands (and even hundreds of thousands or millions) of dollars conducting such work leading up to the permit application. Furthermore, once filed, additional substantial time and financial resources are expended by a project applicant in conducting further environmental review connected with the Section 404 application, such as NEPA analysis and compliance, the analysis of project alternatives under Section 404(b)(l), responding to public comments and agency comments on the ACOE's public notice of the application, Section 401 water quality certification, compliance with the National Historic Preservation Act, the federal Endangered Species Act, etc.

It would be extremely unfair and would produce an unjustifiable economic hardship to Applicants for a Section 404 permit to have to revise (or re-do or even start over on) studies, plans, analyses, designs, prior approvals, prior entitlements, and the like, because the new Rule was being applied to such a project after the Section 404 permit application had already been filed. Moreover, similar considerations of fairness and avoidance of

undue economic hardship should compel the Agencies to make clear to the public in the final Rule, that the final Rule will not be applied retroactively to any project which has already obtained a Preliminary JD or an approved JD prior to the effective date of the final Rule. (p. 2)

Agency Response: **Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

12.9. SUPPLEMENTAL COMMENTS ON IMPLEMENTATION

Summary Response

The agencies (the U.S Environmental Protection Agency and U.S. Army Corps of Engineers) believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent.

None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions are modified as a result of this rulemaking.

The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

The final rule clarifies the additional excluded waters and features under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be

altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The agencies are not restricting the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule.

Specific Comments

Jackson County Board of Supervisors (Doc. #1449)

12.1271 Potentially increases the number of county-owned ditches under federal jurisdiction: The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined. (p. 2)

Agency Response: See Summary Response. The final rule clarifies the additional excluded waters and features, including certain ditches that are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. This rule does not impact the citizen suit provisions under the Clean Water Act.

Anonymous (Doc. #3300.1)

12.1272 Section 303 WQS

Case 1 – Theoretical Wastewater Overflow

Under the proposed rule if a ditch is considered a Water of the United States then a sanitary sewer overflow to a dry ditch could create an enormous burden on the local utility. CWA regulates TMDL's and discharges to the Waters of the United States. Currently, if a system has an overflow reaching a stream it is required to follow protocol procedures in clean up and notification, and if significant a consent decree will be issued by state regulators. The protocol requires sampling and monitoring for an extended period of time, which is costly but usually easy to perform. If the overflow goes to a dry ditch but does not reach the stream, what new or additional requirements would the local provider be subject to if the proposed rule is adopted? If the proposed rule is adopted, what COE permit would be required in this case, how long would it take to address the spill in a dry ditch, and what parameters would be required for sampling and for and how long? Remember that to excavate the ditch would involve off-fall of dredging. (p. 3)

Agency Response: **Regulation of sewer overflows under the NPDES program are beyond the scope of this rulemaking. See Compendium 6 – Ditches.**

12.1273 Section 402

Case 1 – NPDES MS4 Permits

(…) If this proposed rule is adopted and moves forward, construction site issues could become cumbersome if the ditch is considered a Water of the United States. Staffs of local governments have a hard enough time currently achieving compliance with erosion and sediment control requirements from contractors and developers. It is very difficult educating and convincing local governing boards to accept the fact that environmental compliance of the CWA and the costs associated with them must be passed on to the development community. They are perceived as unnecessary and prohibiting growth and economic development. (p. 3 – 4)

Agency Response: **Please see summary responses 12.3 and 7.4.4.**

12.1274 CASE 2 – Local Dirt Roads

How does a local jurisdiction maintain a dirt road and ditch under the proposed rule without getting a permit? Roads are bladed, creating off-fall many times into the ditch, and the ditch usually has to have sediment removed for the runoff to move in a positive direction, which is usually a stream or at minimum a channel that is dry and when wet leads to the stream. As proposed it would appear to me that 402 permits would be required for maintenance of dirt roads. Permitting would become a nightmare for the local jurisdiction. (p. 4)

Agency Response: **See Compendium 6 (Ditches). The final rule excludes many ditches from jurisdiction, including ephemeral ditches that are not a relocated tributary or excavated in a tributary; intermittent ditches that are not a relocated tributary, excavated in a tributary, or drain wetlands; and ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial.**

12.1275 There is a definite need to clarify and define how local governments due business under the proposed rule. USEPA and COE have a monumental task at hand. I feel it would be better served if additional local government case studies and interviews were taken into the functionality of the proposed rule. It is a difficult process in developing regulatory rule but local governments for the most part will be the implementers. There needs to be some common ground between the proposed regulation and reality of successful implementation. The ultimate goal is to achieve the requirements of the Clean Water Act. (p. 5)

Agency Response: **State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean Water Act programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory**

partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

W. V. Giniecki (Doc. #4262)

12.1276 EPA has also stated that agriculture is exempt from this proposal, but this is not really true. Only 56 agricultural conservation activities that nave standards set by the Natural Resources Conservation Service (NRCS) are exempt - and that's only for dredge and fill permits (Section 404). Farmers conducting these activities are only exempt from 404 permitting if they follow NRCS standards, which until now were voluntary are many more appropriate and necessary agricultural activities on a farm that do not qualify as dredge and fill," like weed control and fertilizer application, and those are not exempted from the proposed regulation and EPA could easily require farmers to receive a permit under this new regulation. (p. 1)

Agency Response: The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation, including normal farming, silviculture, and ranching activities. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Mohave County Water Authority (Doc. #4346)

12.1277 **NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE MCWA** that we oppose the recent Clean Water Act regulation wording change and request EPA provide a clearly written grandfathering provision for projects and lands already delineated under existing standards. (p. 2)

Agency Response: Consistent with existing Corps regulations and guidance, all approved jurisdictional determinations completed and/or verified by the Corps must be in writing and generally will remain valid for a period of five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Kimble County Commissioners' Court, Kimble County, Texas (Doc. #4534)

12.1278 (…) **WHEREAS**, the EPA claims it is granting farmers and ranchers exemptions – yet those exemptions are extremely narrow and were granted by Congress decades ago. Furthermore, the EPA is, in fact, is narrowing those exemptions by making them – for the first time – conditioned on compliance with specific federal standards and the exemptions only apply to long-standing operations (not newer or expanded farms); (…) (p. 1)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation, including normal farming, silviculture, and ranching activities. The Corps and EPA's existing regulations implementing CWA section 404(f) indicate exempt activities must be part of an "established (i.e., ongoing)" farming,

silviculture, or ranching operation. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Council of the Borough of Ferndale, Cambria County (Doc. #4825)

12.1279 (…) **WHEREAS**, the definitions in the rule could bring MS4 storm water systems under greater regulation and expense through Total Maximum Daily Load (TMDL); and (…) (p. 1)

Agency Response: Please see summary response 7.4.4.

12.1280 **(…) WHEREAS,** this proposed regulation creates uncertainty rather than clarity and would now capture a significant number of public works activities and transportation infrastructure that will now be subject to the Clean Water Act (CWA) and its costly and time-consuming permitting and regulatory protocols; and (…) (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, need to make jurisdictional determinations on a case-specific basis.

L. Banks (Doc. #5554.2)

12.1281 7. Will the potential addition limits of EPA jurisdiction on the farms also submit farmers and/or aerial applicators to NPDES permitting requirements. I noticed that aerial application was not listed as one of the 56 approved NRCS practices even though it is currently an approved practice which is used regularly on most all farms. Does this mean that an aerial applicator could be subjected to excessive fines or permitting/mitigation if flying over a newly extended jurisdictional ditch on the farm? (p. 1)

Agency Response: Please see summary response 12.3. Additionally, the agencies withdrew the Interpretive Rule that referred to the 56 approved NRCS practices that would be exempt from permitting requirements. Comments on the Interpretive Rule are outside the scope of this proposed and final rule. See also Compendium 14 – Miscellaneous for responses to comments on the Interpretive Rule.

12.1282 8. As to the 56 exempt practices, most of them are exempt under present rules. Therefore, I don't see why such an emphasis was placed on this by EPA. I still don't understand why the wording is in the rule about farmers only being exempt if they have farmed the same tract of land continuously since 1977. Having farmed my land for 'only 26 years since 1988', I still interpret this to mean I will have to get a permit for approved NRCS work on my farms. (p. 1)

Agency Response: Please see summary response 12.3. The requirements for the NPDES permitting program or the pesticides general permit (PGP) are beyond the scope of the rule. Additionally, the agencies withdrew the Interpretive Rule that referred to the 56 approved NRCS practices that would be exempt from permitting

requirements. Comments on the Interpretive Rule are outside the scope of this proposed and final rule. See also Compendium 14 – Miscellaneous for responses to comments on the Interpretive Rule.

St. Johns County Board of County Commissioners (Doc. #5598)

12.1283 Stormwater management activities are not explicitly exempt under the proposed rule, so it appears that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S." Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. There is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (p. 2)

Agency Response: Please see summary response 7.4.4.

Black Hills Corporation (Doc. #6248)

12.1284 The concept of "best professional judgment" is referenced throughout the preamble of the .proposed draft rule. Even well-trained environmental practitioners may not be able to make adequate, consistent determinations of the presence or absence of U.S. waters without clear guidance. Across the country, watersheds and associated water features display significant variation in geographic and physical composition. Science professionals, the regulated community and regulators will require clear guidelines to make timely determinations. Jurisdictional determinations will become a repetitive, imprecise exercise in which regulators, science professionals, and the regulated community are likely to reach inconsistent and subjective decisions. (p. 4)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.

American Water Company (Doc. #6935)

12.1285 To eliminate this uncertainty, American Water Company proposes that the Agencies exempt portions of tributaries from permitting where the area to be crossed by a water main does not exhibit the features of a bed, a bank and an OHWM.

2. The Agencies should add to the rulemaking an expedited permitting process for water distribution systems that impact tributaries.

American Water Company, like most water companies, serves the public. Our distribution systems are part of the infrastructure of small towns and medium/large metropolitan areas. Every day, our company is asked to build new water lines to serve new customers. We are also asked - and required as a matter of law, in many instances -to relocate our water mains. Our obligation to serve families and businesses mandates that we undertake these projects. In many instances, we find it necessary to cross dry creeks, man-made depressions and ditches on an expedited basis in order to satisfy civic planning in the communities we serve.

The Agencies should supplement the rule (or add a new rule) to simplify the permitting process for water companies crossing tributaries. This action is warranted even if the Agencies elect not to finalize the proposed rule, for the crossing of tributaries currently considered to be WOTUS. Indeed, this could be accomplished by using a "permit by rule" process. Another alternative is to expedite the process through use of a nationwide permit process for water companies. Regardless of the mechanism, the new rule should expedite the process for obtaining permits that involve water main tributary crossings. Doing so will eliminate unwarranted delays in many development projects, such as new home construction, roadway construction and relocation, and commercial development. The proposed rule, if adopted without the exception proposed in #1 above and the exclusion proposed in #3 below, would cause many more unwarranted delays in commercial and residential development unless the permitting process is simplified. Such an outcome would delay efforts by entities like American Water Company to invest much-needed capital in modernizing critical infrastructure throughout the country, an imperative that has been highlighted time and again by policymakers at every level of government and by customers frustrated with outdated services. (p. 2)

Agency Response: **See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. In order to be considered a tributary and jurisdictional by rule, the water feature must have a bed and banks and ordinary high water mark, and must contribute flow to the downstream (a)(1) to (a)(3) waters. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. This comment is outside the scope of this rulemaking; however, the agencies note that the Nationwide General Permits will be reauthorized in 2017 and public comments will be solicited.**

12.1286 3. Water distribution lines should be excluded from permitting requirements with respect to ephemeral tributaries when pipe is installed below or above the tributary.

American Water Company appreciates that the Agencies wish to protect navigable, interstate waters and territorial seas from pollutants. Our Company draws its supply of water in many instances from such sources. However, the distribution network of water companies, which carry clean water for human consumption, is a closed system. Fully

enclosed/encapsulated water mains do not present a threat of pollution to tributaries, especially to ephemeral tributaries which are essentially dry ditches during most of the year. This is especially true when water mains are built under or above an ephemeral tributary. (Rarely are water mains constructed in the bed of a tributary, although permitting may be appropriate for such placement under certain circumstances.) (p. 2 – 3)

Agency Response: See Summary Response. The agencies believe the proposed rule will result in increased clarity and certainty regarding the identification of "waters of the U.S." The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. In order to be considered a tributary and jurisdictional by rule, the water feature must have a bed and banks and ordinary high water mark, and must contribute flow to the downstream (a)(1) to (a)(3) waters. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. This comment is outside the scope of this rulemaking; however, the agencies note that the Nationwide General Permits will be reauthorized in 2017 and public comments will be solicited.

Sarasota County Commission (Doc. #7529)

12.1287 It is our understanding, that under the proposed rules, our routine maintenance practices would become subject to Section 404 dredge and fill permits, CWA water quality standards, the National Pollutant Discharge Elimination System (NPDES), and general permits for pesticide and herbicide use. The Section 404 permits are a major concern. We strongly recommend that routine stormwater maintenance be exempt from any new permitting requirements. Routine maintenance includes mowing, excavation to original design, bank stabilization and the application of herbicides to clear the flow path. (p. 1)

Agency Response: This comment is outside the scope of this rulemaking. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. The final rule clarifies the additional excluded waters and features, including certain stormwater control features that are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with ditch activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.

12.1288 Please accept the following additional comments:

- Specify in the rule that streets, gutters, and human-made dry ditches and swales are exempt.
- Specify in the rule that routine stormwater canal maintenance is exempt.

- The current Section 404 permitting process can be slow and flood control maintenance cannot wait. The process must be timely and cannot be complicated or costly.
- The rule must explicitly exempt water quality treatment systems from Clean Water Act standards because these systems were created to capture pollutants and protect downstream waters. Systems include stormwater ponds and associated conveyances, roadside ditches, vaults, gutters, bioswales, rain gardens, and other green infrastructure. (p. 2)

Agency Response: **The final rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. Exclusions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. However, the final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies received many comments, particularly from municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressing concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems. See summary response 7.4.4.**

City of Brea, California (Doc. #7636.1)

12.1289 We have reviewed the thoughtful and carefully considered comments of the California Stormwater Quality Association ("CASQA") and fully concur in its concerns that the proposed rule creates a great deal of uncertainty for operators of municipal separate storm sewer systems JLG rMS4"). We further concur that unless the proposed rule is modified to specifically exclude MS4s and related stormwater facilities, there is a real risk that portions of the City's MS4 could be considered a water of the United States even before it discharges into a jurisdictional water such as a river, stream, or ocean. This could lead to significant new and duplicative regulations and burdensome costs, in addition to the stringent requirements of the NPDES permit that currently governs the City's MS4. P. 1)

Agency Response: **Please see summary response 7.4.4.**

Michael D. Schiffer (Doc. #7645)

12.1290 We are already subject to state and federal regulations for pesticide use and aircraft operation, including performance requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Federal Aviation Administration (FAA) for recordkeeping. For any pesticide applications that may occur into, over or near state or federal jurisdictional waters, compliance is required also with National Pollutant Discharge Elimination System (NPDES) pesticide general permits (PGPs) issued by EPA or delegated states. The proposed rule would vastly expand not only federal jurisdictional

waters but ultimately waters of the state – adding responsibilities, challenges and potential liabilities of aerial applicators as they work to consistently comply with the requirements of their various contracts, PGPs and FIFRA label requirements. It appears to us that the agencies have not considered these impacts in its economic analysis, determination that small businesses like ours would experience adverse effects, or the potential legal jeopardy under both CWA and FIFRA. (p. 1)

Agency Response: **Please see summary response 12.3.**

12.1291 Were this rule to be promulgated as proposed, we anticipate subsequent additional federal and state regulations for activities affecting newly-jurisdictional waters, including perhaps further restrictions on pesticide use and revisions to federal or state PGPs. We oppose promulgation of the rule as proposed, and urge the agencies to withdraw the current proposal and start over with adequate representation and input from all stakeholders before a replacement rule is proposed. (p. 2)

Agency Response: **See Summary Response. The final rule clarifies the additional excluded waters and features, including certain stormwater control features that are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. Also, please see summary response 12.3. Permitting requirements for discharges to jurisdictional waters are beyond the scope of this rule.**

Chenier Plain Coastal Restoration & Protection Authority (Doc. #7976)

12.1292 (…) WHEREAS, the proposed new rule calls for regulatory requirements which will create a major burden to the residents, businesses and governmental agencies in the Parishes of Southwest Louisiana by expanding the list of projects requiring administrative review and permitting thereby creating additional regulatory delays for projects which will in turn result in more delays and costs for each parish, add additional paperwork and time to the time required for parishes and municipalities to complete public infrastructure projects due to the new regulatory process, slow down business expansion and add additional restrictions to development through wetland mitigation and significantly alter the benefit cost ratio on some much needed restoration and protection projects in the Chenier Plain of Southwest Louisiana; and (p. 2)

Agency Response: **See Summary Response. The additional costs that may be incurred as a result of the rule were considered in the updated Economic Analysis and that analysis concludes that the benefits of the rule outweigh any associated costs placed on the regulated public and on the agencies themselves. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. With the clarity and certainty provided in the rule there are expected to be efficiencies gained in making jurisdictional determinations. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and**

effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. See the Economic Analysis for additional information regarding costs/benefits of the final rule.

City of St. Marys, Georgia (Doc. #8144)

12.1293 The City of St. Marys was established in 1787 with little consideration for the slow drainage of surface or flood waters in its historic areas. (*There is only an approx. 19 foot rise in elevation in our 25 square mile City.)* The only method used in our historic areas until recently was the 'ditch' method. The City is concerned that there appears to be no definitive rule for the maintenance of these ditches, the definition of a 'ditch', and the maintenance of pre-existing manmade structures (ditches, culverts, lined ditches, ponds, retention areas, etc.). If the proposed buffer requirement is applied to these ditches, then this will compromise the structures that are already located there, as well as deprive the City of the ability to properly plan for re-development of these parcels if vacant or dilapidated.

- The proposed rule states that if existing – or newly created – waters are clearly not under the jurisdiction of the existing rule defining Waters of the US, these waters would be decided on a case by case basis. This will delay the project work of state and local governments and increase the cost and work.
- The proposed rule does not take into consideration the constantly changing coastal conditions of rising seas, rising ground water, artesian wells, surge, flooding from upstream causes, FEMA and FIRM mapping, and the like,
- The proposed rule expands jurisdiction to the flood way to the 1% base flood elevation of any stream. This will make any proposed development that is permitted under FEMA guidelines very costly to implement due to the time and data required to comply with this proposed Waters of the US rule, effectively making these areas 'unbuildable'.
- Existing manmade retention ponds designed to existing State and Local standards all have 'outflows' for when a storm event creates an overflow condition. Under the new rule, this condition will be considered 'Waters of the US' and create maintenance problems for either the City, the Home Owners Associations, or the Citizens that may own all or part of a retention area. Even ponds or wetlands that have no outlet to a Water of the US, has to have an overflow outlet and a related watercourse for when it does overflow. This creates a classic Catch 22, because at that moment – under this rule – the pond/wetlands will become Waters of the US subject to regulation. In other words, every present and future retention or drainage methods that have potential of draining will become Waters of the US, creating a nightmare of higher costs and longer permit time.
- The proposed buffer requirement for 'Waters of the US' – will create massive problems with existing and proposed – but unbuilt – lots/structures. Some of the lots/structures adjacent to existing wetlands have features within this proposed buffer, and this will render these lots/structures unbuildable, thereby destroying

the economic value of the lots/structures, which will negatively affect the health and welfare of our citizens. (p. 1 – 2)

Agency Response: **See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion. The final rule clarifies the additional excluded waters and features, including certain stormwater control features, which are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. Under the final rule, if a water or feature is not specifically excluded under paragraph (b) and does not meet any of the categories of paragraph (a) then the water or feature would not be jurisdictional under the Clean Water Act. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 during the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation, such as in the coastal zones, and to ensure consistent and efficient implementation of the rule. See the preamble section on "Adjacent Waters" for a discussion on the appropriate floodplain to use in determining whether a water may be adjacent. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with maintenance activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act.**

Board of Douglas County Commissioners, Castle Rock, CO (Doc. #8145)

12.1294 Following this expanded process will allow stakeholders to submit informed comments based on the best and most current available information. See Executive Order 12866, Regulatory Planning and Review, September 30, 1993 and Executive Order 13563, Improving Regulation and Regulatory Review, January 19, 2011 (agency should seek the involvement of State, local, and tribal officials and should afford the public a meaningful opportunity to comment). (p. 5)

Agency Response: **See Summary Response. The public notice was extended twice in order to ensure adequate time for public comments to be provided.**

Olivenhain Municipal Water District (Doc. #8596)

12.1295 [U]nder the proposed rule, all Clean Water Act programs would now be required to go through the same process as the Section 404 program. For example, the Section 303 Water Quality Standards program, which is overseen by the states, would be subjected to the increasingly complex and costly regulatory requirements. (p. 2)

Agency Response: Please see summary response 12.3. The final rule does not establish any regulatory requirements, and questions about implementation of the NPDES program are beyond the scope of the rulemaking. Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities that currently are regulated under these programs that protect "waters of the United States" will continue to be. In addition, the final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.

12.1296 VI11. The 1R Provides No Real Assurances for Farmers and Ranchers

The IR does not provide clear and complete protection to farmers and ranchers from CWA enforcement. First, if the IR is truly mere guidance with an attached MOU, it can provide little legal protection to farmers and ranchers if challenged. As stated in the MOU, the list can be 1 changed at any time without any notice and comment provided to the ranching community.

Second, the IR does not provide the needed assurance that farmers and ranchers will not be required to get § 402 NPDES permits for chemical applications on fields and pastures or from protection from requirements under Total Maximum Daily Loads (TMDLs) or Water Quality Standards (WQS). The expansion of the definition of "waters of the U.S." proposed by the agencies would make many ephemeral streams in pastures and fields or roadside ditches "waters of the U.S.," making chemical applications a point source discharge and subject to liability under the CWA. (EPA-HQ-OW- 201 1-0880,79 Fed. Reg. 22187, April 21,2014). The agencies' IR and subsequent presentations and outreach is an attempt to mislead the agricultural community to believe that they are insulated from the expansion of the definition of "waters of the U.S.," but the truth is that they are not.

Third, the IR cannot protect farmers and ranchers from the "recapture provision" under Sec. 404(f)(2). (IR at 2, n. 2).This provision states even if the activity listed is exempt, if EPA or the Corps believe that the activity would change the use, impair or reduce the reach of a water of the U.S. the exemption for that activity no longer applies and a 5 404 permit is required. The IR fails to provide any needed clarity and protection for farmers and ranchers. (p. 35)

Agency Response: **The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.**

Andy Tilton (Doc. #9604)

12.1297 Currently there are storm water attenuation and water quality treatment systems located in these areas and are outside the jurisdictional limits. Storm water ponds are a treatment system component. As such, the quality in the pond is not required to meet the numeric nutrient criteria (NNC). It must meet the NNC when it discharges. Under the clarification, the water in the treatment ponds would have to meet the NNC. How is it possible to have the water in the treatment pond meet the criteria? This is analogous to saying the water in a waste water treatment plant must meet the discharge quality criteria anywhere in the plant. (p. 1)

Agency Response: **Please see summary responses 7.4.4 and 7.1.**

Mecklenburg County Government, North Carolina Doc. #10946)

12.1298 Mecklenburg County currently has a Post Construction Ordinance to meet the Phase 2 requirements of its NPDES permit. The Post Construction Ordinance requires sites to meet water quality as well as water quantity standards. The "significant nexus" that is used to help justify the inclusion of ephemeral channels would still be present on sites through the newly constructed Best Management Practices (BMPs). The BMPs may now be providing a greater positive influence to the "waters of the United States" located further downstream than what would have been provided through just the ephemeral channel with development draining directly into it. The location of ephemeral channel is often in the same location that BMPs would need to be installed, making it more difficult to install BMPs designed to help improve water quality in urban settings. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Minnesota Association of County Agricultural Inspectors (Doc. #10970)

12.1299 The definition changes would affect every CWA program, because there is only one definition of WOUS in the CWA. It is uncertain how these definitions will be used to effectively implement various CWA programs. (p. 2)

Agency Response: **Please see summary response 12.3.**

Anonymous (Doc. #11350)

12.1300 Additionally, there are many uncertainties regarding the implementation of this proposed rule from Environmental Protection Agency's (EPA) jurisdiction. How will this proposed rule impact the National Pollutant Discharge Elimination System Program and permit requirements? Will there be additional limitations on fertilizer applications? A major concern is the potential for project delays. What mechanisms have been put in place to prevent the proposed regulations from creating a resource burden on the implementing agencies? Does the USACE and EPA have the resources required to apply the regulations without increasing processing time on permits? (p. 2)

Agency Response: **Please see summary response 12.3. See also Compendium 11-Economics and Economics Analysis Section 8 for analysis of the rule's impacts on the Section 402 permitting program.**

Board of County Commissioners, El Paso County, Colorado (Doc. #11487)

12.1301 (…) WHEREAS, if a water feature is determined, either per se or on a case-by-case basis, to be a "Water of the United States", the proposed rule would subject county and local governments to increasingly complex and costly federal regulatory requirements under the proposed rule which applies to all Clean Water Act programs including Sections 404-Waters of the United States program, 402-National Pollution Discharge Elimination System (NPDES) program, 303-Water Quality Standards (WQS) program, and other programs including stormwater, green infrastructure, pesticide permits and total maximum daily load (TMDL) standards; and

WHEREAS, many of the local geologic and man-made water related features common to the arid west, including dry arroyos, washes, natural or man-made ponds, conveyance and roadside ditches, ephemeral or intermittent streams that flow only in response to infrequent storm events could become the subject of federal oversight which is impracticable for the federal government to regulate; and

WHEREAS, it is important that the implications of this proposed agency interpretation of Congressional language be considered in the context of the environmental and water challenges being faced by local communities in the west including those challenges associated with drought, forest fires, post fire floods, and the overall health of watersheds; and

WHEREAS, the western arid region will be the most directly and significantly affected by the outcome of this rulemaking process as it is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, and effluent dominated and dependent water bodies; and

WHEREAS, western communities will encounter daunting challenges in the years ahead as they strive to meet water supply, wastewater and stormwater treatment obligations in the face of challenges associated with growing demand, drought, fires, extreme storm events, and unhealthy watersheds; and (…) (p. 1 – 2)

Agency Response: **Please see summary response 12.3. Questions about implementation of the NPDES program are beyond the scope of the rulemaking. Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities that currently are regulated under these programs that protect "waters of the United States" will continue to be. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the**

rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. In addition, the final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.

Board of County Commissioners, County of El Paso, State of Colorado (Doc. #11587)

12.1302 (…) WHEREAS, if a water feature is determined, either per se or on a case-by-case basis, to be a "Water of the United States", the proposed rule would subject county and local governments to increasingly complex and costly federal regulatory requirements under the proposed rule which applies to all Clean Water Act programs including Sections 404-Waters of the United States program, 402-National Pollution Discharge Elimination System (NPDES) program, 303-Water Quality Standards (WQS) program, and other programs including stormwater, green infrastructure, pesticide permits and total maximum daily load (TMDL) standards; and

WHEREAS, many of the local geologic and man-made water related features common to the arid west, including dry arroyos, washes, natural or man-made ponds, conveyance and roadside ditches, ephemeral or intermittent streams that flow only in response to infrequent storm events could become the subject of federal oversight which is impracticable for the federal government to regulate; and

WHEREAS, it is important that the implications of this proposed agency interpretation of Congressional language be considered in the context of the environmental and water challenges being faced by local communities in the west including those challenges associated with drought, forest fires, post fire floods, and the overall health of watersheds; and

WHEREAS, the western arid region will be the most directly and significantly affected by the outcome of this rulemaking process as it is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, and effluent dominated and dependent water bodies; and

WHEREAS, western communities will encounter daunting challenges in the years ahead as they strive to meet water supply, wastewater and stormwater treatment obligations in the face of challenges associated with growing demand, drought, fires, extreme storm events, and unhealthy watersheds; and (…) (p. 1 – 2)

Agency Response: Please see summary response 12.3. Questions about implementation of the NPDES program are beyond the scope of the rulemaking. Instead, the final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402

National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities that currently are regulated under these programs that protect "waters of the United States" will continue to be. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. In addition, the final rule does not change the authority of states and tribes to set water quality standards and designate regulated waters within their boundaries. States and tribes will also continue to have discretion to design and implement ambient surface water monitoring strategies and propose waters for the 303(d) and TMDL programs.

Norton County Road & Bridge (Doc. #11746)

12.1303 The proposed definition of waters of the US is any drainage course that has a defined bank, no matter how minor. A one foot deep normally dry gulley in a back yard or pasture could be regulated and a 404 permit required for any work no matter how minor. These additional permits will clog the permitting system where there is already a regulatory backlog of some 20,000 permits currently in the Army Corp of Engineers system with an average time lapse of up to several years from submission to approval/denial of any individual permit. With limited federal resources federal focus should be on projects in larger drainage areas rather than e diluting the clean water program by being involved with small projects in dry gullies. (p. 1 – 2)

Agency Response: See Summary Response. The definition of tributary under the final rule requires both bed and banks and an ordinary high water mark. Under paragraph (c) for the waters not considered to be waters of the U.S., erosional features that do not meet the definition of tributary are excluded from jurisdiction under the Clean Water Act. This may include some gully features which do not demonstrate the required characteristics. The final rule indicates that the required characteristics provide an indication of sufficient volume, flow, and duration to demonstrate a significant nexus to the downstream (a)(1) to (a)(3) waters.

Anonymous (Doc. #11761)

12.1304 On-the-ground wetland delineation standards (Euliss et al 2002), cannot be accomplished with only GIS analysis as proposed under revisions. High water features of desert playas, as found in the southern Great Plains, have not been fully identified and require on the ground delineation (Lichvar et al 2006), so that playas can be effectively regulated, protected and conserved. Moreover, these larger playas are crucial conservation areas under regional global warming and drought cycles already experienced in the region. (p. 2 – 3)

Agency Response: **See Summary Response. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. Desert playas may be jurisdictional if they meet the terms of an adjacent water or the terms under (a)(8) with a case-specific significant nexus determination.**

Society for Freshwater Science (Doc. #11783)

12.1305 These waters deserve protection as jurisdictional waters and it should be added, distinguished, or confirmed that such tributary waters are still jurisdictional; this critical issue is unclear to us in the current proposed rule. Third, SFS disagrees with exemptions for agriculture, silviculture, ranching, and/or mining. Cumulatively, these land uses represent the greatest area of human disturbed lands affecting tributaries and water quality and their effects on water quality and ecological condition have been extensively detailed in the scientific literature. Failure to protect waters in such settings undermines and limits the progress that can be made on restoring and protecting our national waters because of the extent and rate of growth of these practices. Prior converted croplands are having significant impacts on water quality, especially in tile-drained regions that are increasing in extent. Without adequate oversight and application of Clean Water Act jurisdiction to such waters, water quality will continue to degrade and lead to more frequent adverse ecological responses like hypoxia in the Gulf of Mexico and the cyanobacterial blooms that affected Lake Erie and the Toledo drinking water supply this summer. (p. 3)

Agency Response: **Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas**

to establish a significant nexus. "Tributaries" as defined are jurisdictional by rule. Congress identified in section 404(f)(1) of the Clean Water Act those activities which are exempt from regulation. Congress also identified in section 404(f)(2) conditions under which exempted activities could be "recaptured" and subject to 404 permitting requirements. These conditions include circumstances in which the proposed discharge would result in a change in use of waters and impair flow or circulation or reduce the reach of waters. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. Prior converted cropland has been excluded from this definition since 1992 and remains substantively and operationally unchanged.

Commissioner's Court, Collin County, Texas (Doc. #11989)

12.1306 The Collin County Road and Bridge department maintains approximately 765 miles of roads, over 1,500 miles of roadside drainage ditches and 44 flood prevention dams. **Although the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have indicated the rule proposal is intended only to clarify existing CWA jurisdiction, Collin County is concerned that the proposed rule could have a major impact on county infrastructure and activities which would result in an expensive and time consuming permit or clearance process that has not historically been required. In addition, the delay that this extra regulation would have on repair, removal of vegetation and debris from drainage ditches or other flood control facilities, could bring about citizen suits should damage occur due to heavy rains while the county is waiting for federal action.**

In Addition, since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S." Collin County owns Municipal Separate Storm Sewer System (MS4) infrastructure to include ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. **Under this proposed rule change, there is a significant potential threat for counties that own MS4 infrastructure, because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well.** Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (p. 1 – 2)

Agency Response: **Please see summary responses 12.3 and 7.4.4.**

City of Palo Alto, California (Doc. #12714)

12.1307 Palo Alto is committed to green infrastructure, yet green infrastructure itself can be defined as water of the U.S. Constructed wetlands, swales, and detention basins invite the additional regulation required for waters of the U.S., and cities will be dissuaded from building such features if they are subject to additional, costly regulation. (p. 2)

Agency Response: **Please see summary responses 12.3.2 and 7.4.4.**

Sitka Economic Development Association (Doc. #13023)

12.1308 (…) WHEREAS, the proposed rule will directly and indirectly affect numerous public infrastructure conveyances currently under the jurisdiction and management of SEAK communities, including CBS, (e.g. roadside ditches, flood and storm water drainage systems, drinking water and raw bulk water infrastructure) and place jurisdiction and management under federal authority; and

WHEREAS, federal jurisdiction over waters currently under the jurisdiction of and managed by the State of Alaska and the communities of Southeast Alaska, including the CBS, would create new regulations and layers of permitting; and (…) (p. 1)

Agency Response: See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. The final rule clarifies the additional excluded waters and features, including certain ditches, stormwater control features, and wastewater recycling features that are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking.

Charlotte County Government (Doc. #13061)

12.1309 We strongly suggest, at a minimum, that routine maintenance, including mowing, excavation to original design, bank stabilization, and the application of herbicides to clear the flow path, be exempt from any new permitting requirements. The rule should specify that streets, gutters and human-made ditches and swales should be exempt. It should specify that routine stormwater canal maintenance is exempt. The Galveston rule must explicitly exempt water quality treatment systems permitted via Florida Department of Environmental Protection/Southwest Florida Water Management District South Florida Water Management District from the Clean Water Act Standards because these systems were created to capture pollutants and protect downstream waterways. These systems typically include stormwater treatment attenuation facilities and associated conveyances including roadside ditches, vaults, bioswales, rain gardens, and other green infrastructure. We suggest you significantly modify the proposed rule to address these obvious issues; or simply exclude similar features from any future definition of WOTUS. (p. 2 – 3)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation. Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. The rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Please see summary response 7.4.4.

Newmont Mining Corporation (Doc. #13596)

12.1310 4. Consequences of Deeming Mining Artificial Ponds, or Associated Channels, to be Jurisdictional Waters

The adverse consequences to mining companies of deeming their artificial ponds and associated ditches and other constructed channels to be jurisdictional waters would be enormous. Newmont would be required to obtain CWA 402 permits from the State to discharge tailings to its tailings impoundments, to discharge pregnant solutions and barren solutions to its pregnant and barren heap leach solution ponds, to discharge water into its quench ponds, and to discharge waters into ditches that are associated with these ponds. Indeed, Newmont might have to shut down operations, and lay off hundreds of employees, while seeking CWA 402 permits. In addition, in order to modify any of its artificial ponds or constructed channels, or to close them or to reclaim them as operations cease or change, Newmont would need to obtain CWA 404 permits from the Corps. That is because changing the configuration or volume of the ponds or channels, or closing or reclaiming them, would invariably require that all or portions of these ponds or channels be filled in.[305] Such modifications to channels and expansions of artificial ponds are not infrequent. Thus, on top of the reclamation permits, closure permits, and construction permits that Newmont now obtains from the State of Nevada and from the BLM to build, close, and reclaim ponds or channels, Newmont would need extra permission from EPA and the Corps to design and construct its ponds or channels, and to close them at the end of operations. In addition, of course, a 404 permit would carry with it mitigation obligations.

But there is more. Arguably, the State (or EPA) would have to establish, and Newmont would have to meet, water quality standards and Total Maximum Daily Loads ("TMDLs") for these artificial ponds and their associated ditches, even though no one would ever think to fish in these ponds or channels, to recreate in them, or to use them for any purpose other than as industrial ponds. *See* CWA § 303(d). Indeed, Newmont might be required to make its ponds "fishable/swimmable," an absurd proposition especially with respect to tailings impoundments, which are designed as waste disposal units.

Newmont and other mining companies would also have to go to enormous effort and expense to try to prove to regulators that a particular pond or channel was not an "other water." This would entail significant investigatory and advocacy costs to show that there is no "significant nexus" to deep groundwater from a pond or channel to a TNW, or that rainfall that is captured in the ponds and channels would not otherwise have flowed to a TNW in the absence of these ponds or ditches. In fact, mining companies would have to prove not only that their specific ponds and channels have no such nexus to a TNW but that no other pond or ditch operated by anyone else in the same watershed has such a nexus – something that would be extremely expensive, if not impossible, to show. (p. 23 – 25)

<u>Agency Response:</u> The site specifics of what may or may not be required at Newmont's facility are beyond the scope of this rulemaking. It should be noted that the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts

[305] Under Newmont's reclamation and closure plans, which are approved by the Bureau of Land Management ("BLM") and the State of Nevada, its artificial ponds and associated channels are typically drained at closure, and the ponds and channels filled, graded, and vegetated to support post-mining land use(s).

important qualifiers on some existing categories such as tributaries. Also, the final rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity. A number of commenters have indicated that these water-filled depressions created in dry land are often left on a site after construction or mining activity is complete in order to provide beneficial purposes, such as water retention, recreation, and animal habitat. The agencies are not retaining language from the preambles that stated a water could be found jurisdictional once the construction or mining activity is completed. The agencies believe that it is more likely that waters constructed in association with mining or construction activities are more likely to be allowed to remain after such activities if they are not subject to potential CWA coverage. We believe that this is a positive environmental result consistent with the goals of the Act. Also, please see summary response 7.1. Also please see essay 12.3. See also Compendium 11 and Economic Analysis section 8 for an explanation of how the agencies considered the effects of the final rule on all CWA programs, including section 402.

12.1311 Were the Agencies' Proposal to become law in its current form, any development of mining properties would require extensive and expensive CWA 404 permitting and associated mitigation, as well as extensive mapping of ephemeral drainages and intermittent streams, at great cost to mining companies and, most important, with little to no environmental benefit. Moreover and as noted above, to the extent that a given drainage was deemed jurisdictional, any artificial ponds that are constructed or that exist adjacent to the ephemeral drainage could be deemed per se jurisdictional waters, even if they have no impact on ephemeral drainages or any downstream waters. And all this would be required even though anyone looking at the situation would have to conclude that diverting or filling any such ephemeral drainages would not in any way affect the physical, chemical, or biological integrity of a TNW located many miles away. (p. 38)

Agency Response: **See Summary Response. The rule is not designed to subject any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the U.S.", consistent with existing regulations and Supreme Court precedent. The final rule clarifies the additional excluded waters and features, including erosional features that do not meet the definition of tributary, certain artificial ponds, and certain ponds created incidentally to mining activities that are not jurisdictional under the Clean Water Act. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for further discussion. The paragraph (b) exclusions are applied before the paragraph (a) categories. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking. The agencies have concluded that all tributaries have a significant nexus either alone or in combination with other tributaries to the downstream (a)(1) to (a)(3) waters. If an artificial pond, as described in this comment, did not meet one of the exclusions, then the pond may be**

considered an adjacent water under the final rule if the pond meets the definition of adjacent or is determined to have a significant nexus under paragraph (a)(8).

Colorado Wastewater Utility Council (Doc. #13614)

12.1312 2) Beneficial reuse needs to be included as an agricultural exemption Our utilities work hard to ensure biosolids are being put to beneficial use and not filling up our landfills. In fact , eighty five percent of Colorado's biosolids are put to beneficial use compared to the national average of fifty percent. Much of the lands where biosolids are applied have ephemeral streams with natural breaks in flow . It is unclear whether these waters would fall under the agricultural exemption since the exemption only addresses the harvesting of crops , not the application of biosolids. Additionally, crops are rotated on the land where biosolids are applied resulting in some land not being used to harvest crops at all times. Assuming the agricultural exemption does apply, how long can this land be uncultivated before it is not subject to the agricultural exemption?

Additionally , because rotating crops to conserve soil moisture results in uncultivated land, we need assurances that this land is still subject to the agricultural exemption. We request that the Environmental Protection Agency specify the scope of agricultural exemption to include the application of biosolids for beneficial use. (p. 2)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters from specified activities under section 404(f)(1) of the Clean Water Act and EPA and Corps implementing regulations in are beyond the scope of this rule.

D. Fleming (Doc. #13654)

12.1313 The proposed definition of waters of the US is any drainage course that has a defined bank, no matter how minor. A one foot deep normally dry gulley in a back yard or pasture could be regulated and a 404 permit required for any work no matter how minor. These additional permits will clog the permitting system where there is already a regulatory backlog of some 20,000 permits currently in the Army Corp of Engineers system with an average time lapse of up to several years from submission to approval/denial of any individual permit. With limited federal resources federal focus should be on projects in larger drainage areas rather than e diluting the clean water program by being involved with small projects in dry gullies. (p. 1)

Agency Response: See Summary Response. The definition of tributary under the final rule requires both bed and banks and an ordinary high water mark. Under paragraph (c) for the waters not considered to be waters of the U.S., erosional features that do not meet the definition of tributary are excluded from jurisdiction under the Clean Water Act. This may include some gully features which do not demonstrate the required characteristics. The final rule indicates the required characteristics provide an indication of sufficient volume, flow, and duration to demonstrate a significant nexus to the downstream (a)(1) to (a)(3) waters. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process with consistent application across agencies. The initial phase of implementing the rule will require education and training for agency staff as well as

other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States" or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination.

Interlocking Concrete Pavement Institute (Doc. #13952)

12.1314 ICPI would like to place on the record, to benefit EPA, USACE and the regulated community, that there are in existence today technologically and economically feasible means to meet these stormwater mitigation, water quality, flood reduction and native hydrology requirements. One such technology is permeable interlocking concrete pavements (PICP). Their current, growing use by public and private sector customers offer a substantive and effective rebuttal to any assertion that the expanded goals and regulatory reach of WOTUS is technologically or economically infeasible for the construction industry to meet.

PICP technology can provide highly effective stormwater runoff mitigation, allowing existing developments to restore to native hydrology and new construction to retain existing hydrology.

PICP products and technologies to make this happen exist today and represent off-the-shelf, commercially available means to meet such requirements. Given the state of this technology, it is technically and economically feasible to comply with expected stormwater mitigation requirements by using PICP. (p. 1 – 2)

Agency Response: Please see summary response 7.4.4.

M. Smith (Doc. #14022)

12.1315 The Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. This could put our township in a precarious position as we often balance a small budget against public health and safety needs. Delays of a year at a cost of hundreds of thousands of dollars would make our position untenable. (p. 2)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes

effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States" or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination.

Plumas County Board of Supervisors (Doc. #14071)

12.1316 The proposed rule will hinder the ability of counties to manage public infrastructure ditch systems and impact public safety.

The expansion of the definition of Waters of the U.S., as drafted, will also force counties to seek Section 404 permits for the now-routine maintenance of "waterways," such as roadside ditches and storm water drains. (p. 2)

Agency Response: See Summary Response. Under paragraph (b) of the rule, certain waters and features are not considered "waters of the U.S.," including certain ditches and stormwater control features. The paragraph (b) exclusions are applied before determining whether a water is jurisdictional per the paragraph (a) categories. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the construction of irrigation ditches and the maintenance of irrigation and drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with maintenance activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. Also, please see summary response at 7.4.4.

Indiana Pork Advocacy Coalition (Doc. #14410)

12.1317 EPA and the Corps are soliciting comments on a proposed rule that redefines what they consider to be "waters of the United States" under all CWA programs. In

addition to this proposal, the agencies also released an "interpretive" decision t attempted to clarify how the rule would impact farmers and other agricultural stakeholders. As the near-unanimous voices within agriculture have already commented, we urge in the strongest possible terms that EPA and the Corps rescind the "interpretive" rulemaking on agricultural exemptions immediately. (p. 1)

Agency Response: The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

Golden Spread Electric Cooperative, Inc., (Doc. #14422)

12.1318 C. There are no Scientific Guidelines for Determining "Significant Nexus" If this proposed rule is finalized, the status of many waters will undoubtedly be called into question because the rule provides no true metrics for quantifying "significant nexus". To determine the jurisdiction of "other waters", the rule calls for case-by-case analysis to determine if a "significant nexus" exists between "other waters" and a water jurisdictional by rule. However, Golden Spread agrees with the comments of the Coalition stating that although the Agency identifies factors to consider when determining a significant nexus (i.e., chemical, physical and biological), the WOTUS Rule does little to quantify what "significant" means. Furthermore, the WOTUS Rule does little to describe "significant nexus" in any meaningful scientific terms. The Science Advisory Board panel reviewing the Connectivity Report acknowledges that the "significant nexus" analysis should be based on scientific criteria and calls for the agency to provide metrics, and seek comment with regard to the same. Golden Spread agrees that metrics should be established; however, it should be proposed and published to allow for the public, including the regulated community, to comment. As it stands, the case-by-case jurisdictional determination would depend solely on the opinion of a regulator, who would not be compelled to defend his or, her decision based on any chemical or biological standard. This approach provides little guidance or predictability for a regulated community that must plan significant actions based on these regulations. Golden Spread believes that until those quantified values are themselves proposed and included, thus allowing the public an opportunity to review and analyze how the standards are to be integrated, the proposed rule as written remains gravely inadequate and a possible vehicle for jurisdictional overreach. (p. 5 – 6)

Agency Response: See Summary Response. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective. Please see Section IV.-H. Case-Specific Waters of the United States in the preamble for a discussion on how a significant nexus determination is performed for (a)(7) and (a)(8) waters. The final rule includes a definition of "significant nexus" and a list of factors that will be considered when making such a determination.

Hoosier Energy REC, Inc (D0c. #14561)

12.1319 EPA and the Corp must provide an exemption from the rule for actions taken in response to a spill response action. (p. 3)

Agency Response: Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation. Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule.

Synagro Technologies, Inc. (Doc. #14565)

12.1320 Synagro also recommends that Agricultural Exemption be expressly applied to the land application of biosolids. Many of our farmers rotate the land that they use biosolids on resulting in some of the land not being used to "harvest crops" at all times. Assuming the Agricultural Exemption does apply, EPA should supply proposed language that would state how long agricultural land could be fallow before the land would not be able to benefit from the Agricultural Benefit. Synagro also request that EPA specifically include biosolids land application as a farming practice that is covered by the Agricultural Exemption. (p. 2)

Agency Response: Land application of biosolids is beyond the scope of this rule. Exemptions from permitting for discharges to jurisdictional waters under section 404(f)(1) of the Clean Water Act and EPA and Corps implementing regulations in regard to those exemptions are beyond the scope of this rule.

DMB White Tank, L.L.C. (Doc. #14578)

12.1321 On behalf of DMB White Tank, L.L.C., we are submitting the following comments on the proposed rule referenced above. We are joining in the more detailed comments of Valley Partnership and other organizations filed concurrently. We also want to specifically emphasize the potential disruption of the proposed rule on entities such as DMB White Tank that have been operating under permits issued under Section 404 of the Clean Water Act.

DMB White Tank is the developer of the Verrado master-planned community, located in the White Tank Mountains of Buckeye, Arizona, twenty five miles west of Downtown Phoenix and in the heart of the Sonoran Desert. The project consists of approximately 8,800 acres and is ultimately planned for 11,000 homes and associated schools, parks, work and retail centers, plus extensive natural open space. A portion of the project site includes the former Caterpillar Proving Grounds. As a consequence, project development has included restoration of drainage and floodplain areas disturbed by decades of large construction equipment testing.

Planning for the project began in the late 1990's, which included an evaluation of whether the site contained "waters of the United States" and whether such waters would be disturbed in a manner triggering the obligation to obtain a Section 404 permit. A formal jurisdictional delineation was approved by the Corps of Engineers and a number of drainage features, including ephemeral washes and man-made drainage ditches were deemed jurisdictional. (There are no perennial or intermittent streams or wetlands on the property.)

Largely due to the need to restore drainage across the site, DMB White Tank determined that a Section 404 permit would be needed and applied to the Corps. While the permit application was pending, the U.S. Supreme Court issued its decision in Solid Waste Agency of *Northern Cook County v. United States*, 531 U.S. 159 (2001). Given the lack of agency guidance on the effect of the decision on its jurisdiction, DMB White Tank proceeded with the application unchanged and secured a permit in 2002. Over the course of development, the Supreme Court decided *Rapanos v. United States*, 547 U.S. 715 (2006), but again given uncertainties with agency positions on jurisdiction, has continued to implement the project consistent with its existing Section 404 permit. The permit remains in effect and guides project development, and is planned to do so for the life of the project, which will take us well into the next decade.

DMB White Tank shares the concerns about the extent of federal regulation of dry washes and man-made features and the uncertainties with the proposed rule that are discussed at length in the attached comments. We would like to highlight a special concern that we have regarding the proposal's impact on projects such as Verrado that are operating under existing permits. The proposed rule is silent on how existing permits and delineations will be handled.

To avoid economic disruption and planning uncertainty, it is essential that, if the agencies proceed with rulemaking, they include a clear grandfathering provision that leaves existing permits and determinations undisturbed. Because of the long term reliance on Corps determinations for projects like master-planned communities (Verrado is now in its 11 th year of operation under the permit, which is set to expire in 2017 and will need to be extended further), any grandfathering provision should apply to existing permits and delineations and also extensions of those approvals. Jurisdictional determinations and permits are typically issued for five years (or in the case of permits, sometimes longer) and often require extension after a project such as ours is underway, well after major planning and infrastructure investment is complete.

We appreciate your attention these concerns. The residential construction industry has been in an extended economic downturn since 2008 and is currently going through a fragile recovery. Regulatory uncertainty plays an important role in disrupting investment in our industry and impeding economic growth. While we believe the proposed rule requires substantial reworking to alleviate the concerns expressed in our detailed comments, it is particularly essential that if the proposed rule proceed, that it include a clear grandfathering provision for permits and delineations, as well as extensions of these determinations. (p. 1 – 2)

Agency Response: **See Summary Response. The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

Irvine Ranch Water District (Doc. #14774)

12.1322 Water Conveyance Systems and Man-Made Structures Should Not be Defined As "Tributaries". The proposed rule defines 'Tributary" as "a water physically, characterized by the presence of a bed and banks and ordinary high water mark, which contributes

flow, either directly or through mother water." The proposed rule then goes further to incorporate all streams, underground flows, wetlands, lakes, ponds, and impoundments into the definition of tributary, if they contribute any amount of flow to a WOTUS, even if they lack a bed and bank or an ordinary high water mark. The proposed rule specifically expands the definition of tributary to include man-altered or man-made water conveyances. Through its use of a broad and sweeping definition of tributary, the proposed rule defines man-made, non-stream conveyances as WOTUS and makes them subject to the full spectrum of CWA permitting. Additionally, the rule presumes that all water conveyances have a significant nexus to a WOTUS, which is not true, and uses sweeping language to define these facilities as WOTUS themselves.

The proposed definition of tributary would have broad implications for California's water conveyance systems, and will bring the majority of California's water conveyance systems under CWA jurisdiction. IRWD would not be exempt from this impact. For example, the water conveyance facilities IRWD uses for its water banking I/' operations would likely be impacted. lRWD has partnered with the Rosedale Rio Bravo and Buena Vista Water Storage Districts in California's Central Valley to bank stormwater flows, which would otherwise be lost for water supply purposes, during wet years in the District's groundwater bank. When needed in dry years or ,# emergencies, the water is extract and conveyed back to IRWD and its local partners for use. Under the proposed rule, the conveyance facilities used to deliver water to and from the water bank would likely be deemed a "tributary" and be classified as a WOTUS when it has not been deemed as such previously. (p. 4)

Agency Response: **See Summary Response. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. Similar to other regulations, the rule is derived from science and judicial positions and is ultimately reflective of Administration policy decisions. Under paragraph (b) of the rule, certain waters and features are not considered "waters of the U.S.," including certain ditches and stormwater control features. The paragraph (b) exclusions are applied before determining whether a water is jurisdictional per the paragraph (a) categories. The definition of tributary under the final rule requires both bed and banks and an ordinary high water mark. Erosional features that do not meet the definition of tributary in paragraph (c) are excluded from jurisdiction under the Clean Water Act. This may include some gully features which do not demonstrate the required characteristics. The final rule demonstrates that the required characteristics provide an indication of sufficient volume, flow, and duration to demonstrate a significant nexus to the downstream (a)(1) to (a)(3) waters. The agencies recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. This training and outreach will be regionally-based to ensure appropriate consideration is given to ecoregional variation and to ensure consistent and efficient implementation of the rule.**

Legislative Council on River Governance (Doc. #14791)

12.1323 (…) WHEREAS, the proposed expansion of waterways under federal control could lead to an increase in permitting and mitigation costs and project delays for local governments; and (p. 1)

Agency Response: See Summary Response. The final rule was developed to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Definitions of certain terms are provided for the first time (e.g. tributary), or are further clarified (e.g. adjacent). The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the updated Economic Analysis for additional discussion on costs/benefits of the final rule.

Royalty Owners & Educational Coalition (Doc. #14795)

12.1324 The proposed definition will:

- Dramatically expand waters subject to citizen suits under 33 U.S.C. 5 1365(a)(1);
- Expand EPA jurisdiction under the "Oil Discharge Rule" (40 CFR Part 110.1);
- Force the re-write of most producer SPCC plans under 40 CFR Part 112.2;
- Expand EPA authority with regard to hazardous substances under 40 CFR Part 116.3 and Part 117.1;
- Force a reconsideration of National Pollution Discharge Elimination System Permits under 40 CFR Parts 122-124;
- lmpact 404 Permits under40 CFR Part 230.2 and 404 Dredge and Fill Permits under 40 CFR Part 232.2;
- lmpact National Contingency Plan (40 CFR Part 300.5) and National Contingency Plan Appendix E (40 CFR Part 300, App. E);
- Increase CERCLA requirements under 40 CFR Part 302.3;
- lmpact Effluent Limitations under 40 CFR Part 401.11; and,
- Have broad Endangered Species Act implications. (p. 3 – 4)

Agency Response: Please see summary responses 12.3 and 12.5.

The Wildlife Society (Doc. #14899)

12.1325 We understand that requiring individual determinations of a *significant nexus" for all other haters during the permitting process is impractical and likely infeasible. Scientific evidence of (individual wetlands having a significant nexus to a jurisdictional water in most cases will not be available and accumulating that evidence for individual wetlands is not pragmatic. As an alternative, we support the ecoregion aggregation approach whereby wetlands of a similar context and of similar f m and function (e.g., playas in the southern and central Great Plains, prairie potholes in the northern Great Plains, pocosins of the eastern Atlantic Plain) be regulated in the aggregate, Evidence' that wetlands of a similar form and function maintain a significant nexus to navigable waters m y be available and this method of determining regulatory authority should be used. Additionally, in uncommon instances where *significant nexus" determinations must be made, we recommend the formation of a clear and standardized process in which

these determinations will be made and that this document be made available for public review. (p. 3 – 4)

Agency Response: **See Summary Response. See the preamble discussion under "Case-Specific Waters of the United States" for further discussion on the (a)(7) and (a)(8) waters which require a case-specific significant nexus determination under the final rule. To provide additional clarification, the final rule includes a definition of "significant nexus" which includes a list of specific factors to be considered when making such a determination. The agencies also are developing implementation guidance to accompany the final rule when it becomes effective, which will provide for consistent determinations in an effective and efficient manner to the maximum extent practicable.**

Association of American Pesticide Control Officials (Doc. #14940)

12.1326 A) EPA and the Corps made extensive effort to collaborate with USDA to publish the Interpretive Guidance Rule for the Exemption From Permitting Under Section 404 of the Clean Water Act to Certain Agricultural Conservation Practices. AAPCO has reviewed and evaluated the list of "Normal Farming Practices" described by the NRCS Conservation Practices exempted from Section 404 Dredge and Fill permit requirements. AAPCO is greatly concerned that EPA and the Corps have exempted NRCS Conservation Practices that include pesticide applications for crop protection and pest control activities from the CWA Section 404 Wetland permitting requirements and have not provided for an equivalent consideration for pesticide application practices currently, or potentially, subject to CWA Section 402 NPDES permitting requirements. This circumstance highlights a significant internal discrepancy in the principles and practices of the proposed WOTUS Rule. (p. 3)

Agency Response: **Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation. Please see summary response 12.3.**

National Association of County Engineers (Doc. #14981)

12.1327 Significant Nexus -The proposed rule is vague and provides no guidance to determine what constitutes a "significant nexus." This would lead to inconsistent interpretation and determination depending on who is the regulator/reviewer. There is currently no engineering procedure, guidance, calculation or method to determine what constitutes a "significant nexus." Until a consistent methodology or clear definition is developed, the proposed rule cannot be implemented as stated. (p. 2)

Agency Response: **See Summary Response. See the preamble discussion under "Case-Specific Waters of the United States" for further discussion on the (a)(7) and (a)(8) waters which require a case-specific significant nexus determination under the final rule. To provide additional clarification, the final rule includes a definition of "significant nexus" which includes a list of specific factors to be considered when making such a determination. The agencies are developing guidance to facilitate effective and efficient implementation of the final rule once it becomes effective.**

Erika Brotzman (Doc. #15010)

12.1328 The proposed rule maximizes public benefits because efficient implementation results in effective regulation. Clarified definitions and consistent jurisdiction will alleviate the administrative and judicial burden on the government and provide a more efficient manner in which to regulate the safety of our waters. The agricultural exemptions included in the proposed rule continue to aggravate the effects of pollution in our local water, but sometimes compromises are made. Optimistically, the proposed rule would establish jurisdiction over "tributaries" near my family's home that are not exempt and thus reduce the concentration of pollution at the local beach. Grounded on science and relevant factors, the clarified definitions and the "significant nexus" test are constitutional under the powers granted to Congress. As shown in *Rapanos*, the proposed rule, if codified, would likely receive acceptance by a majority of the Court and reduce the burden of confusion administratively and judicially nationwide. For these reasons, I support the proposed rule that clarifies the definitions and scope of "the waters of the United States" under the Clean Water Act. (p. 2)

Agency Response: See Summary Response. The agencies acknowledge the comments and support for the rule. The rule does not affect any statutory activity-based exemptions under section 404(f)(1) of the Clean Water Act. It is also important to note that the interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

12.1329 I. The Right to Clean Water

A. The proposed rule maximizes public benefits because efficient implementation results in effective regulation.

The Clean Water Act's mission is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[306] Arguably, according to § 101(c) of the National Environmental Protection Act (NEPA), a healthful environment is a fundamental and inalienable right.[307] Sixty percent of streams and millions of wetlands are currently not guaranteed protection.[308] Since the founding of the country, the U.S. has lost over half of the wetlands. For example, California has lost over 90% of wetlands and Colorado has lost over 50%. Wetlands are supportive of biological life, effective in protecting communities from flooding, and improve water quality by purifying groundwater and filtering out pollutants in dense vegetation and sediments.[309] The proposed rule clarifies the scope of the U.S. Army Corps of Engineers' (Corps)

[306] 33 U.S.C. § 1251(a).
[307] Rodgers, ENVIRONMENTAL LAW, 804, FN 25 (referencing the creation of subsection 101(b) of S. 1075: the Senate passed the language, "Congress recognizes that each person has a fundamental and inalienable right to a healthful environment; the House reworded that language for the final bill. Comm. Of Conference, National Environmental Policy Act of 1969, H.R.Rep. No. 765, 91st Cong., 1st Sess. 8 (1969)).
[308] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WATERS OF THE UNITED STATES, www.2.epa.gov/uswaters (last visited Nov. 14, 2014).
[309] Bruce Selcraig, What is aWetland?, Sierra, pp.44-49 (May/June 1996).

jurisdiction under the CWA by identifying waters that have a "significant nexus" to "navigable" waters. Arguably, all water has a significant nexus to "navigable" waters simply by the nature of the waters and the hydrologic cycle. If the Corps are unable to regulate certain waters under the § 404 program those waters remain unregulated; this affects communities nationwide. By clarifying the scope of the Corps' jurisdiction, the proposed rule creates protection for most, if not all, of unregulated and better protection for the public and the environment.

The lack of a clear and consistent jurisdiction needlessly burdens the judiciary, the agencies and the regulated community. The administrative and judicial resources expended on the increased litigation and jurisdictional decisions results in less efficiency and more confusion implementing the Clean Water Act. Frequent case-by-case analysis requires additional staff time and resources to issue jurisdictional decisions, this works contrary to an efficient permitting process. The resources expended to "interpret and apply the ambiguous jurisdictional test and guidelines" is unnecessary and detracts from effective regulation under the CWA.[310] The proposed rule will remove the case-by-case analysis by establishing clarified definitions and consistent jurisdiction. This would reduce the time and use of resources performing activities that do not further the purposes of the CWA such as carrying out jurisdictional decisions or engaging in litigation to establish jurisdiction. Clarifying the jurisdictional scope of "the waters of the United States" would provide a more efficient permitting process; less strain on administrative, judicial, and financial resources; and better protection for the public and the environment. (p. 2 – 3)

Agency Response: **See Summary Response. The agencies acknowledge the comments supporting the rule. The purpose of the rule is to clarify the definition of "waters of the United States" in a manner consistent with the Supreme Court decisions, including the SWANCC decision on "isolated" waters and the Rapanos decision. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination.**

National Pork Producers Council (Doc. #15023)

12.1330 NPPC encourages the Agencies, before finalizing this rulemaking, to conduct a thorough and accurate field review of this class of features across the country and to provide NPPC and the rest of agriculture with their assessment of the likely jurisdictional consequences for these features.

Lacking such an assessment, the Agencies have undertaken this rulemaking in the absence of critical and important information to help them and the public assess the practical effects of the policies being advanced in the proposed rule. (p. 16)

[310] Jennifer L. Baader, Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction, 88 Chi.-Kent L. Rev. 621, 622 (2013)

Agency Response: **See Summary Response. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. See the Economic Analysis for further discussion on jurisdictional changes.**

North Carolina Farm Bureau Federation (Doc. #15078)

12.1331 If anything, this proposed regulation has added to the number of site visits that will be needed, and the time needed in the field, by the Agencies' personnel. The many ambiguous definitions, even more reliance on the judgment of the regulatory staff, and the expansion of the area covered by the rules absolutely will entail more site visits and in-the-field determinations.

Because there will be more site visits needed and more information gathered, farmers and landowners will have to wait a tremendous amount of time for the Agencies to come and make a determination -- many months to over a year or more. This will have a tremendous effect on time-sensitive activities, which may not be able to be conducted because the Agencies cannot get to the farm to do a determination.

Further, the Agencies do not have adequate personnel to do all of these additional waters determinations that will be required under the proposed rule. Will property owners with more private financial resources jump to the front of the line because they can hire expensive consultants to do delineations that require less staff time by the Agencies? This would be unfair to property owners who could not afford such consultants, but have the same needs for determinations as those who can.

It is a serious mistake for the Agencies to assume that this proposed rule will result in a need for fewer on-site determinations. The Agencies ' resources and landowner needs for timely determinations must be considered. This proposed rule should be withdrawn. (p. 4)

Agency Response: **See Summary Response. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted**

alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

National Association of Counties (Doc. #15081)

12.1332 Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project. (p. 11)

Agency Response: See Summary Response. The comments are beyond the scope of this rulemaking effort. While it is the responsibility of the Corps as the lead agency to determine if Endangered Species Act and the National Historic Preservation Act concerns are being met for a permit, there are cases where these laws or other federal, state or local laws would still require review outside a CWA related permit. A section 404 permit does not remove the requirement to get other permits if needed. Obtaining a jurisdictional determination from the agencies does not trigger Section 7 of the Endangered Species Act, a federal action does, and a CWA section 404 permit is a Federal action. However, private landowners are also required to comply with Section 10 of the Endangered Species Act in the absence of a federal action. The agencies are required to comply with other federal laws if within the scope of their federal action, including the Endangered Species Act and the National Historic Preservation Act. The agencies work to ensure this compliance with other federal laws is completed in the most efficient and effective manner, and may include programmatic agreements or local operating procedures to streamline the process. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S.

Association of Metropolitan Water Agencies (Doc. #15157)

12.1333 For situations that fall outside of any exclusions, we also recommend that, when this rulemaking is finalized, the Corps and EPA re-visit the eligibility criteria for nationwide permits. The final definition of WOTUS will have a direct impact on whether the current triggers are sufficient to ensure that (1) Corps and EPA staff resources remain focused on site-specific projects that have significant potential impacts and (2) water utilities and other entities engaged in construction, maintenance, repair, expansion, and

diversification projects incorporate generally accepted practices to assure protection of WOTUS, while minimizing regulatory burden and avoiding associated project delays. For water utilities, the ability to engage in timely construction and other maintenance and improvement projects has significant implications for infrastructure function, system integrity, public health, fire protection, local economies, and the local community's quality of life. It is critical that the Corps and EPA structure nationwide permits so as to not delay water system maintenance, repair, and construction activities. (p. 3 – 4)

Agency Response: See Summary Response. The comments are outside the scope of this rulemaking effort. See the Nationwide Permit program for further discussion of impact thresholds which may/may not require pre-construction notification. Nationwide Permit Program regulations can be found in 33 CFR Part 330. The nationwide permits will be reauthorized in 2017 after a public comment period soliciting comments.

Watershed Watch in Kentucky, Inc. (Doc. #15159)

12.1334 WWKY has worked for several years to promote the planning and development of green infrastructure in Kentucky communities. Because some governmental and other stormwater-regulatory entities have raised concerns about how the proposed rule would be applied to MS4s, WWKY recommends that the Corps and EPA work directly with affected communities and stormwater associations to help refine how the proposed rule would be applied to MS4s. (p. 3)

Agency Response: EPA engaged in outreach to local governments and stormwater professionals while developing the final rule and looks forward to working with them again in the implementation of the rule. As discussed in summary response 7.4.4., the final rule includes an exclusion for stormwater control features, including green infrastructure, built in dry land.

J. Canfield, Jr. (Doc. #15237)

12.1335 Some of those opposed to the agencies' proposed rulemaking seem to have been misinformed about how this proposed rule applies to farmers in particular. The agencies have exempted traditional farming practices, and the propose d rule would preserve all agricultural exemptions and exclusions from CWA requirements, retaining the same provisions that have existed for the past forty years.[311] In addition, according to a Memorandum of Understanding, farmers would be able to carry out conservation practices without permitting by ensuring that these practices enhance water quality and are done in accordance with Natural Resources Conservation Service standards.[312] (p. 2 – 3)

Agency Response: Exemptions from permitting for discharges to jurisdictional waters are beyond the scope of this rule. The interpretive rule titled, "U.S.

[311] United States Environmental Protection Agency. "Waters of the U.S."

[312] United States Department of Agriculture, United States Environmental Protection Agency, and the United States Department of the Army. "Memorandum of Understanding Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards. March 25, 2014. Accessed November 6, 2014. http://www2.epa.gov/sites/production/files/201403/documents/interagency_mou_404f_ir_signed.pdf.

Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015.

City of Greeley, Colorado, Water and Sewer Department (Doc. #15258)

12.1336 Please clarify how the final rule will apply to prior permitting and jurisdictional determinations (p. 7)

Agency Response: See Summary Response. The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.

Sealaska Corporation (Sealaska) (Doc. #15356)

12.1337 Energy Transmission and Distribution Facilities. Activities related to the transmission and distribution of energy may now require federal permits under the proposed rule, causing uncertainty, delay, and cost. Such facilities are planned for the villages of Angoon, Hoonah and Hydaburg and offer relief for struggling Southeast Alaska villages from high electricity costs from diesel fuelled generators. For example, the development of transmission and distribution facilities could be negatively impacted if traditional transmission/distribution rights of way are now to be considered waters of the U.S under the proposed rule. These rights of way often include ditches alongside roadways that may not fall within the two narrow exclusions proposed by the Agencies. The lack of guidance about what types of areas would constitute "uplands" adds additional uncertainty, delay, and costs to the process for siting and constructing these facilities. In addition, utilities that operate substations along transmission routes are required by EPA regulations to have Spill Prevention Control and Countermeasure (SPCC) Plans in place. The increased scope of CWA jurisdiction under the proposed rule would require utilities to incur additional costs to expand these SPCC plans to take into account the areas not currently considered waters of the U.S. The challenges facing transmission facilities also apply to the construction of new generation. This is especially true for natural gas plants that require pipelines to transport gas to any new natural gas electric generating facility. The siting and permitting of new natural gas pipelines may be delayed further by the proposed rule. The Agencies should avoid needless adverse impacts to energy projects by revising and clarifying the rule as discussed in this letter. (p. 21-22)

Agency Response: Under the final rule, the scope of regulatory jurisdiction is narrower than that under the existing regulations. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. These ditch exclusions are clearer for the regulated public to identify and more

straightforward for agency staff to implement than the proposed rule or current policies. The ditch exclusions do not affect the possible status of that ditch as a point source. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow that are not excavated in or relocate a tributary or drain wetlands, regardless of whether or not the wetland is a covered water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies. The ditch exclusions do not affect the possible status of that ditch as a point source. The agencies have deleted the term "uplands" in response to the confusion the term created. Please also see summary response 12.5.

North Dakota Office of the Governor, et al. (Doc. #15365)

12.1338 Using floodplains to create per se federal jurisdiction is ill-defined and will result in expansive federal jurisdictional claims. Floodplains vary across the country based on climate and geography. In parts of the west, floodplains may be limited to the bed and bank of the flooding body where this regulation could possibly make more sense. However, in the Red River Valley of North Dakota and Minnesota, the flatness of the land allows the floodplain to be miles wide. Using a vague definition of floodplain would allow the EPA and Corps to have federal jurisdiction over miles of land after the flood recedes; not to mention the potholes, wetlands, and streams filled by the flood.

Defining floodplains by a set number of years event is also ineffective because floodplains can change dramatically with climactic and meteorological changes. Rather, water in floodplains should only be jurisdictional within the riparian area of the flooded zone. This pragmatic approach acknowledges that flood spillovers can cause pollution problems, but also realizes that large realms of federal jurisdiction are not the solution. (p. 9)

Agency Response: See Summary Response. See the definitions in paragraph (c) of the final rule for further clarifications under the definition of "neighboring" and the corresponding preamble sections for additional discussion about the terms used in the final rule such as "floodplain". The final rule has been revised to reflect concerns received about the proposed rule, including additional clarity as to the use of "floodplains" in the final rule.

12.1339 The expanded tributary definition does not provide clarity and could act as a roadblock to normal agricultural practices.

The definitions of tributaries and their riparian lands are so expansive, that vast areas of agricultural land will be contained within areas defined as jurisdictional. The statement that EPA is not managing land is nonsensical. The most fundamental management practice of agriculture is water management – its retention, conservation, or removal. This rule claims jurisdiction over anything from fields to tributary drains at field outlets, and leverages authority over agricultural practices smaller than field scale. Conditions

and climatic events that impact farmers are highly variable and even erratic, making state jurisdiction appropriate over federal.

For example, North Dakota has experienced a wet cycle during the last two decades in which water lying in fields drastically changes throughout the year. In the eastern part of the state, where the landscape is flat, water may sit in a field from April through June, and then dry up for the end of the planting season. Under the proposed rule, this depressed area – if it develops a bed, bank, and ordinary high water mark or reaches an actual navigable water – could be considered a WOTUS. This could be anything from a tire track that sits with water too long to a low area where rainwater channels.

Additionally, the federal jurisdictional inclusion of intermittent streams and tributaries and ephemeral streams means agriculture management will be further impeded, as farmers will not know which water on their lands is jurisdictional. The broad scope of these regulations creates a scenario where the farmer is going to have to prove that they did not discharge rather than federal agencies proving that there is a problem. This is a backwards scenario. If there is a discharge into upstream waters, it is regulated by the state and is appropriately handled at the state level. It is the state's responsibility to address pollution events until they impact waters within EPA's jurisdiction as defined by the Supreme Court. Current state oversight makes it unnecessary and unjustified for EPA to regulate all waters as a just-in-case scenario. (p. 11-12)

Agency Response: **See Summary Response. See the preamble section on "Tributaries" for further discussion on the characteristics required to meet the definition of a tributary. To be considered a "tributary" under the final rule, a water feature must demonstrate both bed/banks and an ordinary high water mark which would distinguish them from non-jurisdictional features. The tributary characteristics required by the rule indicate sufficient volume, flow, and frequency of water such that the tributary would have a significant nexus to the (a)(1) to (a)(3) waters. The rule also contains clarifying language regarding which water features are and are not Waters of the US. Please see the preamble section Water and Features that Are Not Waters of the United States" for further clarification. The agencies do not agree that the rule will have an effect on farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs.**

William Schock (Doc. #15394)

12.1340 The Supreme Court determined that the EPA and USCOE had overreached their authority in its implementation of the Clean Water Act before this rule was written. It is of little reassurance that the agency's claim that this draft rule will not expand the

jurisdiction of the EPA when the court has already upheld that it is currently overreaching. The current EPA estimates that its jurisdiction will only expand by 3% are even less reassuring since this would result in further overreaching, it is clearly dishonest. The only course of action at this juncture by the EPA would be to reduce its jurisdiction to levels that would be commensurate with the desires of the affected states and the Supreme Court. This could easily be reductions in the neighborhood of 90% in arid states such as Arizona. (. 2 – 3)

Agency Response: See Summary Response. The Economic Analysis provides a discussion on predicted changes in jurisdiction. The Technical Support Document provides additional information on the legal basis for the final rule.

Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407)

12.1341 Many "tributaries" that arguably meet the above definitions carry storm water runoff. We Energies is required to manage this runoff in the course of conducting its business. The proposed rule will impose federal CWA regulation to features that are constructed and used pursuant to other federal and state regulatory programs. For example, electric and gas distribution facilities cross or otherwise affect ephemeral drainages and ditches. The agencies should meet with stakeholders to fully understand the implications on other federal and state regulatory programs and revise the rule to avoid duplication and conflicting requirements. (p. 5)

Agency Response: See Summary Response. The rule contains clarifying language regarding which water features are and are not Waters of the US. Please see the section in the preamble on "Water and Features that Are Not Waters of the United States" for further clarification. In particular, paragraph (b) of the final rule clarifies the exclusion for stormwater control features and the exclusion for erosional features and ephemeral features that do not meet the definition of "tributary." The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs. Implementation of regulatory programs that rely on the definition of waters of the US is beyond the scope of this rulemaking.

National Association of Manufacturers (Doc. #15410)

12.1342 Environmentally beneficial projects, such as the maintenance (including sediment removal and other maintenance activities) of stormwater conveyance systems that keep stormwater away from potential contaminants and industrial processes, may require permits, as these stormwater conveyances could be "waters of the United States" under the proposed rule. (p. 29)

Agency Response: See Summary Response. The comments are outside the scope of this rulemaking. The rule contains clarifying language regarding which water features are and are not Waters of the U.S. Please see the section in the preamble

on "Water and Features that Are Not Waters of the United States" for further clarification. In particular, paragraph (b) of the final rule provides clarification regarding the exclusion for stormwater control features and the exclusion for erosional features and ephemeral features that do not meet the definition of "tributary." The rule does not affect the statutory activity-based exemptions under section 404(f)(1) of the Clean Water Act, including those related to the maintenance of drainage ditches. In addition the Corps nationwide general permit program includes several permits for discharges associated with maintenance activities that may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. Also, please see summary response 7.4.4.

12.1343 Minor spills that occur completely within the boundaries of a facility and are immediately addressed such that no potential contaminants leave the spill area or impact any current water of the United States may become illegal discharges to a new "water of the United States" if the spill occurs on a roadway, in or near a stormwater system, or in other areas where water may occasionally be present. (p. 29)

Agency Response: **Please see response summary 12.5.**

12.1344 Projects will undoubtedly be delayed, and some even abandoned, if Clean Water Act permits are required as a result of the proposed rule due to the extremely long lead-time required for obtaining permits and going through the required federal consulting processes. The lead-times are excessive now, and the agencies have not addressed how the proposed rule, and its likely increased permit requirements, will not result in even longer lead-times for receiving permits. (p. 29)

Agency Response: **See Summary Response. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States" or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination.**

12.1345 Not only might projects be delayed due to the need for permits, in some instances these delays may well render projects economically or operationally infeasible. The proposal raises uncertainty regarding whether small and routine projects that currently take advantage of established general or nationwide permit programs might be required to obtain individual permits, causing additional delay and great increased cost. Over time,

changes in agency permits have changed the requirements that allow projects to take advantage of these permits, but these permit programs were not established with the proposed rule's sweeping changes to which "waters" may be jurisdictional in mind. Likewise, the end result of the proposed rule on general and nationwide permit programs may be that these programs are no longer viable, meaning that individual permits will be required for every project. It is not clear that the agencies considered the impact of this change on their resources, nor have they considered the impacts to permittees (p. 29).

Agency Response: **See Summary Response. The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. Furthermore, the agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.**

12.1346 Several of our members have received jurisdictional determinations, or preliminary jurisdictional determinations, from the Corps finding that certain waters are non-jurisdictional because they do not meet the "significant nexus" test contained in the Rapanos Guidance. In several cases, the waters found to be non-jurisdictional in these determinations under the Rapanos Guidance would likely be found to be jurisdictional under the proposed rule due to the characteristics and locations of the waters making them newly minted "tributaries" or "adjacent" waters. Furthermore, nowhere do the agencies address what will become of these jurisdictional determinations, which are valid for five years, if the proposed rule were to be adopted. This will create regulatory uncertainty and may require duplication of efforts by the regulated community and the agencies to address questions that resources have already been expended to answer. (p. 30)

Agency Response: **See Summary Response. The Rule will be effective 60 days after publication in the Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble addresses the status of final JDs and permits as well as pending JDs and permits. The agencies have revised the definition of "neighboring" under adjacent (a)(6) waters in an effort to provide more of a "bright line" to reduce the "burden of proof" on both the agencies and the regulated public. The rule states that all tributaries and all adjacent waters have a significant nexus either alone or in combination with other similarly situated waters in the region such that they are jurisdictional by rule. Waters must meet the confines of the definitions in order to be jurisdictional by rule.**

Calcasieu Parish Police Jury, Louisiana (Doc. #15412)

12.1347 WHEREAS, if more waters fall under federal jurisdiction, parishes/counties will be forced to submit more Section 404 permits and will face longer delays in the jurisdictional determination and permitting process. Under this new proposed rule, Calcasieu Parish will be burdened by an abundance of Section 404 permits due to the fact that forty-six percent (46%) of the Parish is located in a Special Flood Hazard Area whereby those properties would be greatly affected; and (p. 2)

Agency Response: **See Summary Response. Please see the Economic Analysis completed for the final rule for a discussion on predicted changes in jurisdiction. There are two types of jurisdictional determinations; preliminary and approved jurisdictional determinations. Preliminary jurisdictional determinations indicate which waters on a property may be waters of the U.S., presume all waters on a property are jurisdictional, are not legally binding instruments, and enable a landowner to set aside the issue of jurisdiction and move directly into the permit evaluation phase of the process. Preliminary jurisdictional determinations cannot be used to decline jurisdiction and are generally more expedient than approved jurisdictional determinations. Approved jurisdictional determinations are the official Corps determination that jurisdictional "waters of the United States" or "navigable waters of the United States," or both, are either present or absent on a particular site. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act/Rivers and Harbors Act. The majority of jurisdictional determinations completed by the Corps are preliminary. Not every permit application requires a jurisdictional determination.**

12.1348 WHEREAS, the permit itself is not a problem, but the process used can be challenging for local governments, as 404 permits can be time-consuming and expensive to obtain, causing delays of up to three to five years, with significant overhead costs associated with consultants, lawyers, engineers and special conditions attached to the permit. These additional delays and costs could significantly alter the benefit cost ratio on some vital restoration and protection projects in Southwest Louisiana. The State of Louisiana loses the size of Delaware each year, and we simply cannot afford to add delays to coastal restoration projects at this critical stage; and (p. 3)

Agency Response: **See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. Several categories of waters under the 2003 and 2008 guidance documents required case-specific analysis to determine jurisdiction, including significant nexus determinations. There is not expected to be a required timeframes for completion of a jurisdictional determination, which can be dependent on a variety of factors including climate and weather patterns. See the preamble section for the case-specific significant nexus determination discussions regarding "similarly situated" under (a)(7) and (a)(8) waters. The agencies will continue to only provide a jurisdictional determination at the landowner's request; the agencies do not determine jurisdiction absent such a request. See previous response for types of jurisdictional determinations and ways in which the permit process may be accessed more rapidly.**

United States Steel Corporation (Doc. #15450)

12.1349 The proposed rule applies the new definition of "waters of the U.S." throughout all CWA programs, and will result in fundamental changes to those programs. The agencies have not considered the implications 0 f this application. (p. 2)

Agency Response: **See Summary Response. The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA) and Supreme Court precedent. The final rule does not establish any regulatory requirements or change implementation of CWA programs or processes, which are outside the scope of this rule.**

Keweenaw Bay Indian Community (Doc. #15497)

12.1350 The Keweenaw Bay Indian Community{KBIC) is a federally-recognized tribal nation located along the shores of Lake Superior, with a strong cultural and spiritual connection to the land and water, and whose members rely heavily on the natural environment to meet subsistence, economic, spiritual and medicinal needs. KBIC ceded traditional homelands ("Ceded Territory") to the U.S. under the Treaty of 1842; however reserve rights to hunt, fish, trap, and gather within this territory. All federal agencies, including the Environmental Protection Agency (EPA), share in the federal government's responsibility to protect treaty rights and maintain and enhance trust resources.

Water is our lifeblood, to KBIC, the protection and restoration of waters is vital in ensuring the availability of resources for the next seven generations. KBIC supports the proposed definition's inclusion of: 1) all tributaries of waters described in subsections 1-4 of Section(s) of the rule; and 2) wetlands and waters adjacent to those waters and their tributaries. However, KBIC would appreciate further consultation regarding the impacts the proposed definition may have on reserved treaty rights. (p. 1)

Agency Response: **The agencies appreciate KBIC's comments supporting the proposed definition. The agencies considered these comments and other tribal comments in the development of today's rule. The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act Final Rule* is available in the docket for this rule.**

Packaging Corporation of America (Doc. #15515)

12.1351 The Proposed Rule will invariably have a number of significant consequences for forest owners, including uncertainty whether water features on forest lands are jurisdictional new or additional permitting obligations; new requirements to meet water quality standards or total maximum daily loads (TMDLs); and increased exposure to citizen suit litigation. These new complexities will have the effect of bringing regulatory uncertainty to forest landowners and increased costs to our procurement of fiber resources, with no commensurate improvement to the environment. The Proposal does not serve the agencies' goal of providing clarity as to whether a given parcel of land contains WOTUS. Forest owners cannot reliably predict whether a seemingly isolated waterbody on their land will be deemed as lying within a "riparian area" or "floodplain" of jurisdictional water. Nor can they confidently distinguish between an excluded erosional feature and a jurisdictional ephemeral tributary. Given the ambiguity and lack of clarity in the proposal, forest owners will be put in a position of trying to account for extensive tributary systems, riparian areas, floodplains, and the extent of subsurface hydrologic connections that extent far beyond the boundaries of their lands. This may not be possible for landowners who are carrying out normal silvicultural activities that do

not produce sufficient financial returns to justify the analysis. As a result, forest owners could lose the ability to manage lands and may see other less benign uses for their land.

The Proposal also poses a significant problem for forestry operations subject to best management practices. Categorical designation of ditches and ephemeral streams, in particular, will cause considerable confusion as to how forest owners are to implement best management practices like buffers along roadside ditches. Moreover, despite existing exemptions in CWA Sections 404(f) and 402(I) for certain activities in the forest, the Proposal's expansion of WOTUS could mean that non-stormwater discharges of pollutants into newly jurisdictional ditches and ephemeral drainages could be considered unlawful discharges without an NPDES permit, thereby potentially triggering daily penalties. The expansion of jurisdiction under the Proposal could also trigger new obligations under CWA Section 303 relating to water quality standards and TMDLs. For example, an impaired waters listing and the regulatory restrictions resulting from the TMDL process could negatively impact private forest owners, who must comply with any resulting lad use restrictions and may see a reduction in their property values.

Finally, forest owners have long had to defend against citizen suits such as the "forest roads" case that tool almost a decade to resolve. The Proposal would invite similar citizen lawsuits against forest landowners seeking to halt operations. Given the vague terms in the proposal, citizen plaintiffs could find any number of ways to allege that a given silvicultural activity results in a direct discharge to some water feature that is purportedly a WOTUS. Regardless of whether such allegations have any merit, resolving them costs time and money and they disrupt forestry operations. Given the potential implication of the rule to forest management concerns, the Agencies need to include broad new language that would reaffirm clear exemptions of silvicultural activities. (p. 5-6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Exemption from permitting requirements for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section 404(f)(1) of the Clean Water Act those activities for which the discharge of dredged or fill material is exempt from regulation.**

Business Council of Alabama (Doc. #15538)

12.1352 The proposed rule goes into much detail as to what factors or parameters should be used to determine a "significant nexus". In order for an applicant or the agencies to evaluate the evidence as to whether a proposed project area meets the various tests for "connectivity" it is likely to take a significant amount of time and costs. Because of time and/or costs to the applicant associated with the agencies evaluation of all these parameters it will encourage applicants to concede that a connection exists and that their project will impact WOTUS thereby triggering a Corps permit application. These concessions are likely to result in over regulation and mitigation for many projects where the science would not support EPA/Corps jurisdiction. (p. 4-5)

Agency Response: **See Summary Response. The rule clarifies which waters are and are not jurisdictional under the Clean Water Act. The agencies are developing**

guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective.

Brown County Farm Bureau (Doc. #15576)

12.1353 Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide or moving cattle if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earthmoving activity, such as plowing, planting or fencing, except as part of established farming ongoing at the same site since 1977.

Technically, EPA could absolutely require a permit for cows or hogs crossing a stream or wet pasture. Under federal regulations, manure is a Clean Water Act pollutant. If a low spot on a pasture is a jurisdictional wetland or ephemeral stream under the new rule, EPA or a citizens group could sue the owner of the livestock that discharge manure into those jurisdictional waters without a Section 402 permit. (p. 1)

Agency Response: Please see summary response 12.3.

K. Ransford (Doc. #15675)

12.1354 (…) 5. I am concerned about the 56 exemptions that that farmers have from the Clean Water Act. Agricultural irrigation practices do a lot of damage to rivers in the West. At a public meeting to discuss the proposed rule in nearby El Jebel in July, 2014, a farmer in the audience complained that the new rule would prevent him from using the pesticide 2-4-D to clear weeds from his irrigation ditches. In fact, it is illegal to use this pesticide in ditches, but I suspect it happens regularly. The USDA updated its agricultural census in 2012, and I looked at 14 counties that make up the Upper Colorado River headwaters. Combined, their average income from products sold is $51,612, and their average expenses are $57,212. They lose money every year, but divert as much water out of streams as possible in order to prove up their water rights - irrigated land sells for nearly 3 times more than dry land in Colorado. Because they lose money, many farmers cut corners wherever they can, including putting pesticides in irrigation ditches. But, this is harmful to streams. I think failing to adopt this new rule because of objections from the agricultural community is a big mistake. (…) (p. 1)

Agency Response: The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015. Exemption from permitting requirements under section 404(f)(1) of the Clean Water Act for discharges to jurisdictional waters is beyond the scope of this rule. Congress identified in section 404(f)(1) those activities for which the discharge of dredged or fill material is exempt from regulation.

City of Jackson, Mississippi (Doc. #15766)

12.1355 II. Regulation of ditches and stormwater structures would be unnecessary, unduly complex, time-consuming, and counter-productive

Classifying ditches and storwwater management infrastructure as "waters of the united States" could subject the City to a broad range of cumbersome and impractical CWA

regulatory schemes. Cities and counties use ditches and their related infrastructure to capture and convey water away from low-lying roads, properties, and businesses to prevent accidents (such as traffic accidents on low-lying roadways), protect public safety, and to limit flooding and the damage flooding causes. These ditches require maintenance, such as cleaning out vegetation and debris, as well as repairs and modifications. The proposed rule could require Section 404 permits for these basic ditch maintenance activities. See 33 U.S.C. 5 1344 (requiring permits for "discharge of dredged or fill material"). The jurisdictional determination process for Section 404 permits entails lengthy and resource-intensive delays. And often, as part of the approval process, the permit requires applicants to "mitigate" the environmental impacts of proposed projects and attach special conditions on maintenance activities, which can be at great expense.

Further, the proposed rule could conflict with stormwater measures and programs and lead to further regulation under numerical water quality standards (including total maximum daily loads). And the new requirements would potentially extend EPA's reach into local land use activities traditionally reserved to state and local regulation. In addition, other types of infrastructure projects, including construction and maintenance activities associated with stormwater management, could become federally regulated. For example, local governments use green infrastructure-stormwater detention ponds, bioswales, vegetative buffers, and constructed wetlands - to address stomwater runoff problems and protect water quality. Stormwater projects and green infrastructure should n

be subject to the cumbersome and impractical Section 404 process. (p. 2 – 3)

Agency Response: **See Summary Response. Under paragraph (b) of the rule, certain waters and features are not considered "waters of the U.S.," including certain ditches, stormwater control features, and certain green infrastructure. The paragraph (b) exclusions are applied before determining if jurisdiction applies per the paragraph (a) categories. See the preamble section on "Water and Features that Are Not Waters of the United States" for further clarification. The final rule does not affect the existing statutory activity-based exemptions under Section 404(f)(1) of the Clean Water Act, including those for the maintenance of drainage ditches. In addition, the Corps nationwide general permit program includes several general permits for discharges associated with maintenance activities, some of which may not require pre-construction notification for expeditious review and efficiency in processing verifications under Section 404 of the Clean Water Act. Also, please see summary response 7.4.4 regarding stormwater control features.**

National Association of State Conservation Agencies (Doc. #15778)

12.1356 Additionally, our experience is both EPA and USACE regulatory programs implementation vary greatly from region to region. The proposed rule is fraught with ambiguity, and its implementation would rely heavily on subjective interpretation and analysis on the part of regulators. This approach fails to provide certainty to the regulated community and is thus inequitable and unreasonable for the owners and operators of America's working lands. (p. 2)

Agency Response: **See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The initial phase of implementing the rule will require education**

and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The agencies understand that there is regional variation which can make it appear that there are inconsistencies in the program. However, the rule aims to reduce any inconsistencies and provide a bright line of clarity for the agencies, state partners, and the regulated public.

Martin Marietta (Doc. #16356)

12.1357 At a December 12, 2013, meeting with representatives of the White House Office of Management and Budget, the EPA and Corps of Engineers, Steve Whitt presented information on a 2,700-acre green site being developed in Texas. The USGS maps for this area indicated that almost seven miles of blue line streams exist within the property boundary. A 2009 jurisdictional determination (confirmed by a full field review) indicated that there were no jurisdictional features within the project boundary. This specific type of situation is why Corps field staff should not be allowed to make jurisdictional determinations based on desk-top studies. This will lead to inaccurate and inconsistent determinations by Corps field staff.

This Texas site is also a prime example of how the proposed rule will expand jurisdiction. Our consultant estimates that more than a mile of drainage way within this project boundary would be jurisdictional under the new definition. At $250 per foot, the mitigation costs would be $1,250,000 if this is managed at a 1:1 ratio. The proposed site will sweep in marginal aquatic areas and lead to increased regulation of remote and ephemeral areas.[313] (p. 2)

Agency Response: See Summary Response. See the Economic Analysis regarding predicted changes in jurisdiction. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. The agencies have been using remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the

[313] *This paragraph was included to provide context to the first paragraph, already included in the final #12 Compendium.*

district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate. See the preamble for further discussion on desktop tools in the "Tributary" section. In addition, desktop tools are critical in circumstances where physical characteristics waters are absent in the field, often due to unpermitted alteration of waters. The majority of this information is available for the public's use; these tools can allow for greater consistency with currently available and accessible data sources.

Wyoming Department of Environmental Quality (Doc. #16393)

12.1358 The process used to develop the proposed rule lacked any meaningful consultation with the states. The result is a rule that contains a considerable amount of uncertainty regarding the extent of the CWA's authority and the additional costs that will be associated with the implementation of federal regulations over an expanded universe of waters. Additionally, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) did not comply with the state consultation criteria in Executive Order 13132 (Aug. 10, 1999) regarding the formulation of policies that have federalism implications. The proposed rule infringes on states' rights to regulate water quality in surface waters with no rational connection to traditionally navigable waters - the touchstone of CWA jurisdiction. (p. 2)

Agency Response: The agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule State and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous State and local government organizations. Please see Preamble discussion of Executive Order 13132. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. Please also see summary response 12.3.

Kentucky Waterways Alliance (Doc. #16581)

12.1359 Jurisdictional and Non-Jurisdictional Determinations

It is critically important that the federal agencies, interested groups, and the public have ready access to as much information as possible and practicable about jurisdictional determinations. The agencies should learn from and correct numerous problems that developed in the last decade.

Key to public participation is the regular posting by the Corps districts of the jurisdictional determination forms. RGL 07-01 specifies that completed jurisdictional forms "shall be posted within 30-days of completion," but it is difficult to discern whether this is followed in practice without monitoring district websites regularly. The

Corps and EPA headquarters should ensure that jurisdictional decisions are publicly available in a timely way. All districts should be required to post all completed determinations at least once a week. Additionally, jurisdictional determinations should remain available on Corps websites for five years, that is, while they are in effect.

Moreover, the proposed rule should include a process by which case-by-case determinations of significant nexus are recorded and used in future decisions. The rule should include a requirement that districts compile and publicize such determinations in order to assist in identifying other similarly situated waters with the region.

The Corps' district personnel (and EPA field staff) should be required to use a common, publicly accessible, database for JDs. Such a tool will enable concerned citizens, resource managers, and others to assess whether similar waters are being treated similarly across the country, track the amount of resources found nonjurisdictional and consider whether to make policy or regulatory changes to adequately protect important resources. (p. 13 – 14)

Agency Response: **See Summary Response. The final rule has been modified from the proposed rule in an effort to improve clarity and provide additional "bright lines" for the agencies and the regulated public to understand which waters are and are not jurisdictional and which waters require a case-specific significant nexus determination. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies will continue to provide a jurisdictional determination at the request of a landowner. The Corps anticipates continuing the practice of posting approved jurisdictional determinations on district websites.**

12.1360 D. Gillham (Doc. #16906)

C. More ambiguity and potential for government regulation will deter farmers and ranchers from participating in conservation programs, when these already require lots of time and paperwork. (p. 2)

Agency Response: **See Summary Response. All jurisdictional determinations are made on a case-by-case basis at the request of a landowner. The agencies do not agree that the rule will have an effect on farmers' ability to make decisions about activities on private land. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands. Therefore, we do not believe that the implementation of conservation practices will be negatively impacted by the Federal Government as a result of the rule. In addition, the rule does not affect the statutory activity-based exemptions under section 404(f)(1) of the Clean Water Act, including those for normal farming activities.**

Delaware County Department of Watershed Affairs (Doc. #16936)

12.1361 Specifically, we are requesting that the NRCS Conservation Practice Standard #574 (Spring development) and #614 (Pipeline and Trough) to be included in the list of NRCS Conservation Practices exempt from permitting under the Clean Water Act. (p. 3)

Agency Response: **The interpretive rule titled, "U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the**

Applicability of Clean Water Act Section 404(f)(l)(A)," was withdrawn by the agencies as required by the Consolidated and Further Continuing Appropriation Act on January 29th, 2015. Exemption from permitting requirements section 404(f)(1) of the Clean Water Act for discharges to jurisdictional waters is beyond the scope of this rule.

Cook County, Minnesota, Board of Commissioners (Doc. #17004)

12.1362 (…) WHEREAS, the EPA and the Corps affirm that these new regulations will result in an increase in jurisdictional determinations that will initiate an increased need for permits (more Corps §404 permits, State permitting authorities will be faced with more National Pollutant Discharge Elimination System [NPDES] permits and more entities will be subject to Clean Water Act [CWA] requirements); and

WHEREAS, in addition to the Corps §404 dredge and fill permits, the guidance applies to all CWA programs including §303 water quality standards, §401 state water quality certifications, §311 Oil Pollution Act (including Spill Prevention, Control, and Countermeasure [SPCC]), and §402 program (including NPDES permits, pesticide general permit, and storm water); and (…) (p. 4)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction. Please see summary response 12.2 regarding 401 certifications. See also summary response 12.3. The rule does not change or impose new requirements for complying with the pesticides general permit. See also summary response 7.4.4 regarding stormwater control structures.

Arizona Rock Products Association (Doc. #17055)

12.1363 ARPA companies are very concerned on the time commitments and financial resources that would be required to technically and accurately determine the potential for subsurface connections for wetlands, or waters, adjacent to tributaries and are jurisdictional. Depending on the operation location, there are often times multiple factors to consider when designing a final reclamation plan that ensures public safety, ensures compliance with all environmental factors, and meets the requirements of the state or federal agencies. Some sites are located at, or adjacent to, areas that have undergone significant engineering change over time (e.g. new highways, bridges, impoundments, utility channel crossings, soccer fields, parks, commercial development, etc.)

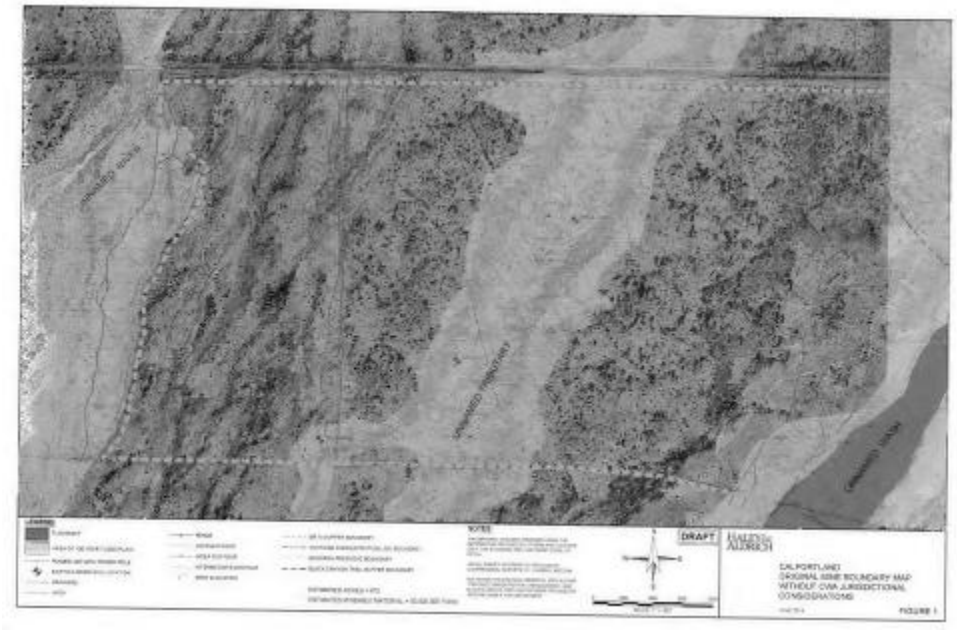
The post mining land use is engineered to not only ensure the most practicable and best land use (e.g. commercial development) for the property owner, but mine planning and reclamation plans are developed that improve the market value, bolster the local economy with high paying jobs, but also may actually improve the regional management of waters via tributary flow. ARPA companies work with the state and local governments to plan the best post-mining land use and improve the functionality of the existing property, all while maintaining the highest regards for public safety. In the arid southwest, historical natural and man-made features exist throughout most ephemeral tributaries. The

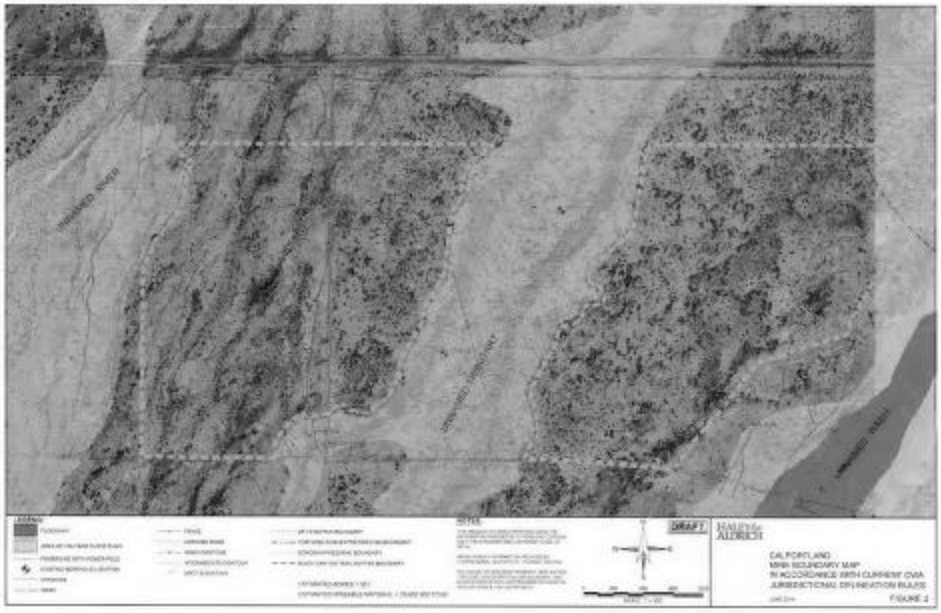
dynamics of unpredictable and variable rainfall have changed the effectiveness of many of these features, and in some cases have changed the natural flow patterns of the tributaries over time. Some features remain intact and are considered to be sound in design. While others are breached, dilapidated, may no longer serve their original engineered intent.

The arid southwest contains both historical, and relatively new engineered improvements that may or may not affect the determination of inclusion as jurisdictional and depending on the location and mine plan design of individual operations, may significantly change the dynamics of the tributary.

Additionally, the changes to the CWA jurisdictional language will be particularly impactful in the arid/semi-arid west, where ephemeral streams and isolated "other waters" are prominent features of the landscape. Given the specific hydrologic and geologic desert conditions that prevail in this area, the proposed rule's expansion of CWA requirements goes far beyond anything that could be justified as a reasonable interpretation of the CWA's jurisdiction over "navigable waters." The proposed rule inappropriately proposes to expand CWA jurisdiction to features that are effectively dry land so long as they ever—or might ever—contribute the slightest increment of water flow to downstream traditional navigable waters, no matter how small that flow or how far away a navigable water might be. Such an expansion would impose substantial costs and administrative burdens upon land development activities in the arid southwest, negatively affecting the local economy with no discernible environmental benefit.

Please see the attached Example A – *Impacts on Calportland's Proposed Arizona Mine Site.* The information provided is specific to a proposed mining site in Arizona and highlights the Association's concerns given the unique conditions of the arid southwest. (p. 4 – 5, 9 – 12)





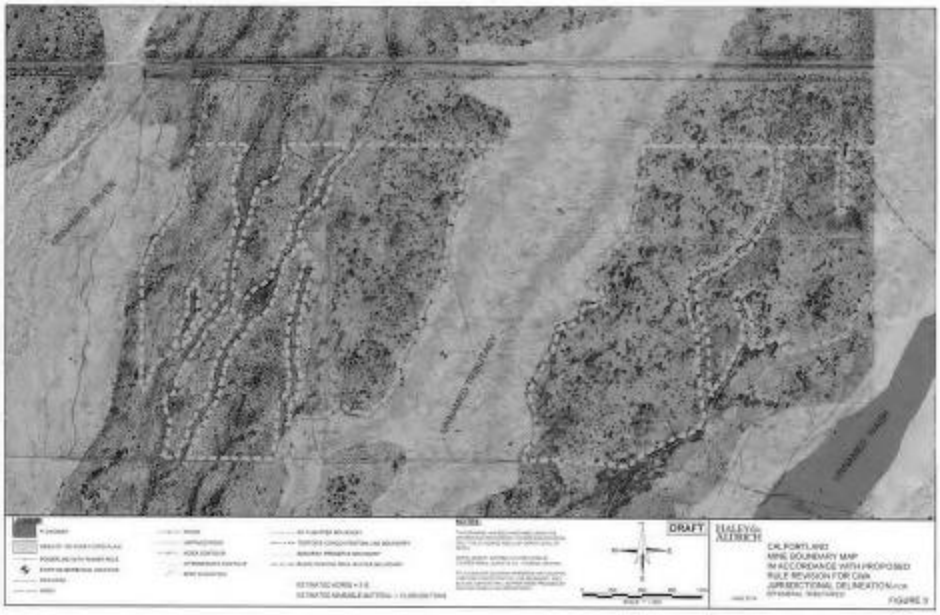


Table 1. CalPortland Mine Site in the Arid Southwest

	Map 1	Map 2	Map 3
	Original Mine Plan, without CWA Jurisdictional Delineation Consideration	**Revised Mine Plan, In Accordance with Current CWA Jurisdictional Delineation Rules**	**Potential Mine Plan, In Accordance with Proposed Rule Revision for CWA Jurisdictional Delineation (for Ephemeral Tributaries)**
Acres (approx.) *(Net Loss est.)*	672 *Net Loss of Mineable Acres: 0*	351 *Net Loss of Mineable Acres: 321*	316 *Net Loss of Mineable Acres: 35*
Estimated Mineable Material (tons) *(Net Loss est.)*	50,000,000 *Net Loss of Mineable Volume: 0 tons*	29,800,000 *Net Loss of Mineable Volume: 20,200,000 tons with Current Rule*	12,000,000 *Net Loss of Mineable Volume: 17,800,000 tons with New Rule Imposed*

CalPortland Mine Site
Ephemeral Tributary Example Photo #1

CalPortland Mine Site
Ephemeral Tributary Example Photo #2

Agency Response: **See Summary Response. A water body must meet the definition of "tributary" to be considered jurisdictional under (a)(4). The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. Some ephemeral features may include on an ordinary high water mark without the characteristics of bed and banks; such ephemeral features would not be considered a tributary under the rule. It is also important to note that the tributaries must also contribute flow directly or through another water to an (a)(1) to (a)(3) water in order to be jurisdictional. The rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." The Science Report and the SAB support that tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters. The agencies have found that ephemeral streams that meet the definition of "tributary" provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will increase consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the OHWM regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient. The training will include regionally-based sessions to ensure consistent and efficient implementation of the rule. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the**

rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.

K. G. Oertel (Doc. #17317)

12.1364 In addition, the proposed rule language provides no assurance that it will be implemented consistently and with reasonable predictability by even the lowest measurement. By applying the agencies' jurisdiction to "other waters" on a case-specific basis, there is no safety net or guarantee that the rule will be applied fairly, evenly, or with any predictable or measurable standards. How will an applicant know which permits he or she is required to obtain for work which was not typically under the jurisdiction of the EPA or Army Corps of Engineers prior to the enactment of this rule? How will the agencies limit their power so as not to expand their jurisdiction into areas not preconceived by Congress? In fact, there is no limit to the agencies' jurisdiction under the proposed rules. (p. 1)

Agency Response: See Summary Response. See Technical Support Document for the legal basis of the final rule. The agencies note that the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient. The training will include regionally-based sessions to ensure consistent and efficient implementation of the rule while appropriately considering ecoregional variations.

Middle Snake Regional Water Resource Commission (Doc. #17380)

12.1365 It also appears the new definition will cover every body of water in the U.S. including canals, ditches, farm ponds and even wet lands that are only wet a small part of the year. This is too much. Farmers move soil and water each and every year, but to do so in the future may require a CWA permit. You don't have the manpower to make the new regulation work and it's not necessary. Where is the common sense? (p. 2)

Agency Response: See Summary Response. The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process. See the preamble section "Waters and Features That Are Not Waters of the United States" for information on waters excluded under the Clean Water Act. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public which may result in an initial delay in

certain jurisdictional determinations but after the initial implementation period the jurisdictional determinations are expected to be more efficient. The training will include regionally-based sessions to ensure consistent and efficient implementation of the rule while appropriately recognizing ecoregional variability. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The rule will improve efficiency and provide needed clarity regarding jurisdictional determinations, reducing uncertainties and delays. The agencies do not agree that the rule will have an effect on farmers' ability to make decisions about activities on their private lands. The statutory authority of the CWA does not convey to the Federal Government any ownership of or property rights in any private lands.

Jason Smith, House of Representative, Congress of the United States (Doc. #17454)

12.1366 WHEREAS, the draft rule will increase the cost to the city and its citizens to maintain these ground structures without any additional compensation to the city; (p. 3)

Agency Response: See Summary Response. Please see the Economic Analysis completed for the final rule for a discussion on costs/benefits of the final rule.

Natural Resources Defense Council and Southern Environmental Law Center (Doc. #17477.14)

12.1367 As a result of the SWANCC decision, many states are experiencing varying interpretations by District offices of the Army Corps regarding the jurisdictional scope of the 404 program. There does not appear to be any national consistency in the process, type of information, and criteria that are being utilized for making jurisdictional decisions for isolated waters. Of concern to the states is some Districts' omission of information on other wetlands that may be impacted by a proposed project. This action does not provide state agencies or the public with the information required to evaluate the jurisdictional determination, consistency with state's approved coastal management program, or other environmental factors. To be in compliance with state coastal management programs and §401 of the CWA, the Corps must provide information on all wetland impacts associated with a§404 permit, not just impacts to jurisdictional wetlands. (p. 2)

Agency Response: See Summary Response. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources. All jurisdictional determinations are made on a case-by-case basis in response to a landowner's request. The review area for a jurisdictional determination is generally limited to the area in which impacts

to waters of the U.S. may occur. Although waters outside the landowner's review area may be considered in a significant nexus determination the jurisdictional determination is only specific to waters on the landowner's review area. Previous jurisdictional determinations for (a)(7) and (a)(8) waters made in the single point of entry watershed may be used in future jurisdictional determinations in the same single point of entry watershed.

12.1368 With regard to clarifying any changes in CWA jurisdiction, CSO recommends that any guidance or regulations address the following points.

1) Clarify that the SWANCC decision did not invalidate the regulatory provisions defining "waters of the United States." All that it invalidated was the "Migratory Bird Rule," which was in fact not a rule but a policy and guidance document.

2) Clarify that the SWANCC decision does not invalidate previously issued permits, and their terms and conditions should continue to be enforced, including mitigation requirements.

3) Adopt the Riverside Bayview "significant nexus" test for determining jurisdiction over wetlands, and establish a presumption that all wetlands within or abutting the 100 year floodplain are to be considered "adjacent." Wetlands within a floodplain are hydrologically connected during normal flood events and stormwater flows that occur during natural climatic cycles within riverine and stream systems and are, therefore, not isolated. The guidance should require an assessment of the hydrological and ecological functions that particular wetlands perform within a watershed context. These include: flood control, erosion control, water quality maintenance, groundwater recharge, and conservation of biological diversity. Wetland scientists have never recognized the artificial regulatory distinction between "adjacent" and "isolated" wetlands, and there is now an opportunity to clarify that it is the function, not the label, that matters.

4) Clarify that the definition of "tributaries" includes groundwater tributaries and man-made structures, as well as all surface tributaries whether mapped or unmapped. The courts have adopted a common sense approach to this issue which holds that, for purposes of determining CWA jurisdiction, what matters is whether the discharge has the potential to adversely affect the "chemical, physical or biological integrity" of water. Courts have not required physical proximity to "open water" as a necessary predicate for federal regulation.

5) Clarify and expand the "significant impact on interstate commerce" test for jurisdictional determinations. Specifically, the guidance should emphasize that, under applicable Supreme Court decisions, it is the "aggregate effect" of the regulated activities on interstate commerce that must be evaluated, not simply the effect of regulating a particular wetland fill. In the SWANCC decision, the Court acknowledged that most discharges of dredge or fill material involve the kind of economic activity that falls squarely within the commerce clause.

6) Clarify the extent of jurisdictional waters in order for states to recommend any needed changes to state wetland and water programs and to their administration and legislature.
7) Establish a nationally consistent process for the Corps in making jurisdictional

decisions over isolated waters and ensure that Corps Districts provide state agencies and the public with the information necessary to evaluate all wetland impacts. (p. 2-3)

Agency Response: **See Summary Response. The Technical Support Document provides additional information on the legal basis of the final rule, including discussion on the Riverside Bayview, SWANCC, and Rapanos Supreme Court decisions. The preamble contains a discussion about "significant nexus" in the section "Water and Features That Are Not Waters of the U.S." and about the use of the floodplain under the definition of "neighboring" in the section on "Adjacent Waters." The preamble section on "Tributaries" provides a discussion about the definition of "tributary." Tributaries can include man-made features if they meet the definition of "tributary" and are not excluded under paragraph (b) of the rule. Groundwater is listed as an excluded water under paragraph (b). The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies believe the clarity and certainty provided in the rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals or the regional supplements to the wetland delineation manual, both of which are outside the scope of this rulemaking but are related resources.**

W. Stevens (Doc. #17663)

12.1369 The impacts of this proposal to oil and gas development could be substantial and costly: [...]It will increase the number of Dredge and Fill permits requiring notification, agency action and perhaps individual permits. Permitting delays may disrupt timelines taking from 6 months to two years, thereby excluding drilling some wells. Of course, this leads to increased permit and mitigation costs, as well. (p. 1-2)

Agency Response: **See Summary Response. See the Economic Analysis prepared for a discussion on predicted changes in jurisdiction and costs/benefits of the final rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The clarity and certainty provided in the rule will provide some efficiencies in making jurisdictional determinations for certain categories jurisdictional by rule. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include**

regionally-based training to ensure consistent and efficient implementation of the rule.

12.1370 The proposed rule raises many questions about implementation. The EPA and Army Corps should provide guarantees that previous jurisdictional determinations resulting in a finding of "no jurisdiction" should be grandfathered. Otherwise, many conscientious operators that in good faith obtained permits to begin operations may find those permits worthless and subject to possibly expensive and time-consuming renewals if this rule is finalized. The proposed rule has no implementation plan or effective date, and says nothing about what will happen to in-progress jurisdictional applications or permit applications. (p. 3)

Agency Response: **See Summary Response. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. Approved JDs associated with existing permits/verifications that were authorized prior to the publication of the final rule language will remain effective for the lifetime of the permit/verification. The preamble addresses the status of final JDs and permits as well as pending JDs and permits.**

L. Schlothauer (Doc. #17946)

12.1371 Due to the fact that the proposed definition of navigable waters may be expanded this leads me to consider how this may impact producers in the Southwestern U.S. as it has begun to include ephemeral waters. This is very concerning to me. This year we have been fortunate in southern NM to have above normal precipitation which has resulted in flash flooding and run-off from crop and livestock operations such as cotton, corn and dairies. These run-off waters could be potentially composed of manure nutrients classified as pollutants by the EPA. A common question this summer in our area as livestock producers and framers work through the proposed revisions to the CWA was how will a piece of land dry for the majority of time in the desert surrounding local agriculture operations be classified? Many producers around the country are concerned about how the proposed rule will affect their operations and this is no different in New Mexico. The dairy and cattle industry are the two largest generators of agricultural income as "39% of the state's total agricultural receipts are generated by dairy products" and "37% by beef cattle and calves" (New Mexico Economy, Agriculture). Controversy over disposing manure nutrients has compounded as we have begun to see above average precipitation. (p. 1 – 2)

Agency Response: **See Summary Response. See the Economic Analysis for discussion on predicted changes in jurisdiction. The final rule clarifies which waters are and are not jurisdictional under the Clean Water Act. The Clean Water Act does not regulate land or land use, but rather only provides jurisdiction over waters of the U.S. The Clean Water Act only regulates point source discharges of pollutants from a person into waters of the U.S. and not non-point source overland runoff.**

Warm Springs Watershed Association (Doc. #18019)

12.1372 In its report to EPA, the SAB found that "the literature review provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams

exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters" This review of scientific literature presents hard evidence that providing drinking water to West Virginians as well as millions of Americans along the Potomac and Ohio rivers downstream depends in part on healthy headwaters in West Virginia. (p. 1)

Agency Response: Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, can significantly impact the chemical, physical, and biological integrity of downstream waters – playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.

Donald Shawcroft (Doc. #18569)

12.1373 This jurisdictional expansion will be disastrous for farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. On much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges. (p. 2)

Agency Response: The definition of "adjacent" in the rule does not include those waters that are subject to established, normal farming, silviculture, and ranching activities. Wetlands and farm ponds being used for normal farming activities, as those terms are used in the Clean Water Act and its implementing regulations, are not jurisdictional under the Act as an "adjacent" water. Waters subject to normal farming, silviculture, and ranching activities instead will continue to be subject to case-specific review, as they are today. The rule clarifies that waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. This provision interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule.

12.1374 The same goes for the application of fertilizer—including organic fertilizer (manure)—another necessary and beneficial aspect of many farming operations. It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields—and put EPA

into the business of regulating whether, when, and how a farmer's crops may be fertilized. In fact, if low spots on pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue the owner of cows that "discharge" manure into those "waters" without a section 402 permit. They could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains. 2 Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits) if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time. (p. 2)

Agency Response: **Please see summary response 12.3.**

Anonymous (Doc. #18770)

12.1375 #5 - In a coastal environment we have very high ground water tables and tidal influences. Most manmade canals are wet all year round, regardless of rainfall. These systems serve as flood control channels and are not manmade. This is like flows in highland and riverine environments. It is OK to protect natural areas such as creeks and headwaters. But the proposed definition changes extend jurisdiction up into the system and will change the ability to manage the systems that protect property and the environment. It will lead to less protection and work and not more. The fiscal impact to jurisdictions will cripple most programs into conducting more extensive paperwork instead of managing real problems in the field. With the potential impacts of Climate change, it will make any resilience projects more difficult to plan and implement. (p. 2)

Agency Response: **See Summary Response. See the Economic Analysis for a discussion on predicted changes in jurisdiction and costs/benefits of the final rule. The rule only provides a definition for "waters of the U.S." The rule does not affect the regulatory programs of the CWA for which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs.**

Anonymous (Doc. #18801)

12.1376 (…) 6) For agricultural (e.g., farmers, cattle ranchers) specific exemptions are needed as well as very specific clarity. (…) (p. 2)

Agency Response: **The rule provides greater clarity regarding which waters are subject to CWA jurisdiction. Exemption from permitting requirements under section 404(f)(1) of the Clean Water Act for discharges to jurisdictional waters is beyond the scope of this rule. Section 404(f)(1) identifies in those activities for which the discharge of dredged or fill material is exempt from regulation.**

Hickory Underground Water District 1, Texas (Doc. #18928)

12.1377 Just a few examples where groundwater, which in Texas is not owned by the State but rather is the property of the landowner overlying the aquifer, would be negatively impacted by the proposed rule:

a. Where "bed and banks" permits are granted to transport groundwater from one location to another

b. Aquifer Storage and Recovery Projects, which are becoming an important conservation and allocation strategy in the state. Surface water is injected into aquifers, with resultant commingling of groundwater and surface water, and then pumped back to the surface when needed.

c. Groundwater district production permit rules for zones of aquifers where there is significant discharge to springs. (p. 1)

Agency Response: See Summary Response. See paragraph (b) for waters which are excluded under the final rule, including groundwater. See the preamble section on "Waters and Features That Are Not Waters of the U.S." for additional discussion on groundwater. The Clean Water Act is a surface water act and only has authority to regulate surface waters. Also, see the exclusions for groundwater recharge basins and other similar features that are also not considered waters of the U.S. The rule does not diminish or in any way detract from the intent and purpose of CWA sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality.

Anonymous (Doc. #18955)

12.1378 1. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. These MS4s own, operate, and maintain millions of Stormwater Control Measures (SCMs) and Best Management Practices (BMPs). These SCMs and BMPs include both structural and non-structural practices, programs, and features. In order for these MS4s to operate and maintain their systems in an efficient and cost-effective manner, the WOTUS jurisdictional status of the vast majority of these constructed SCMs and BMPs must be clear. Determining the WOTUS jurisdictional status of these constructed SCMs and BMPs on a case-by-case basis is not manageable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs is not acceptable or practicable. (p. 1)

Agency Response: Please see summary response 7.4.4.

City of Olathe Kansas (Doc. #18982)

12.1379 National Pollutant Discharge Elimination System (NPDES) outfall locations for wastewater facilities may be affected by the shifting of the limits of the WOTUS causing an increased level of permitting and possible relocation of outfall pipe, taking dollars away from other possible infrastructure improvements. (p. 2)

Agency Response: Please see summary response 12.3. The final rule does not change or impose new NPDES permitting requirements. NPDES permitting requirements are beyond the scope of this rule. See also Compendium 11-Economics and the Economics Analysis Section 8 for an explanation of the rule's impacts on the Section 402 program.

Associated Industries of Florida (Doc. #19325)

12.1380 The State of Florida is unique in many ways. Its geology, topography, and watercourses are like no other state in the nation, dominated by vast floodplains along the coast and countless wetlands, rivers, streams and lakes inland. Virtually, all of these features are connected underground by our precious aquifer system through sandy soils and porous limestone. Because Florida's elevation is only slightly above sea level and relatively flat, its history is replete with, and its lifestyle is dependent upon the effective management of stormwater. Florida also leads the nation in water quality efforts, recently approving numeric nutrient standards designed to keep its waters healthy and clean. As a result, Florida is crisscrossed by man-made ditches, canals and ponds for flood control, irrigation, stormwater management, and water quality improvement. All of these factors, both natural and man-made, make Florida particularly susceptible to the proposed changes to the WOTUS definition. (p. 1)

Agency Response: See Summary Response. See paragraph (b) of the final rule and the preamble section for "Waters and Features That Are Not Waters of the U.S." These excluded waters include certain ditches, groundwater, and stormwater control features. The rule does not affect the statutory activity-based exemptions under section 404(f)(1) of the Clean Water Act, including the construction of irrigation ditches, and the construction and maintenance of drainage ditches, and certain other maintenance activities. In addition, the Corps nationwide general permit program includes several applicable general permits for the activities described above in an efficient permit mechanism.

Wright Soil and Water Conservation District (Doc. #19350)

12.1381 In reviewing the proposal, it is evident that the proposed rule identifies most waters: lakes, rivers, streams, wetlands and ditches no matter how small; therefore, almost all actions involving waters would need a Corp of Engineers' (COE) permit of some sort. Many routine permits include culvert and tile replacement and ditch cleaning and could perhaps be handled with general permits. However, the District is very concerned about the ability of the Corp with its limited staff to respond in timely fashion and the cost to the public for them to be able to respond to the numerous permit requests. Currently, no timeline deadline requirement for the Corp conflicts greatly with the timeline requirements set for WCA reaction. If the current proposed language is adopted, the "District" would expect a backlog to quickly appear and overwhelm the available staff to the point they are virtually stalemated. The public would be extremely irate and/or avoid the application process altogether which could/would lead to violations.

The State of Minnesota developed and passed the Wetland Conservation Act (WCA) in 1991 and puts controls on wetland drainage. Also, Minnesota's Department of Natural Resources' Public Waters rules are already established that deal with larger water bodies, lakes and streams. To this point, the Corp of Engineers and the Minnesota Board of Water and Soil Resources (BWSR) have not been able to come to agreement on some sort of joint permit program that would streamline permitting and serve the public more efficiently with a better environmental outcome. The District feels that states with their own permit programs should become a high priority for a joint program with COA/EPA -

the Corp of Engineers could review a certain percentage of the Joint Permits to ensure compliance with their rules.

The current situation, as it is, has fostered government distrust by the public and confusion by landowners and state and local officials and makes government look very indecisive in the eyes of the public. This situation has led many people to take action without obtaining permits and local official ignoring potential consequences of federal regulation. The Wright Soil and Water Conservation District feels it is imperative that this situation be clarified in a way that makes sense and provides for timely permitting especially for, but not limited to, small inconsequential projects. Therefore, the Wright SWCD feels that the proposed version of the rules should be withdrawn. (p. 1 – 2)

Agency Response: See Summary Response. The rule does not affect the provisions of the CWA for which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The agencies believe with the clarity and certainty provided in the rule that there will be some efficiencies gained in making jurisdictional determinations for certain categories jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.

Jil Tracy, State Representative 94th District (Doc. #19518)

12.1382 Most egregious is the fact that the rule throws into confusion extensive state regulation under various CWA programs. Implementation of this rule will have significant implications on most if not all of the 14 Statewide Permits authorized and under the administration of the Division of Water Resource Management, Illinois Department of Natural Resources. (p. 2)

Agency Response: States play a vital role in the implementation and enforcement of the Clean Water Act. Consistent with the CWA, states retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. Please see summary response 12.3. Also, please see Compendium 11 and Economics Analysis Section 8 for an assessment of the costs and benefits for the CWA section 402 program.

Des Moines Water Works (Doc. #19663)

12.1383 Impaired Waters in Iowa

Congress and EPA's continued failure to see non-point source pollution as within their regulatory authority is disconcerting. The real question should not be where regulators can regulate, but where is regulation needed to improve and protect water quality. Adoption of the Iowa Nutrient Reduction Strategy (INRS) is an exceptional example of regulatory procrastination. The INRS does not contain any timelines or goals to reach a 45% nutrient reduction. While point sources (municipal, business and industry wastewater treatment facilities) are required to meet nutrient reduction through their regulation of permits, agricultural reduction of nitrate and phosphorous rely on voluntary implementation of conservation practices. In spite of a lack of commitment, funding, technical assistance and the threat of non-compliance with the INRS due to state and federal rulemakings – including the WOTUS rulemaking, EPA should not tout the INRS as an exemplary or progressive plan, when there are not measures or timelines and it can hold other rulemaking efforts hostage. Some of the largest agricultural organizations, in this case, the Iowa Farm Bureau Federation, are using scare tactics and half-truths to spread the perception that EPA and the Corps actions are comparable to a radical takeover of all things sacred to agriculture (Appendix F). These covert actions should be adamantly condemned. The failure of the INRS is already being blamed on WOTUS if adopted. What this boils down to is the usual and annoying battle between regulators and agriculture interests who continuously denounce any type of regulation. It is time for regulators to set numeric nutrient standards by watershed, Congress and state legislators to uphold their decision and enforce all entities that contribute pollution to a body of water in violation of the nutrient standard, and penalize those who obstruct their ability to regulate. (p. 3)

Agency Response: The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. However, this rule does not alter the definitions of "discharge of a pollutant," "pollutant," or "point source." Please see summary response 12.3.

12.1384 Public Drinking Water Utility Concerns

As a public drinking water utility we are charged with protecting public health, supporting an economy that is vibrant, fire protection, and sustaining a good quality of life for consumers. Iowa citizens are counting on the new rule to protect the quality of water at their tap, flowing through their communities, and supporting their livelihoods. However, DMWW is concerned that additional permitting requirements will increase consumer cost and delay critical infrastructure projects. Any regulatory or geographic expansion of WOTUS has implications for additional permitting and review by the US

Fish and Wildlife Service through the Endangered Species Act or historic preservation agencies through the National Historic Preservation Act. Aside from the permit process itself, and additional scrutiny of projects will do little to protect water quality and has the potential to affect project schedules and increase consumer costs associated with permits, studies, and compensatory mitigation. Examples of projects are:

- Construction of road crossings over streams and wetlands
- Installation of maintenance of water lines in rivers and wetlands
- Installation of outfalls
- Installation of intakes
- Discharge of fill material into streams or wetlands for building pads
- Inundation of streams or wetlands with standing water by construction that obstructs surface channel flow

(p. 3 – 4)

Agency Response: **See Summary Response. See the Economic Analysis for additional information on costs/benefits. The rule does not affect the regulatory requirements of the CWA for which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve consistency and predictability for all CWA programs. The agencies believe with the clarity and certainty provided in the rule that there will be some efficiencies gained in making jurisdictional determinations for certain categories jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

Flood Control Water Agency, Santa Barbara County Public Works Department, Santa Barbara County, California (Doc. #20491)

12.1385 Increasing the regulatory burden will have many negative impacts and no tangible beneficial impacts. Increased regulation will increase the workload of the Corps of Engineers which will slow permit issuance for all projects. In addition, due to regulatory requirements, the cost of maintenance of these existing facilities will greatly increase and .impact ag6flcies already struggling to complete the needed work. Finally, many of these facilities are privately owned, (in Santa Barbara County and many others), and individual people or Homeowners Associations will not know these permits are needed, nor are these groups adept at procuring such permits. Agencies who receive 404 permits usually have an entire staffing unit of professionals who seek such permits and the burden of expecting homeowners to navigate this process is unjustified. (p. 1 – 2)

Agency Response: **See Summary Response. See the Economic Analysis for additional information on costs/benefits. The rule does not affect the provisions of the CWA for which authorization may be required for discharges of dredged and/or fill material into or other activities within waters of the U.S. In addition, the rule does not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the Corps implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S. The rule will improve predictability for all CWA programs. The agencies believe with the clarity and certainty provided in the rule that there will be some efficiencies gained in making jurisdictional determinations for certain categories jurisdictional by rule. The Corps will develop the tools necessary to assist its staff with the jurisdictional determination process specific to section 404 in the implementation of the final rule to make the process predictable, efficient, and effective. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public, which will include regionally-based training to ensure consistent and efficient implementation of the rule.**

Alpine County Board of Supervisors, County of Alpine, California (Doc. #20492)

12.1386 The changes to the definition of "Waters of the U.S." triggers new unfunded mandates on local governments by expanding federal jurisdiction

The term "navigable water" has a distinct meaning in the CWA and requires state and local government administrative and regulatory actions that can increase the scope and cost of permitting. Changes to the definition of tributary, as well as the inclusion of the vague and relatively undefined "adjacent waters," will likely alter the way many water bodies are regulated.

For example, a tributary defined as a Water of the U.S. under this rule would have to be added to the list of impaired waters in the state. Such a listing will trigger a number of cost-prohibitive requirements on local governments, including but not limited to: the development of a use attainability study; the identification of designated beneficial uses; the adoption of site specific water quality objectives; the application of and compliance with numeric effluent limits, and the potential for a Total Maximum Daily Load allocation. These additional requirements will make counties subject to additional enforcement actions - including civil and criminal penalties - and place local governments at great risk of third-party litigation. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Please see summary response 12.3.**

12.1387 (…) California has imposed stricter standards on all storm water permittees, including MS4 permit holders, and the proposed rule as it stands would only serve to exacerbate the already difficult task of compliance for rural counties in our State by causing jurisdictional confusion and dramatically increased compliance costs. Many rural California counties have either recently been required to comply with the MS4 permit, or

will be required to comply within the next permit cycle. The implementation costs for new permittees would increase exponentially if the proposed rule is not modified to include clarification and exemptions for MS4 permit holders. (p. 2)

Agency Response: **Please see summary response 7.4.4.**

ATTACHMENTS AND REFERENCES

Comments included above in this document discuss the Proposed Rule, and some include citations to various attachments and references, which are listed below. The agencies do not respond to the attachments or references themselves, rather the agencies have responded to the substantive comments themselves above, as well as in other locations in the administrative record for this rule (e.g., the preamble to the final rule, the Technical Support Document, the Legal Compendium). In doing so, the agencies have responded to the commenters' reference or citation to the report or document listed below as it was used to support the commenters' comment. Relevant comment attachments include the following:

Appendix A: Comments on notice of availability regarding the exemption from permitting under section 404f1a of the clean water act to certain agricultural conservation practices (Doc. #15403, p.12)

Copy of since removed version of Q&A document indicating that existing jurisdictional determinations will not be disturbed (Doc. #14285, p. 55)

Exhibit 9 (Doc. #17921.2, p. 248)

Exhibit 16 (Doc. #17921.15, p. 41)

Exhibit 17 (Doc. #17921.15, p. 44)

Exhibit 21 (Doc. #17921.15, p. 95)

Parkhurst, B.R. Comments on U.S. Environmental Protection Agency's (2013) Draft Report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," prepared for Arizona Mining Association, Phoenix, AZ, November 5, 2013. (Doc. #13951, p. 13)

Stoner, N. Letter, May 5, 2014 (Doc. #3536, p. 5)

Topographic Maps (Doc. 18864, p. 35-38)

Vitter, D. Letter, May 20, 2014 (Doc. #3536, p. 6)

In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. The agencies have not verified the references, or the validity of hyperlinks.

33 U.S.C. § 1251(a). Doc. #15010, p. 2)

Alaska Department of Fish and Game, *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*, available at: http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.overview (Doc. #19465, p. 20).

Baader, Jennifer L. *Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction*, 88 Chi.-Kent L. Rev. 621, 622 (2013) (Doc. #15010, p. 3)

BOR 2008 Guidance Comments, at pp. 3 and 4. (Doc. #19461, p. 10)

The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S." May 15, 2014. Available at: http://www.brattle.com/news/-and-knowledge/publications/archive/2014. (Doc. #13024, p. 14)

Central Arizona Project, Action Brief: Discussion and Consideration of Action to Adopt Position on the Proposed Rule, 'Definition of Waters of the United States Under the Clean Water Act' (the 'Proposed Rule') (June 5, 2014), http://www.cap-az.com/documents/meetings/06-05-2014/6.%20%20Clean%20Water%20Act%20060514.pdf. (Doc. #17921.1, p. 78)

Congressional Research Service, January 30, 2012; The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments; Copeland, Claudia, p.2, available at http://www.fas.org/sgp/crs/natsec/97-223.pdf (Doc. #15401, p. 5)

Department of Water Resources *Report on 1956 Cooperative Study program - Water Use and Water Rights Along Sacramento River and in Sacramento-San Joaquin Delta, Vol. 1* (March 1957) (Doc. #12858, p. 4)

Digital Data Base of Lakes on the North Slope, Alaska. 1986. U.S. Geological Survey Water-Resources Investigations Report 86-4143. (Doc. #10538, p. 9)

Dougherty, S.T., S. Russo, and D. Freeman. 2010. A Successful Strategy for Environmental Permitting of an Aggressively Scheduled Major Water Project. Proceedings of the American Society of Civil Engineers, Pipeline 2010 Conference, Keystone, CO. (Doc. #14914, p. 5; Doc. #15178.1, p. 7)

Duncan, D. G. and K.L. McGrath, EPA and U.S. Army Corps Seek to Expand Jurisdiction Under the Clean Water Act, Engage Volume 13, Issue 1 (March 2012), http://www.fedsoc.org/publications/detail/epa-and-us-army-corps-seek-to-expand-jurisdiction-under-the-clean-wateract. (Doc. #14136.1, p. 13-14)

E&E's Greenwire publication and entitled "Bed, bank and beyond: EPA rule proposal stumps arid Ariz." Available at http://www.eenews.net/stories/1060007241 (Doc. #14285, p. 46)

Fact Sheet on the National Costs of the Total Maximum Daily Load Program (Draft Report) (Aug. 1, 2001), EPA 841-F-01-004. Available at: http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/costfact.cfm.

Lichvar and McColley, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual (August 2008) (Doc. #14258, p. 16; Doc. #14914, p. 15)

EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 10 (March 2014) (hereinafter, EPA Economic Analysis), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003 (Doc. #19540, p. 119)

EPA, Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow Control, No. 832-R-14-001 (Mar. 2014), available at http://water.epa.gov/infrastructure/greeninfrastructure/upload/Greening_CSO_Plans.PDF. (Doc. #17921.1, p. 76)

EPA SAB letter to Administrator McCarthy, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (October 17, 2014) (SAB Connectivity Peer Review Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

EPA Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report (EPA SAB Panel). 2014. Memorandum from Dr. Amanda D. Rodewald to Dr. David Allen, Re: 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." September 2. (Doc. #15178.1, p. 32)

EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control. (Doc. #16413, p. 6)

Executive Order 13563: Improving Regulation and Regulatory Review. Signed January 18, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf (Doc. #13024, p. 15)

Exhibit 2. Letter from Army Corps of Engineers to TCA finding that the proposed Tesoro Extension would not occur within waters of the United States. (Doc. #16897, p. 2)

Frohn, R.C., M. Reif, C. Lane, and B. Autrey. 2009. Satellite remote sensing of isolated wetlands using object-oriented classification of Landsat-7 data. Wetlands 29:931-941. (Doc. #11014, p. 72)

General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (GAO-04-297), at pp. 3-4 (Feb. 2004). (Doc. #14258, p. 17)

Hall, J.V., W.E. Frayer and B.O. Willen, Status of Alaska Wetlands at 3 (U.S. Fish and Wildlife Service 1994) *available at* http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf (Doc. #15038, p. 4; Doc. #19465, p. 21)

http://anrcatalog.ucdavis.edu/pdf/8055.pdf (Univ. of California) (Doc. #16413, p.7)

http://www.cals.ncsu.edu/wq/wqp/wqpollutants/nutrients/factsheets/FactsheetNM1.pdf (North Carolina) (Doc. #16413, p.7)

http://ucanr.edu/sites/UCCE_LR/files/180590.pdf (California) (Doc. #16413, p.7)

http://www.cap-az.com/. (Doc. #17921.1, p. 78; Doc. #19540, p. 121)

http://www.deq.utah.gov/FactSheets/docs/handouts/nutrients.pdf (Utah) (Doc. #16413, p.7)

http://www.epa.gov/compliance/data/planning/priorities/cwacafo.html [Webarchive]; See also, e.g., http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2008priori tycwacafo.pdf. (Doc. #16413, p. 7)

http://www2.epa.gov/nutrientpollution/where-occurs--akes-and-rivers (EPA) (Doc. #16413, p.7)

http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf (page 4) (last visited on October 2, 2014) (Doc. #14132, p. 7)

http://water.epa.gov/type/rsl/monitoring/upload/EPA-MARB-Fact-Sheet-112911_508.pdf (EPA) (Doc. #16413, p.7)

http://epa.ohio.gov/Portals/35/visioning_workshop/Ohio%20Nutrient%20Fact%20Sheet.pdf (Ohio) (Doc. #16413, p.7)

http://www.epa.state.il.us/water/nutrient/ (Illinois) (Doc. #16413, p.7)

http://geo.usace.army.mil/egis/f?p=340:6:0::N0 (Doc. #16897, p. 2)

http://www.iowapolicyproject.org/2010docs/100927-nutrients.pdf (Iowa) (Doc. #16413, p.7)

http://www.mass.gov/eea/docs/dep/water/drinking/alpha/i-thru-z/manure.pdf(Massachusetts) (Doc. #16413, p.7)

(http://midwestadvocates.org/assets/resources/nutrient_pollution_factsheet.pdf Gulf) (Doc. #16413, p.7)

http://moritz.botany.ut.ee/~olli/eutrsem/Howarth02.pdf (Coastal Waters) (Doc. #16413, p.7)

http://www.nnyagdev.org/PDF/NNYPFacts1w.pdf (New York) (Doc. #16413, p.7)

http://portal.ncdenr.org/c/document_library/get_file?uuid=2eddbd59-b382-4b58-97ed-c4049bf4e8e4&groupId=38364 (Cape Fear River) (Doc. #16413, p.7)

http://portal.ncdenr.org/c/document_library/get_file?uuid=e438d6bc---d147-4d7b-8224-08e5a7c74b86&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=48bc46d8-c344-4f07-a656-7a211157c985&groupId=38364 (Neuse River) (Doc. #16413, p.7)

http://portal.ncdenr.org/c/document_library/get_file?uuid=b4f40c70-fc0f-4bd7-b4a1-b34dd7794f99&groupId=38364 and http://portal.ncdenr.org/c/document_library/get_file?uuid=12436e58-83ba-41bf-bcac-d2fe4aa2b60c&groupId=38364 (Tar-Pamlico River) (Doc. #16413, p.7)

http://pubs.usgs.gov/fs/fs218-96/ (USGS) (Doc. #16413, p.7)

http://water.epa.gov/polwaste/nps/agriculture_facts.cfm (EPA) (Doc. #16413, p.7)

Ice, G.G. and D. Binkley. 2003. Forest stream water concentrations of nitrogen and phosphorus: A comparison with EPA's proposed water quality criteria. J. For. 101(1):21-28. (Doc. #15075, p. 4)

Ice, G. and B. Sugden. 2003. Summer dissolved oxygen concentrations in forested streams of northern Louisiana. South. J. Appl. For. 27(2):92-99. (Doc. #15075, p. 4)

Lane, C.R. and E. D'Amico. 2010. Calculating the ecosystem service of water storage in isolated wetlands using LiDAR in north central Florida. Wetlands 30:967-977. (Doc. #11014, p. 73)

Lang, M., O. McDonough, G. McCarty, R. Oesterling, and B. Wilen. 2012. Enhanced detection of wetland-stream connectivity using LiDAR. Wetlands 32:461-473. (Doc. #11014, p. 73)

Lang, M., G. McCarty, R. Oesterling, and I.Y. Yeo. 2013. Topographic metrics for improved mapping of forested plains. Wetlands 33:141-155. (Doc. #11014, p. 73)

Letter from Craig Hill, President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water (Sept. 29, 2014) (http://www.regulations.gov/#!documentDetail;D=EPAHQ-OW-2011-0880-7633). (Doc. #18005, p. 15)

Letter from Justin Cutler, Project Manager, Delta Office, Corps Sacramento Dist., to James Gibson, Gibson & Skordal at 1 (Aug. 24, 2000); Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, Corps Sacramento Dist. at 3 (Aug. 17, 2000). (Doc. #15016, p. 89)

Letter from Michael S. Jewell, Chief, California/Nevada Section, Corps Sacramento Dist., to James Gibson, Gibson & Skordal at 1 (Aug. 13, 2001). (Doc. #15016, p. 89)

Letter to Nancy Stoner, Acting Assistant Administrator of Water, USEPA from Sam Brownback, Governor of Kansas (July 14, 2011). (Doc. #18864, p. 11)

Lichvar, R.W. and S.M. McColley. 2008. A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States. A Delineation Manual. ERDC/CRREL TR-08-12. (Doc. #14914, p. 12; Doc. #15178.1, p. 31)

Martin, G.I., L.K. Kirkman, and J. Hepinstall-Cymerman. 2012. Mapping geographically isolated wetlands in the Dougherty Plain, Georgia, U.S.A. Wetlands 32:149-160. (Doc. #11014, p. 73)

Meltz, R. and C. Copeland, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond" at 11 (Congressional Research Service, September 2014) http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf (Doc. #14946, p. 2)

Memorandum from Gary S. Guzy, Gen. Counsel, EPA, and Robert M. Andersen, Chief Counsel, Corps, to EPA Assistant Adm'r for Water, et al., "Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters" (Jan. 19, 2011) (providing the Agencies' interpretation of SWANCC). (Doc. #15016, p. 89)

Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014) http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ (June 30, 2014) (Doc. #17921.1, p. 91, Doc. #19540, p. 131; Doc. #16897. p. 2)

North California River Watch v. City of Healdsburg, No. 04-15442, (2006); *Idaho Rural Council v. Bosma*, 143 F.Supp. 1169, 1180 (D. Idaho 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997); *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1357 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co*., 870 F. Supp. 983,989 (E.D. Wash. 1994); *Sierra Club v. Colorado Refining Co*., 838 F. Supp. 1428, 1434 (D.Colo. 1993). *United States Steel Corp. v. Train*, 556 F.2d 822(7th Cir. 1977). Southern Environmental Law Center just gave notice to Duke Energy that it plans to enforce CWA to clean up coal ash pits on the Cape Fear River. (Doc. #8323, p. 4)

Petrie, M., M. Brasher, AND D. James. 2014. Estimating the biological and economic contributions that rice habitats make in support of North American Waterfowl. The Rice Foundation, Stuttgart, Arkansas, USA. (Doc. #11014, p. 10)

Rapanos v. United States, 547 U.S. 715, 739, 126 S. Ct. 2208, 2225, 165 L. Ed. 2d 159 (2006). (Doc. #15010, p. 5)

Rodgers, ENVIRONMENTAL LAW, 804, FN 25 (referencing the creation of subsection 101(b) of S. 1075: the Senate passed the language, "Congress recognizes that each person has a fundamental and inalienable right to a healthful environment; the House reworded that language for the final bill. Comm. Of Conference, National Environmental Policy Act of 1969, H.R.Rep. No. 765, 91st Cong., 1st Sess. 8 (1969)). (Doc. #15010, p. 2)

Selcraig, Bruce. *What is a Wetland?*, Sierra, pp.44-49 (May/June 1996). (Doc. #15010, p. 2)

State Constraints – State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. 2013. Environmental Law Institute (Doc. #14579, p. 2)

Status of Alaska Wetlands, at 20. (Doc. #15038, p. 10)

Stoner, Nancy. "Setting the Record Straight on Waters of the US." EPA Connect, July 7, 2014. http://blog.epa.gov/epaconnect/author/nancystoner/. (Doc. #13024, p. 14)

Sunding, D. and D. Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects). (Doc. #17921.1, p. 75; Doc. #19540, p. 119, 130)

U.S. Army Corps of Engineers, Jurisdictional Determination Form – Instructional Guidebook (2007) ("Jurisdictional Guidebook") (Doc. #14258, p. 16)

U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook 47, FN 4(May 30, 2007) (Doc. #16897, p. 3)

US Army Corps of Engineers, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the United States*, Robert W. Lichvar and Shawn M. McColley, August 2008. (Doc. #16489, p. 17)

U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, September 2007. (Doc. #19465, p. 21)

U.S. Army Corps of Engineers (Corps). 2008. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), ed. J.S. Wakely, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-08-28. Vicksburg, MS: U.S. Army Engineer Research and Development Center. (Doc. #14914, p. 12)

U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007) (Doc. #14407, p. 15)

U.S. Army Corps of Engineers. Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes. January 2013. (Doc. #14789, p. 1)

United States Department of Agriculture, United States Environmental Protection Agency, and the United States Department of the Army. "Memorandum of Understanding Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards. March 25, 2014. Accessed November 6, 2014. http://www2.epa.gov/sites/production/files/201403/documents/interagency_mou_404f_ir_signed.pdf. (Doc. #15237, p. 3)

U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Office of Research and Development, Washington DC, EPA/6001R-111098B September 2013. (Doc. #16489, p. 17)

US EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and semi-Arid American Southwest, November 2008, http://www.epa.gov/esd/land-sci/pdf/EPHEMERAL_STREAMS_REPORT_Final_508-Kepner.pdf. (Doc. #12754, p. 5)

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of Waters of the U.S.," March 2014. http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf (Doc. #13024, p. 14)

U.S. EPA Office of Inspector General, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149, at 1 (2009), available at http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf. (Doc. #14620, p. 3)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WATERS OF THE UNITED STATES, www.2.epa.gov/uswaters (last visited Nov. 14, 2014). (Doc. #15010, p. 2)

U.S. General Accounting Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction at 24-26 (Feb. 2004), available at http://www.gao.gov/assets/250/241520.pdf. (Doc. #15016, p. 89; Doc. #16413 p. 33)

U.S. Geological Survey. 1986. Digital Data Base of Lakes on the North Slope, Alaska, Water-Resources Investigations Report 86-4143. (Doc. #15038, p. 10)

United States Geological Survey. Office of Water. Washington, DC. National Hydrography Dataset. October 2013. (Doc. #14407, p. 9)

U.S. Governmental Accountability Office, Report to Congressional Committees, Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps and Time Frames Vary, GAO-13-221, pp. 26-30 (Feb. 2013), http://www.gao.gov/products/GAO-13-221. (Doc. #15254, p. 24)

Ward, J.M. 2014. Letter to G. McCarthy and B. Perciasepe re: EPA's July 11, 2014 Presentation by Ms. Nancy Stoner on the Proposed Rule Defining Waters of the United States, Held July 11, 2014 at the National Association of Counties (NACo) Annual Conference in Room R03 Morial Convention Center, New Orleans, LA. July 18, 2014.

Supplemental References

33 U.S.C. § 1251(a). Doc. #15010, p. 2)

Baader, Jennifer L. *Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction*, 88 Chi.-Kent L. Rev. 621, 622 (2013) (Doc. #15010, p. 3)

North California River Watch v. City of Healdsburg, No. 04-15442, (2006); *Idaho Rural Council v. Bosma*, 143 F.Supp. 1169, 1180 (D. Idaho 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997); *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1357 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co*., 870 F. Supp. 983,989 (E.D. Wash. 1994); *Sierra Club v. Colorado Refining C*o., 838 F. Supp. 1428, 1434 (D.Colo. 1993). *United States Steel Corp. v. Train*, 556 F.2d 822(7th Cir. 1977). Southern Environmental Law Center just gave notice to Duke Energy that it plans to enforce CWA to clean up coal ash pits on the Cape Fear River. (Doc. #8323, p. 4)

Rapanos v. United States, 547 U.S. 715, 739, 126 S. Ct. 2208, 2225, 165 L. Ed. 2d 159 (2006). (Doc. #15010, p. 5)

Rodgers, ENVIRONMENTAL LAW, 804, FN 25 (referencing the creation of subsection 101(b) of S. 1075: the Senate passed the language, "Congress recognizes that each person has a fundamental and inalienable right to a healthful environment; the House reworded that language for the final bill. Comm. Of Conference, National Environmental Policy Act of 1969, H.R.Rep. No. 765, 91st Cong., 1st Sess. 8 (1969)). (Doc. #15010, p. 2)

Selcraig, Bruce. *What is a Wetland?*, Sierra, pp.44-49 (May/June 1996). (Doc. #15010, p. 2)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WATERS OF THE UNITED STATES, www.2.epa.gov/uswaters (last visited Nov. 14, 2014). (Doc. #15010, p. 2)

United States Department of Agriculture, United States Environmental Protection Agency, and the United States Department of the Army. "Memorandum of Understanding Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards. March 25, 2014. Accessed November 6, 2014.

http://www2.epa.gov/sites/production/files/201403/documents/interagency_mou_404f_ir_signed.pdf. (Doc. #15237, p. 3)