Clean Water Rule Comment Compendium
Topic 14 – Miscellaneous

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 miscellaneous topics 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.

Note: While the contractor established a placeholder in this document for the "Agency Response," the rule is promulgated by the Environmental Protection Agency and the Department of the Army and the responses are those of the agencies.

Topic 14. MISCELLANEOUS

Specific Comments

Jim Nielsen, Senator, Fourth District, California State Senate (Doc. #19649)

14.1 I have also been contacted by Placer County Water Agency that provides water for consumption as well as agriculture throughout Placer County and into adjacent counties. Their water supply and delivery system involves innumerable movements of water between different watersheds, large and small, and discharges into creeks and rivers. There are numerous large and small water agencies in my district, and all will be faced with the same paperwork.

Additionally, I have been contacted by the City of Roseville, the largest city in my district, informing me that this proposed rule would have significant implications for MS4 permit holders. Roseville is part of the Statewide Storm Water Coalition, which is comprised of 48 cities, counties and organizations. The MS4 Permits are used for storm water discharges from separate small municipal storm sewer systems. Roseville relies on man-made ditches and channels to divert storm water away from businesses and homes to prevent flooding. Under the Clean Water Act, the city has an obligation to ensure that pollutants discharged from its storm drain system are reduced to the maximum extent practical. The EPAs proposed rule will greatly expand the reach of the Clean Water Act to classify large portions of the city's storm drain system as WOTUS as opposed to what they really are: a flood control system that discharges into WOTUS.

Additionally, the EPA's proposed rule will impose a significant burden on the City of Roseville Maintenance of the storm drain system will require separate permitting that will increase costs and impose time constraints on normal city operations. The city will additionally be prevented from using portions of its flood control system to implement treatment project that will result in cleaner water and benefit the environment. Lastly, attaining compliance within the system, rather than at the point of discharge, is simply unfeasible. This last point raises the distinction between the Clean Water Act permitting requirements and whether a particular water body is a WOTUS, and must meet applicable Water Quality Standards. Even though a particular discharge or activity may not require a Clean Water Act permit, other regulatory restrictions apply to WOTUS that will impact use of the water body. These include Water Quality Standards and Total Maximum Daily Loads (TMDLs). In California, municipal storm water permits issued under the Clean Water Act prohibit the City from discharging pollutants into WOTUS that cause or contribute to exceeding allowable Water Quality Standards. If the storm drain system is a WOTUS, compliance with this requirement will be infeasible and the City could find itself perpetually out of compliance. (p. 2-3)

Agency Response: The agencies considered comments from local governments and listened to concerns over what waters may be jurisdictional under the proposed rule. The facts specific to the City of Roseville's sites should be evaluated in any determination of which if any of their waters are jurisdictional. This type of site-specific analysis is beyond the scope of the rule. The agencies note they have modified the exclusion paragraph in the rule to specifically address storm water

control features created in dry land as well as wastewater recycling structures created in dry land. The preamble to the final rule and the Features and Waters Not Jurisdictional Compendium provide in depth discussion of each of the exclusions and how they may apply to waters within complex water supply networks. 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. In order for these canals and aqueducts, to be considered "tributary" they must both contribute flow and have the bed bank and another indicator of ordinary high water mark .

Finally with regard to ditches, the rule provided additional clarity over the regulation of ditches by explicitly excluding certain categories of ditches See Preamble Section IV.I (Features and Waters Not Jurisdictional) and the Ditches Compendium for more information.

14.1. SITE-SPECIFIC EXAMPLES

Agencies' Summary Response:

Commenters provided the agencies with numerous examples of site specific situations and examples of particular waters that they believe should or should not be considered jurisdictional, including an assessment as to whether the proposed rule would be an expansion of jurisdiction for a particular waterbody. The agencies greatly benefited from these comments. Based on these and other comments, the final rule incorporates several changes to further the goal of clearer, and more consistent and easily implementable standards, including brighter lines where feasible and appropriate. For example, the final rule includes a new exclusion for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; changes to clarify the treatment of ditches; and changes to the definition of "adjacent" and "neighboring".

As a result of these and other changes, the final rule replaces existing procedures that frequently depended on an individual, time-consuming, and often inconsistent analysis of the relationship between a particular stream, wetland, lake, or other water with downstream navigable waters.

While the agencies carefully considered these comments about particular locations, it is beyond the scope of this rulemaking to provide detailed responses to site-specific analyses of particular waters, nor is it feasible. The comments are based on the proposed rule and many of them do not include all of the information needed to assess whether a particular water would be jurisdictional under the final rule. Moreover, this is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. For all of these reasons, drawing conclusions about the jurisdictional status of an individual water based on site-specific circumstances is beyond the scope of this rulemaking. Nevertheless, as an aid to the commenters, in the responses below, the agencies highlight the preamble sections and/or compendiums most relevant to the site-specific situation described by the commenter.

Expansion of Jurisdiction

Many commenters remarked on the proposed rule being an expansion of 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. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction.

Jurisdictional Determinations

Some commenters raised concerns on the validity previously approved Corps' Jurisdictional Determinations. The preamble explains the effective dates of this regulation. 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. Similarly, consistent with existing regulations and guidance, jurisdictional delineations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization. The agencies generally do not make jurisdictional determinations without the landowner's request to do so.

Maps

Some commenters requested maps of jurisdictional waters and others discussed the mapping efforts by the agencies. As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. 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.

Specific Comments

Region 10 Tribal Caucus (Doc. #14927)

14.2 The proposed rule is especially important for communities impacted by mining, such as many tribal communities in EPA Region 10, because, according to EPA's Toxic Release Inventory, mining is the Nation's number one toxic polluter.

Mining in the western United States has contaminated stream reaches in the headwaters of more than 40 percent of the watersheds in the West. Some mines generate a perpetual source of pollution where mining exposes sulfide-bearing ore that, when mixed with water, generates sulfuric acid. The outflow of sulfuric acid water, also known as acid

mine drainage ("AMD"), contaminates drinking water aquifers, lakes, streams, and prime fish and wildlife habitat. Once AMD beings, it cannot be stopped and requires treatment for many hundreds or thousands of years. (p. 2)

Agency Response: The agencies recognize the potential effects of mining and acid mine drainage on the Nation's waters. However, the final rule is a definitional rule that clarifies the geographic scope of the CWA. Issues associated with acid mine drainage are beyond the scope of the rulemaking.

Pueblo of Sandia (Doc. #2729)

14.3 Water quality in the Rio Grande is an important part of the Pueblo of Sandia's culture and history. In the arid southwest riparian ecosystems cover less than 2% of the landscape and both water quantity and water quality are of utmost importance. (p. 1)

Agency Response: The Agencies agree that protecting water quality is of the utmost importance and believe this rule will more effectively focus 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.

M. Longietti, State Representative - PA (Doc. #4047)

14.4 The Township Supervisors have also expressed to me that the Army Corp of Engineers took away farmland from township residents a number of years ago. They are concerned that the proposed rule change could result in the additional loss of farmland and farmers in their community, which would change the character and viability of the community. For all of these reasons they have requested that the proposed rule change be significantly modified to appropriately address these concerns. (p. 1)

Agency Response: See Agencies' Summary Response in 14.1. The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. 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." Further, this rule does not affect the exemptions provided in the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)), which exempts many normal farming activities such as seeding, harvesting, cultivating, soil and water conservation practices, and other activities from the Section 404 permitting requirement. 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.

Galveston Bay Council (Doc. #0866)

14.5 The Council wants to encourage you to consider the conclusions of two studies, mentioned numerous times in either the Connectivity Report or the preamble to the proposed rule, as you apply the final rule in the Galveston Bay region. Those studies are:

- M.G. Forbes, et al., "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," Wetlands 32(4): 705-715 (2012)

- B.P. Wilcox, et al., "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," Wetlands 31: 451-458 (2011)

These two studies are particularly relevant to the Galveston Bay region and should be helpful when your agencies determine whether waters in identified ecological regions or hydrologic-landscape regions are similarly situated for purposes of evaluating a significant nexus, as well as the basis for determining which ecoregions or hydrologic landscape regions should be so identified. The proposed rule and some scientific data suggest that "other waters," including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a particular water body.

These two studies provide valuable insight to help determine if the technical and scientific record could support limited specific subcategories of waters that are similarly situated or have a significant nexus sufficient to establish jurisdiction in the Galveston Bay region. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. The agencies have determined by rule that Texas Coastal Prairie Wetlands are "similarly situated," see Preamble at Section III.C and IV.H, Other Waters Compendium, and the Technical Support Document section IX for a more detailed discussion. Additionally, both studies you referenced were reviewed as a part of the Technical Support Document and were included in the Science.

Jack Hakim, Mayor, et al, Bullhead City, Arizona (Doc. #4185)

14.6 WHEREAS, these desert systems are ubiquitous in the City of Bullhead City's landscape and can apparently remain jurisdictional even if upstream of a natural or man-made break, and unlike other states, Arizona is literally crisscrossed with man-made canals that are essential for critical water delivery; (p. 1)

Agency Response: The definition of "tributary" addresses these circumstances and states that waters that meet the definition of tributary remain tributaries even if such breaks occur, so long as bed and banks and an ordinary high water mark are present upstream of the break. The agencies have historically regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The agencies have historically regulated aqueducts and canals.

14.7 WHEREAS, under EPA's proposed assumptions, it is possible that every mile of these canals, including those that are currently not jurisdictional, will fall under Clean Water Act regulation; (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. Please see also the previous the Response 14.6, and refer to the Tributary and Exclusions section for specific discussions on the jurisdiction and exclusions of ditches.

Rebekah Warren, Senator, Michigan 18th District (Doc. #4769)

14.8 As a Michigan State Senator, I believe broad federal protections arc imperative to protecting our local waters. Michigan has lost 50% of its wetlands, and 17% of the wetlands that remain, along with 26,000 lakes and ponds, could be considered "isolated"' waters no longer protected under the Clean Water Act. Wetland destruction continues in Michigan despite the many benefits these wetlands provide: improving water quality, providing wildlife habitat, flood control, groundwater recharge and recreational opportunities. I support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. (p. 1)

Agency Response: See Agencies' Summary Response in 14.1. The final rule did not change the definition of tributaries significantly from the proposal. See Tributary Compendium for a specific discussion. See also Adjacent Waters Compedium.

Representative Tammie Wilson, House of Representatives, Alaska State Legislature (Doc. #4902)

14.9 Alaska has a unique soil structure, 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. (p. 1-2)

Agency Response: See Agencies' Summary Response in 14.1. Neither the proposed rule nor final rule treat permafrost as water, and the commenter does not explain the basis for her statement. Moreover, this rule makes no changes in the definition of wetlands used in the 1987 Corps of Engineers Wetland Delineation Manual and the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) dated September 2007. The procedures and guidance for identify wetlands is outside the scope of this rule.

14.10 Alaska is unique in its geography. The proposed new "rules" would put the majority of Alaska's land under the jurisdiction of the EPA and that would be devastating to the people of Alaska. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. The commenter does not explain the basis for her statement. The agencies recognize the unique geography in Alaska. The greater clarity provided by changes such as the rule's distance thresholds and new or refined definitions, limited case specific analysis and more explicit exclusions provides the necessary clarity to the public. The agencies do not anticipate a marked increase in the extent of "waters of the U.S." in Alaska.

Doyle Wilson, Ph.D., RG, Water Resources Coordinator, Lake Havasu City (Doc. #5205)

14.11 In Lake Havasu City, the vast majority of "waters" are desert washes that are part of ephemeral systems that flow into the Colorado River with a very low probability to

influence the physical, chemical, or biological integrity of those downstream navigable waters. (p. 1)

Agency Response: See Agencies' Summary Response in 14.1.The rule excludes erosional features and only covers tributaries which contribute flow and that have physical indicators of flow – bed and banks and ordinary high water marks. The agencies intend to cover ephemeral streams where they meet the definition of "tributary." The science supports the regulation of headwater streams and the agencies outlines this support in the Technical Support Document at Section VII.

Terry E. Branstad, Governor, State of Iowa et al. (Doc. #8377)

14.12 Permitting delays and uncertainty will slow farmers conservation efforts. Bob Ausberger and his wife Joyce, have always worked to be good stewards of the land they farm in Greene County, Iowa near Jefferson. The Ausbergers want to build retention basins and other structures to slow the water flow in a three-quarter-mile-long ditch on their land that runs from a drainage district outlet in Buttrick Creek, and ultimately reaches the North Raccoon River. But like a lot of farmers in Iowa, the Ausbergers' conservation plans have been delayed by bureaucratic red tape as government agencies try to determine just what agencies have to approve plans, and which permits farmers need. "It seems like it should be pretty simple, but it seems to get complicated pretty fast with the different agencies," said Bob Ausberger. The Ausbergers requested conservation planning assistance in early 2013, but were informed that before the NRCS office could begin to do any planning work, he would have to determine whether the project required a permit from the U.S. Army Corps of Engineers. Bob filled out the paperwork required by the Corps and is waiting for a reply to determine whether or not the project will need a permit. But he worries the jurisdictional determination process and then the permitting process, even if he is successful, will delay the project in 2015 or beyond. Timing is important, Ausberger said, because construction on the conservation structures is limited by frozen ground during the winter and crops during the growing season."I really believe that farmers need to step up for the state's nutrient reduction strategy, and I think most people want to do that, " he said. "But sometimes when you try to do that, life just gets more complicated. There are probably thousands of small ditches like this around Iowa and the Midwest, and we could do a lot of good with this type of project on them." Original story credit to Dirck Steimel Iowa Farm Bureau Spokesman (p. 4)

Agency Response: See Agencies' Summary Response in 14.1.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. (See also the Ditches and the Features and Waters Not Jurisdictional Waters Compendium Compendium)

Florida Department of Agriculture and Consumer Services (Doc. #10260)

14.13 To further evaluate the potential effects of the Proposed Rule on the extent of federal wetlands jurisdiction within the state of Florida, we completed an evaluation for two discrete agricultural areas that have existing approved federal wetlands jurisdictional determinations. The agencies' statement in the Supplementary Information section of the Proposed Rule that "…the scope of regulatory jurisdiction in this proposed rule is

narrower than that under the existing regulations" implies that the approved wetlands jurisdictional determinations for these areas should either remain the same or decrease in scope. However, as discussed earlier in this report, proposed definitions for new terms in the rule create the potential for expanded federal wetlands jurisdiction.

Area No. 1 comprises approximately 4,612 acres of agricultural land, for which the ACOE approved a federal wetlands jurisdiction determination in 2013. A section of the jurisdictional area is depicted on Figure 2.1.1-1. According to the approved determination, approximately 353.1 acres are under federal wetlands jurisdiction. In addition, a total of 88.6 acres of wetlands were determined to be non-jurisdictional isolated wetlands. Figure 2.1.1-2 depicts the same section overlaid with the 100-year floodplain data publically available for the state of Florida (based on the 1996 FEMA Flood Insurance maps), and shows that the 100-year floodplain encompasses a majority (90%) of Area No. 1. According to the Proposed Rule, waters located within the floodplain would be considered "neighboring," thus "adjacent," waters, and therefore jurisdictional categorically by rule. Under this scenario, 88.1 acres (99.4%) of the previously determined 88.6 acres of non-jurisdictional wetlands would be considered jurisdictional under the Proposed Rule. Based on the evaluation of the floodplain data alone, the total federal wetlands jurisdiction for this area would increase by approximately 20%, encompassing 99.9% of the total wetland acreage.

Figure 2.1.1-3 depicts the existing jurisdictional wetlands in Area No. 1 overlaid with the potential extent of the "riparian area," as previously evaluated in Section 1.2.2.1 of this report. The overlay shows that the potential riparian area generally encompasses all of Area No. 1. Under the Proposed Rule, waters located within the riparian area would be considered "neighboring," thus "adjacent" and therefore jurisdictional categorically by rule. Under this scenario, all 88.6 acres (100%) of the previously determined non-jurisdictional wetlands would be considered jurisdictional. Based on the evaluation of the potential riparian area alone, the total federal wetlands jurisdiction for this area would increase by approximately 20%, encompassing100% of the total wetland acreage. [...] This analysis demonstrates not only that the Proposed Rule would result in an expansion of federal wetlands jurisdiction over waters currently approved by the ACOE as nonjurisdictional, but also that it would result in an expansion of federal wetland jurisdiction over areas previously determined to be isolated wetlands in accordance with SWANNC. (p. 21-26)

Agency Response: **See Agencies' Summary Response in 14.1. The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble at Section IV.G and compendium on adjacent waters. In addition, under the final rule waters that are subject to established, normal farming, silviculture, and ranching activities are not adjacent. While the agencies acknowledge the final rule may result in changes to some current Corps practices, the agencies disagree that the rule expands jurisdiction beyond the current regulation or is in conflict with the *SWANCC* decision.**

14.14 Area No. 2 comprises approximately 2,512 acres of agricultural land. Federal wetlands jurisdiction for this area was approved by the NRCS in a 2007 certified wetland

determination. According to 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), a certified wetland determination "means a wetland determination made by the Natural Resources Conservation Service (NRCS) that is of sufficient quality to make a determination of ineligibility for program benefits under the Food Security Act of 1985." The certified wetland determination alone would not necessarily identify the scope of federal wetlands jurisdiction under the CWA.

Our assessment of the federal wetlands jurisdiction for this area under the CWA (following Rapanos), was based on the following assumptions:

1) The areal extent of wetlands depicted for Area No. 2 was based on the approved NRCS certified wetland determination. The February 25, 2005, Joint Guidance indicates that "[t]o the maximum extent permissible by current statute and regulation, NRCS and COE will rely on each other's wetland determination."

2) NRCS identified-wetlands that intersect a USGS National Hydrography Dataset (NHD) flow path (to include canal/ditch, stream/river, and artificial flow path) were considered jurisdictional.

3)NRCS-identified wetlands located within areas identified as water bodies in the USGS NHD GIS data that are associated with an USGS NHD flow path (to include canal/ditch, stream/river, and artificial path) were considered jurisdictional.

4) NRCS wetlands that did not meet the criteria listed under numbers 2 and 3 above were considered to be isolated. Isolated wetlands determinations did not specify whether they were made based on a lack of a significant nexus, or based solely on the MBR prior to SWANNC. It is assumed that all isolated wetlands could be subject to a site-specific significant-nexus determination, and therefore, may include both jurisdictional and nonjurisdictional wetlands.

Based on these assumptions, we made a determination of jurisdictional or isolated for each NRCS-identified wetland area (refer to Figure 2.1.2-1). This analysis resulted in the following categories for evaluation:

• Approximately 232.61 acres of jurisdictional wetlands. These areas are presumed to meet the criteria for jurisdiction pursuant to the existing "waters of the United States" rule and associated Rapanos guidance.

• Approximately 66.0 acres of isolated wetlands. These areas would require a site-specific significant-nexus analysis to determine final jurisdiction (i.e., this category likely includes both jurisdictional and non-jurisdictional areas).

Figure 2.1.2-2 depicts Area No. 2 overlaid with the 100-year floodplain data publically available for the state of Florida (based on the 1996 FEMA Flood Insurance maps). The overlay shows that the 100-year floodplain encompasses a majority (99.6%) of Area No. 2. According to the Proposed Rule, waters located within the floodplain would be considered "neighboring," thus "adjacent," and therefore considered to be jurisdictional categorically by rule.

Under this scenario, all 66.0 acres (100%) of the previously identified isolated wetlands would be considered jurisdictional by category. Based on the evaluation of the floodplain data alone, the total federal wetlands jurisdiction for this area would increase by approximately 22%, encompassing 100% of the total wetland acreage. Figure 2.1.2-3 depicts the existing jurisdictional wetlands in Area No. 2 overlaid with the potential extent of the "riparian area," as previously evaluated in Section 1.2.2.1 of this report. The overlay shows that the potential riparian area generally encompasses all of Area No. 2. According to the Proposed Rule, waters located within the riparian area would be considered "neighboring," thus "adjacent," and therefore considered to be jurisdictional categorically by rule. Under this scenario, all 66.0 acres (100%) of the previously determined non-jurisdictional wetlands would be considered jurisdictional under the Proposed Rule. Based on the evaluation of the potential riparian area alone, the total federal wetlands jurisdiction for this area would increase by approximately 22%, encompassing100% of the total wetland acreage.

This analysis demonstrates that the Proposed Rule would result in an expansion of federal wetlands jurisdiction for Area No. 2 over waters identified as isolated and potentially nonjurisdictional. (p. 26-30)

Agency Response: **See Agencies' Summary Response in 14.1.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 definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and compendium on adjacent waters. In addition, under the final rule waters that are subject to established, normal farming, silviculture, and ranching activities from being considered adjacent. The use of remote sensing and mapping that can assist in establishing the presence of water are 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.**

14.15 Section II.A. of the Proposed Rule states that "the EPA and the Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations at lower cost and improved speed than the existing primarily field-based approaches." This section further states that "[i]n the normal course of making jurisdictional determinations, information derived from field observation is not always required in cases where a 'desktop' analysis furnishes sufficient information to make the requisite findings."[...]

The maps provided with the letter referenced above depicted surface water features contained within the publicly available USGS NHD GIS data, which the letter states

"were originally prepared in 2005 and subsequently updated as more information became available in 2009 and 2013." [...]

As noted in both the July 28, 2014, and August 6, 2014, letters from Ms. Stoner, GIS data depicting the extent of federal wetlands jurisdiction within the state of Florida subject to the CWA, existing Rapanos guidance, and the Proposed Rule is not publicly available. However, as noted throughout the Proposed Rule, the agencies reference and intend to rely upon publicly available GIS databases, including the NHD and NWI, to assist in making jurisdictional determinations.

In evaluating the potential extent of federal wetlands jurisdiction in Florida on a watershed level using GIS sources referenced in the Proposed Rule, we conducted a GIS analysis for portions of two 12-digit Hydrologic Unit Codes (HUCs) using publicly available information that included:

- •Aerial Photography (based on Esri, DigitalGlobe, GeoEye, i-cubed, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community)
- • USFWS NWI, 2014
- • South Florida Water Management District (SFWMD) Land Cover Classification, 2008
- • USDA NRCS Hydric and Predominately Hydric Soils, Web Soil Survey accessed October 2014
- • USGS NHD 1:24,000 Scale Flowline Data, December 2012
- • USGS Watershed Boundary Dataset accessed in October 2014 (to include sub-watershed 12-digit HUC)
- • 100-Year Floodplain Data based upon 1996 FEMA Flood Insurance maps
- • NRCS STATSGO2 General Soil Map of the United States [2006] to include the following Soil Orders for Florida: Spodosol [spodic horizon] and Alfisol [argillic horizon])
- • Karst systems (based on Closed Topographic Depression [2004] GIS data available from the FDEP)
- • The extent of the Surficial Aquifer System (based on the USGS Principal Aquifers of Florida [2003] GIS data layer)

As acknowledged by Ms. Stoner, "…no national or statewide maps have been prepared by any agency, including the EPA, depicting the scope of waters subject to the CWA…" We agree that no single dataset provides the extent of federal wetlands jurisdiction. Consequently, we used a combination of these publicly available GIS datasets to evaluate the potential extent of federal wetlands jurisdiction under the existing rule and under the Proposed Rule. The analysis was based on the following procedures and assumptions:

1) Since field-level data was not available and not practicable to compile for the entire watershed-level analysis, we determined the extent of wetlands (i.e., the geographic footprint) by conducting a GIS analysis using publicly available databases. The ACOE

2010 Regional Supplement to the Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0) requires presence of hydrophytic vegetation, hydric soils, and wetland hydrology to meet the definition of a wetland. Therefore, any areas mapped as wetlands and deep water habitats in the USFWS NWI data base and underlain by NRCS-mapped Hydric or Predominantly Hydric soils (i.e., mapped soils units containing greater than 66% hydric components), and areas mapped as a Level III 500 series or 600 series by the SFWMD Florida Land Use, Cover and Forms Classification System and underlain by NRCS-mapped Hydric or Predominantly Hydric soils were identified as potential wetlands for the purposes of this analysis.

2) To determine which of these potential wetlands might be considered jurisdictional by the ACOE/EPA, we overlaid them onto the USGS NHD GIS data. Any wetlands touching a USGS NHD flow line (to include connector, canal/ditch, stream/river, and artificial path) or falling within areas mapped as water bodies by the USGS NHD that are associated with a mapped flow line, were considered potentially jurisdictional. For the purposes of this analysis, USGS NHD flow lines (to include connector, canal/ditch, stream/river, and artificial path) were used to identify potential tributaries.

Any wetlands located outside of these areas were mapped as potentially isolated. Isolated wetlands determinations did not specify whether they were made based on a lack of a significant nexus, or based solely on the MBR prior to SWANNC. It is assumed that all isolated wetlands could be subject to a site-specific significant-nexus determination, and therefore, may include both jurisdictional and non-jurisdictional areas.

We acknowledge that following a site-specific analysis and consideration of field-level review and data, not all flow lines considered in this analysis as mapped by the USGS NHD may be considered to be tributaries under the existing rule. However, it is likely that under the Proposed Rule, additional features (such as agricultural field ditches) that are not typically represented in GIS data layers may meet the proposed definition of a "tributary." Consequently, this analysis may overestimate the extent of federal wetlands jurisdiction under the existing rule, and may underestimate the extent of federal wetlands jurisdiction under the Proposed Rule. Given this conservative approach, we assume that any estimated expansion of federal wetlands jurisdiction associated with the Proposed Rule would be compounded based on a site-specific analysis.

3) To estimate the potential extent of federal wetlands jurisdiction under the Proposed Rule, we used the GIS data for Florida to evaluate potentially jurisdictional wetlands and potentially isolated wetlands relative to the 100-year floodplain and the proposed definitions of "floodplain" and "riparian area" (as discussed in Sections 1.2.2.1 and 1.2.2.2 of this report). According to the Proposed Rule, any wetlands falling within the riparian area or floodplain of a jurisdictional water would be considered to be "neighboring," thus "adjacent," and therefore categorically jurisdictional by rule.

i. The FEMA 100-year floodplain (based on the 1996 FEMA Flood Insurance maps) was used for the floodplain analysis, as this is the smallest publicly available GIS floodplain data for Florida, and is consistent with the explanation of floodplain included in Section III.G. of the Proposed Rule.

ii. To identify the potential riparian area, the following features were mapped using publicly available GIS data in accordance with the explanation provided in Section III.G. of the Proposed Rule:

a. Soils with a restrictive layer that impede the vertical flow of water (based on NRCS STATSGO2 General Soil Map of the United States [2006] to include the following Soil Orders for Florida: Spodosol [spodic horizon] and Alfisol [argillic horizon]).

b. Karst systems (based on Closed Topographic Depression [2004] GIS data available from the FDEP).

c. The extent of the Surficial Aquifer System (based on the USGS Principal Aquifers of Florida [2003] GIS data layer). (p. 30-36)

Agency Response: **See Agencies' Summary Response in 14.1.The agencies support the use of remote sensing of information and mapping as tools to identify waters and in particular tributaries as discussed in the preamble.**

14.16 Watershed Area A comprises approximately 28,069 acres. Based on the assumptions outlined in Section 2.2, we identified 6,277.9 acres of potential wetlands within the watershed and made a determination of potentially jurisdictional or potentially isolated for each wetland area (refer to Figure 2.2.1-1). This analysis resulted in the following categories for evaluation:

- Approximately 5,464.0 acres of potentially jurisdictional wetlands. These areas are presumed to meet the criteria for jurisdiction pursuant to the existing "waters of the United States" rule and associated Rapanos guidance.

- Approximately 813.9 acres of potentially isolated wetlands. These areas would require a site-specific significant-nexus analysis to determine final jurisdiction (i.e., this category likely includes both jurisdictional and non-jurisdictional areas).

Figure 2.2.1-2 depicts Watershed Area A overlaid with the 100-year floodplain data publically available for the state of Florida (based on the 1996 FEMA Flood Insurance maps). The overlay shows that the 100-year floodplain encompasses a majority (93%) of the area. According to the Proposed Rule, waters located within the floodplain would be considered "neighboring," thus "adjacent," and therefore considered to be jurisdictional categorically by rule. Under this scenario, 813.4 acres (99.9%) of wetlands that would be identified as non-jurisdictional isolated wetlands under the existing rule would be considered jurisdictional by category under the Proposed Rule. Based on the evaluation of the floodplain data alone, the total federal wetlands jurisdiction for this area would increase by approximately 13%, encompassing virtually 100% of the total wetland acreage. Figure 2.2.1-3 depicts Watershed Area A overlaid with the potential extent of the "riparian area" as defined in the Proposed Rule and previously evaluated in Section 1.2.2.1 of this report. The overlay shows that the potential riparian area generally encompasses all of Watershed Area A. According to the Proposed Rule, waters located within the riparian area would be considered "neighboring," thus "adjacent," and therefore considered jurisdictional categorically by rule. Under this scenario, all 813.9 acres (100%) of the previously identified potentially isolated wetlands would be considered jurisdictional categorically under the Proposed Rule. Based on the evaluation

of the potential riparian area alone, the total federal wetlands jurisdiction for this area would increase by approximately 13%, encompassing 100% of the total wetland acreage.

This analysis demonstrates that the Proposed Rule would result in an expansion of federal wetlands jurisdiction for Watershed Area A over waters identified as isolated wetlands that potentially are non-jurisdictional under the existing rule. (p. 36-40)

Agency Response: **See Agencies' Summary Response in 14.1.The "definition of "neighboring now includes distance limits from the OHWM or high tide line of an (a)(1) through (a)(5) water both within and outside of the 100 year floodplain that must be considered before determining if a water is jurisdictional by rule. Additionally, the limits provided in (a)(8) case specific waters limit which waters are subject to a case-specific determination.**

14.17 Watershed Area B comprises approximately 25,983 acres. Based on the assumptions outlined in Section 2.2, we identified 5,528.9 acres of potential wetlands within the watershed and made a determination of potentially jurisdictional or potentially isolated for each wetland area (refer to Figure 2.2.2-1). This analysis resulted in the following categories for evaluation:

• Approximately 4,765.5 acres of potentially jurisdictional wetlands. These areas are presumed to meet the criteria for jurisdiction pursuant to the existing "waters of the United States" rule and associated Rapanos guidance.

• Approximately 763.4 acres of potentially isolated wetlands. These areas would require a site-specific significant-nexus analysis to determine final jurisdiction (i.e., this category likely includes both jurisdictional and non-jurisdictional areas).

Figure 2.2.2-2 depicts Watershed Area B overlaid with the 100-year floodplain data publically available for the state of Florida (based on the 1996 FEMA Flood Insurance maps). The overlay shows that the 100-year floodplain encompasses a majority (78%) of the area. According to the Proposed Rule, waters located within the floodplain would be considered "neighboring," thus "adjacent," and considered jurisdictional categorically by rule. Under this scenario, 683.8 acres (90%) of wetlands that would be identified as isolated wetlands under the existing rule would be considered jurisdictional by category under the Proposed Rule. Based on the evaluation of the floodplain data alone, the total federal wetlands jurisdiction for this area would increase by approximately 13%, encompassing 99% of the total wetland acreage.

Figure 2.2.2-3 depicts Watershed Area B overlaid with the potential extent of the "riparian area" as defined in the Proposed Rule and previously discussed in Section 1.2.2.1 of this report. The overlay shows that the potential riparian area generally encompasses all of Watershed Area B. According to the Proposed Rule, waters located within the riparian area would be considered "neighboring," thus "adjacent," and therefore considered jurisdictional categorically by rule. Under this scenario, all 763.4 acres (100%) of the previously identified potentially isolated wetlands would be considered jurisdictional categorically under the Proposed Rule. Based on the evaluation of the potential riparian area alone, the total federal wetlands jurisdiction for this area would increase by approximately 14%, encompassing 100% of the total wetland acreage.

This analysis demonstrates that the Proposed Rule would result in an expansion of federal wetlands jurisdiction within Watershed Area B over waters identified as isolated wetlands that are potentially non-jurisdictional under the existing rule. (p. 40-43)

Agency Response: See Agencies' Summary Response in 14.1.Please also see previous response 14.16.

14.18 As a specific example, restoration efforts in the Lake Okeechobee watershed take into account the hydrologic alterations that have resulted in delivery of water to the lake in large pulses. This has a detrimental effect on downstream waters, which include the Everglades and the St. Lucie and Caloosahatchee rivers and estuaries. In recognition of this, Florida's restoration efforts have included restoring storage in the watershed as a significant component. A pilot project conducted jointly by three Florida agencies and the World Wildlife Fund led to the development of a pay-for-performance program whereby ranchers in the watershed are paid to store water on their property. Lake Okeechobee stakeholders have embraced this innovative and highly successful program, and we are in the process of expanding the program statewide to enhance other restoration and protection efforts. While some areas of the participating ranches already are considered jurisdictional waters, the additional definitions of terms in the proposed regulations would greatly expand the extent of these jurisdictional areas. The significant expansion of WOTUS likely will make Florida's ranchers reluctant to participate in the State's water storage programs for fear of additional regulatory burden, thereby inhibiting our restoration efforts rather than enhancing them. (p. 57)

Agency Response: See Agencies' Summary Response in 14.1.Under the final rule, waters that are subject to "normal farming, ranching, and silviculture" are not "adjacent" Stormwater control features constructed to convey, treat, tor store stormwater that are created in dry land are not "waters of the United States" This change from the proposal 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.

To address concerns of the agricultural community, the agencies also highlight that even where waters are covered by the CWA there are many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and 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.

14.19 The expansion of WOTUS has the potential to result in significant costs to urban areas. The costs will be borne primarily by Municipal Separate Storm Sewer System (MS4) permittees through MS4 and Corps dredge and fill permitting requirements. The Florida Stormwater Association (FSA) and Florida H20 Coalition developed separate estimates of these potential costs. The FSA estimate, which was based on a representative set of water bodies in seven significantly urbanized Florida counties, concluded that potential restoration costs could range from about $2 million to greater than $50 million for each water body. The Florida H20 Coalition estimate, which was based on four Southwest Florida counties, concluded that potential median costs for those counties could range from hundreds of millions of dollars to greater than a billion dollars. In both cases, the costs would be incurred in an attempt to restore highly altered and sometimes wholly artificial water bodies to the same nutrient standards applicable to Florida's lakes and streams. However, there would be no environmental benefit achieved, since the biology of the water body is driven largely by the highly altered nature of the system and not by nutrient concentrations in the systems. As noted above, these estimates apply only to a subset of Florida's water bodies and counties, and statewide costs would be significantly higher. (p. 57-58)

Agency Response: **See Agencies' Summary Response in 14.1, Compendium for Features and Waters Not Jurisdictional and Section IV.I of the preamble. 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 (i.e., sections 303, 305, 311, 401, 402, and 404). The agencies conducted an economic analysis to provide the public with information on the potential indirect costs and benefits associated with this definitional rule. The economic analysis was done for informational purposes only, and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis. The economic analysis fulfills the requirements of Executive Orders 13563 and 12866. The economic analysis and an explanation for how indirect costs and benefits estimates were derived are documented in the Economic Analysis for the Clean Water Rule; Definition of "Waters of the United States" Under the Clean Water Act (Final Rule) and can be found in the accompanying docket.**

Battelle Energy Alliance, LLC (Doc. #16448)

14.20 In addition to the rule's lack of meaningful guidance on ephemeral "other waters," the rule does not address dry stream beds of "other waters." A recent case in Santa Fe, New Mexico, illustrated the confusion behind applying the CWA to "other waters." A family in Santa Fe purchased land and began to clean up garbage that had accumulated on the property. The family was served a Notice of Violation for violating section 404 of the CWA (dredged and fill material) because the garbage had accumulated in a dry arroyo, which the ACOE had determined to be a water of the United States. The ACOE alleged that the removal of the garbage could pollute the Rio Grande River 25 miles away. The

family sued the ACOE, but the case was subsequently dismissed because the ACOE changed its position so that the dry arroyo was not considered a water of the United States.[1]

Because the case was never heard on the merits, the court did not issue an opinion to determine how dry beds of ephemeral streams that are not categorically navigable are regulated under the CWA. The case was filed and dismissed before the proposed rule was printed in the Federal Register. Yet the Agencies failed to address in the proposed rule how the CWA would apply to dry beds of ephemeral streams that are not categorically navigable. Therefore, the Agencies should explain in the proposed rule when the dry beds of ephemeral "other waters" will be regulated.

It would be of great benefit to the public to have a rule that addresses ephemeral streams and their dry beds in the context of the "other waters" portion of the proposed rule. (p. 7)

Agency Response: See Agencies' Summary Response in 14.1. Please see also the preamble, and the Tributary Compendium, the Features and Waters Not Jurisdictional Compendium for a discussion of the exclusion for ephemeral features, the definition of tributaries and also the relevance of flow regime.

T. Moxley (Doc. #2520)

14.21 Due to the fact that over 91 percent of all streams in New Mexico have the potential to be determined Waters of the US. despite the fact that they are dry most of the year, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of Waters of the U. S. (p. 28)

Agency Response: See Agencies' Summary Response in 14.1, and Section III.B of the preamble for a discussion of the Science Report and the SAB, as well as the Compendiums for Tributaries and Features and Waters Not Jurisdictional.

New Mexico Department of Agriculture (Doc. #13024)

14.22 This rule will have an impact on land use, particularly in areas in the arid West. According to the New Mexico Environment Department and the New Mexico Water Quality Control Commission, there are 108,649 miles of streams of which 99,332 miles are intermittent or ephemeral. That means that over 91 percent of all streams in New Mexico have the potential to be determined Waters of the U.S. despite the fact that they are dry most of the year.[2] Therefore, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of Waters of the U. S. (p. 16)

Agency Response: See Agencies' Summary Response in 14.1 and Section IV.F of the rule preamble, and the Tributary Compendium of the Response to comments

[1] Smith v. Army Corps of Engineers, No. 1 :12-CV-01282-MV-LFG (D.N.M. March 8, 2013).
[2] New Mexico Environment Department. "WQCC Draft 2014-2016 State of New Mexico CWA Section 303(d)l305(b) Integrated Report ." September 9, 20 14. Available at : http//www nmenv.state.nm.us/swqb/303d-305b120l4-2016/.

for a discussion on the definition of tributaries and also the relevance of flow regime.

14.23 Due to the fact that over 91 percent of all streams in New Mexico have the potential to be determined Waters of the US. despite the fact that they are dry most of the year, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of Waters of the U. S. (p. 28)

Agency Response: See Agencies' Summary Response in 14.1, Preamble Section III.B. (Science Report) and Preamble Section IV. F (Tributaries); and the Compendiums for Tributaries and Features and Waters Not Jurisdictional.

Interstate Mining Compact Commission (Doc. #14114)

14.24 We are also concerned that this rulemaking does not take into consideration comprehensive state programs that are already in effect, and that EPA and the Corps may be relying on inadequate and inaccurate information regarding the breadth and scope of some states' laws and programs. Though not cited in the proposed rule itself, EPA officials have referred to reliance on a 2013 Environmental Law Institute (ELI) study titled, "State Constraints — State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act" to defend the proposition that this rulemaking is needed because state programs for protecting water resources are inadequate. EPA purports that the proposed rule will address states' regulatory inadequacies. EPA has asserted that Pennsylvania, for example, is one such state. However, in Pennsylvania there are approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17 square miles of the Delaware estuary, and 63 miles of Great Lakes shore front that make up the waters of the Commonwealth which have long been protected by a network of state laws. The state's regulations constitute a robust, comprehensive, and effective regulatory framework for protection of the waters of the Commonwealth. The ELI study fails to identify codified statutes and regulations that have provided the foundation for Pennsylvania's regulatory program for decades, but only cites a 1996 Executive Order and the wetlands provision under the Pennsylvania Dam Safety and Encroachments Act. The study fails to reference the extensive Pennsylvania Clean Streams Law (CSL) passed in 1937, and the multiple chapters of Pennsylvania Code which comprise the state's regulatory program. The CSL is clear and comprehensive and the scope of protected waters is not subject to confusion or debate, unlike this proposed rulemaking. In 2013, 62% of the water-related permitting in Pennsylvania was done pursuant solely to state law authority, while only 38% was pursuant to the delegated National Pollutant Discharge Elimination System (NPDES) program. The states are in the best position to provide effective, fair, and responsive oversight of water and land use within their communities and have consistently and conscientiously done so. (p. 4)

Agency Response: The agencies meet extensively with States, local and county governments. The purpose of this rule was to clarify the scope of "waters of the United States" that are protected under the Clean Water Act (CWA), 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.

The agencies recognize the vital role that states and tribes play in the implementation and enforcement of the Clean Water Act. This rule does not affect the authority of states and tribes to implement their programs to more broadly and more fully protect the waters in their jurisdiction. This is addressed in the preamble in the Executive Summary and within the Federalism sections.

14.25 In North Dakota, many of the hazardous abandoned coal mines that the state reclaims hold water in final mine pits and in mine spoils. It is unclear whether these areas would be considered "water filled depressions created incidental to construction activity" which would be exempt from the proposed "waters of the United States" definition. We urge EPA and the Corps to clearly exempt waters held in abandoned mines from the definition. Otherwise, reclamation work to eliminate hazardous conditions will unnecessarily be subject to the lengthy Section 404 permitting process. (p. 5)

Agency Response: As discussed in the Preamble and Features and Waters Not Jurisdictional Compendium, the agencies did included an exclusion that considers water-filled depressions created in dry land incidental to mining activity which is consistent with the agencies' 1986 and 1988 preambles.

14.26 Areas that may be jurisdictional based on the definitions of "tributary" and "other waters" do not contribute significant amounts of water, if any, to traditional navigable waters. A large percentage of the closed depression prairie potholes in North Dakota, for example, 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. EPA and the Corps should provide specific examples of tributaries (especially ephemeral streams) and isolated water bodies in different regions of the country that would be categorically considered as jurisdictional waters under the proposed definition, and those that would not be jurisdictional. (p. 5)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Other Waters, Tributaries, and Scientific Evidence Supporting the Rule, as well as the Preamble discussions on "tributaries," "adjacent waters," "waters subject to a case specific analysis," and "significant nexus."

Office of the Governor, State of Kansas (Doc. #14794)

14.27 The Federal agencies believe that all tributaries should be jurisdictional because they are connected to the stream system and are poised to contribute flow and material to downstream waters, thereby influencing the physical, chemical and biological nature of those waters. Kansas believes connectivity in the western stream networks is tenuous and episodic, at best. As an example, Kansas cites recent flow conditions seen on an intermittent stream, the Smoky Hill River above Cedar Bluff Reservoir in Gove and Trego counties (see Appendix B to this letter). While the Smoky Hill River is a classified water under Kansas Water Quality Standards, and therefore, a WOTUS, it nonetheless is illustrative of the typical flow conditions seen in western Kansas that contradict the belief that upstream-downstream connections should automatically be assumed. Rains in

August 2013 induced runoff in Gove County as noted by the rise in flow seen at the U.S. Geological Survey gaging station at Elkader, Kansas. The corresponding flow seen 50 miles downstream at the USGS station near Arnold, Kansas is attenuated and much reduced in volume and peak. Subsequent rains later in August triggered a rise in flow at Arnold, but because of the localized nature of the rains, no response was seen upstream at Elkader.

Challenging the proposed rule's principle that all tributaries make expected contributions to downstream waters, the relative change in pool elevation in Cedar Bluff Reservoir, downstream from the Arnold station, is negligible and insignificant. Stream connectivity on the Smoky Hill River reflects the findings of EPA's Scientific Advisory Board, who cautioned the Federal agencies that connectivity is not a binary attribute, but instead has a wide continuum of significance. Our concern here is not with a larger stream such as the Smoky Hill River, but instead where the proposed rule will take us, i.e., the tributary to the tributary to the tributary of the Smoky Hill River. Those small order streams will be, in fact, ephemeral and the significance of their impacts very marginal, if even measurable. Flow movement in Kansas ephemeral streams is more likely to move vertically downward by deep percolation than longitudinally along the channel in the downstream direction. (p. 4-5)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Section Compendium for and Scientific Evidence Supporting the Rule, as well as Sections III.B and IV. F of the Preamble (The Science Report and Tributaries, respectively).**

Arizona State Land Department (Doc. #14973)

14.28 The lack of definitional clarity throughout the Proposed Change and the reality that the regulatory agency alone will make the subjective determination regarding what, exactly, constitutes a "water of the United States" means that regulated patties will simply not be able to anticipate when, how, or to what degree they may be controlled. In fact, this scenario has the potential to expand federal authority to an unfathomable degree and, by doing so, negatively impact both the Trust and the statewide economy.

According to the most recently available data, more than 170,000 acres of State Trust land are currently subject to federal jurisdiction, based on the existing meaning of "waters of the United States." Importantly, this means that many of those who lease State Trust land for grazing, commercial, and agricultural purposes are already impacted by federal regulations. In fact, the current regulations impact more than 160,000 acres used for grazing; more than 7,000 acres utilized for commercial purposes; and more than 4,000 acres used for agricultural operations. The Trust relies on the lessees of these areas to generate revenue, and the people of Arizona rely on them to produce the goods and services upon which they rely. Neither the Trust nor the State can afford the uncertainty that will result from implementation of the Proposed Change, as it is currently written.

The lack of definitional clarity throughout the Proposed Change and the power of the federal regulatory agency to unilaterally make decisions forces the Trust and the State into an untenable position from which neither knows how many acres of State Trust land may be swept into the federal purview, if the Proposed Change is implemented as written.

For example, the Department has calculated that this new language could potentially transfer regulatory authority over nearly 2,000,000 acres from the State to federal administrative agencies. This amount constitutes nearly twelve times as much area as is subject to federal regulation under the current rule. Of this, more than 1,700,000 grazing acres; nearly 96,000 commercial acres; and nearly 33,000 agricultural acres could be impacted. Increasing federal authority to this degree and at this rapid pace would hinder the operations of innumerable lessees, threaten the revenue upon which the Trust relies, and burden the people of Arizona who rely on the goods and services provided by lessees. (p. 2-3)

Agency Response: See Agencies' Summary Response in 14.1. As stated in the summary, the final rule provides additional clarity and bright lines to the definition of "waters of the United States."

Arctic Slope Regional Corporation (Doc. #15038)

14.29 Are all of the 56.4 million acres of wetlands on the North Slope jurisdictional waters because they are "traditional navigable waters" or riparian areas that are "adjacent" to "traditional navigable waters"?

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? (p. 10)

Agency Response: See Agencies' Summary Response in 14.1. The rule has added distance limits and definitions of "neighboring" and "significant nexus" to provide greater clarity. This rule does not change the methods or Regional supplements used to identify waters and all of those documents and guidance are outside the scope of this rule.

Sealaska Corporation (Doc. #15356)

14.30 Expansion of jurisdictional wetlands that require a permit and will create significantly greater impacts for permit applicants that are not necessary to achieve the purposes of the CWA in Southeast Alaska for a number reasons. The purposed changes do not balance the increased burden imposed on applicants versus any additional any ecological services to protect against impacts from development due to these unique circumstances:

- Unique character of the coastal temperate rainforest
- Extensive government ownership
- Southeast Alaska island archipelago difficult to operate. (p. 2)

Agency Response: The permitting process are not changed by this rule and are outside the scope of the rule.

14.31 Our region is a remote location that is already costly to operate due the island archipelago and because of the relatively short construction and operating seasons. Project delays here have more significance than projects delays elsewhere in the lower 48 states. On the one hand we are fortunate to have abundant anadromous fish streams and resources, but the management of this resource almost always requires narrow operating windows for

any 'in stream work' or any work that may adversely impact anadromous fish habitat. A project that misses these windows can be easily delayed for a year, and expanded EPA jurisdiction increases this likelihood. Jurisdictional wetland determinations can be difficult and agency personnel sometimes make questionable determinations and permit applicants are faced with the choice of accepting an overly broad wetland determination or appealing the determination and facing costly project delays that could mean the loss of a whole construction season or longer.

The new rule proposed by EPA will include vast areas that will require Section 404 permits beyond the CWA and case law, it will include vast areas that are actually isolated wetlands and with this expansion virtually all projects, except those that occur on mountain tops, will require a Section 404 permits. EPA/Corps efforts must continue to require onsite analysis and field reconnaissance to establish what a jurisdictional wetland is and what is not. Wholesale capture of vast areas by rule, as the proposed rule would do, will create a tremendous and unnecessary burden on our region that already is struggling. Again EPA has not sharpened the jurisdictional line, it has significantly moved it. (p. 4)

Agency Response: **See Agencies' Summary Response in 14.1. The rule does provide greater clarity about which waters are jurisdictional by including distance limits, adding definitions for "neighboring" and "significant nexus," and identifying waters that are not jurisdictional. The greater clarity regarding which waters are subject to CWA jurisdiction will also reduce the existing need for time-intensive case-specific jurisdictional determinations.**

North Cass Water Resource District (Doc. #5491)

14.32 The District is concerned about the impacts of these proposed rules and the dramatically adverse impacts they could have on agriculture in the Red River Valley. (p. 2)

Agency Response: **See Agencies' Summary Response in 14.1. This is a definitional rule. Under the final rule, 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 change from the proposal 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.**

Sierra Soil and Water Conservation District (Doc. #5593)

14.33 The exemptions for agriculture that are claimed by the proposed changes, only apply to long standing operations, not new or expanding farms or ranches, or even operations that have been in continuous operation, yet have had a change of ownership status. The proposed changes would also limit improvement/conservation projects and impose significant hardships on farmers and ranchers who would be limited in their every day

routine activities. In many instances, producers would have to apply for a permit for some of these daily routine activities with no legal guarantee that these permits would be granted. This would give the EPA and Corps of Engineers ultimate control to restrict a producer's ability to farm or ranch and establish federal veto power over farming and other land uses. (p. 1)

Agency Response: See Agencies' Summary Response in 14.1. The exemptions provided for agriculture in the Clean Water Act are unchanged by this rule and are outside the scope of this rule making. Additionally, the permitting requirements and process unchanged by this rule are outside the scope of this rulemaking.

Sweetwater County Board of County Commissioners, Sweetwater County, Wyoming (Doc. #6863)

14.34 Sweetwater County maintains approximately 1,200 miles of county roads and approximately 2,400 miles of associated drainage ditches. Approximately two thirds or 1,600 miles of these county ditches drain uplands into ephemeral waterways that flow into the Green River and then into the Colorado River. Under the proposed rule, both the Green and the Colorado Rivers are designated as waters of the United States, but it is unclear, under the proposed rule, whether or not the 1,600 miles of Sweetwater County road ditches are considered waters of the United States. (p. 1)

Agency Response: In order to provide clarity to which waters are considered "waters of the United States" and which are not, the agencies have modified and expanded the ditch exclusion provided in the proposed rule The rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, and municipalities charged with maintaining the nation's roads.

Murray County Board of Commissioners (Doc. #7528.1)

14.35 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 require s a minimum of eight months to a year to complete each request. (p. 9)

Agency Response: See Agencies' Summary Response 14.1. Under the final rule prairie potholes were determined to be "similarly situated" by rule for purposes of the significant nexus analysis. While the permit backlog referenced by the commenter is beyond the scope of this rulemaking, the rule addresses it by clarifying and simplifying implementation of the CWA consistent with its purposes through clearer definitions and use of bright line rules. See Compendium for Significant Nexus and Preamble, Section IV. H. 3.

Prairie potholes are a category of waters that are considered an (a)(7) water, which requires 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 generally 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.

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

14.36 [T]he recently released "Streams and Waterbodies in Colorado", maps reveal square boundaries in much of Colorado. The square boundaries and abrupt endings where streams actually continue in real life. These odd mapping characteristics indicate incomplete data sets. In addition, the Colorado map reveals no ephemeral stream s in Moffat County, likely because of incomplete data. With certain stream classification data missing for Moffat County, it is difficult to meaningfully comment on the impact of the proposed rule. In addition, the "EPA Regional Wetland Maps" recently released reveal missing data for near 3/4 of Moffat County. Only the SE quarter of Moffat County shows wetland data, making it even m o re difficult to comment on the impacts of the proposed rule. (p. 3)

Agency Response: See Agencies' Summary Response 14.1. The refined definitions, the use of physical indicators of flow and bright lines in the final rule will allow the regulated public a clearer understanding of which waters are "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.

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."

Board of Douglas County Commissioners, Castle Rock, CO (Doc. #8145)

14.37 Based on the attached Douglas County Waters Evaluation, the Proposed Rule expands WOUS to include certain active channels that do not have a direct surface connection with a downstream Water of the U.S. or do not flow regularly and do not have a substantial effect on the integrity of downstream waters. The attached evaluation

highlights this expansion at two locations--Location 2 and 7. At these locations, features drain into active channels which do not have a surface connection to a downstream TNW. Under the Current Guidance, these active channels are considered isolated and not WOUS. In fact, Location 2 drains toward Kinney Creek, a perennial channel that drains toward Cherry Creek. The USACE issued a determination of no-jurisdiction for Kinney Creek in 2013 based on the lack of a direct surface connection to Cherry Creek. This non-WOUS status also applies to all features that drain to the active channels. Under the Proposed Rule, the active channels evaluated at Locations 2 and 7 would likely be WOUS. This potential expansion of WOUS would affect both channel's jurisdiction, but also expand the jurisdiction of all features that flow into that channel. The Proposed Rule does not sufficiently address the economic impacts of this expansion. (p. 11)

Agency Response: **See Agencies' Summary Response in 14.1. The streams that meet the definition of "tributary" are jurisdictional by the rule. It is important to note, that for a stream to be considered tributary it must "contribute flow." Please see the rule preamble, and the Tributary Compendium of the Response to comments for a discussion on the definition of tributaries and also the relevance of flow regime. Additionally, the agencies do not intend to reopen existing approved jurisdictional determinations unless requested to do so by the applicant.**

14.38 Based on the attached Douglas County Waters Evaluation, the Proposed Rule fails to provide clarity if a roadside ditch constructed primarily in uplands would be considered jurisdictional along its entire length if it intercepted flow from a natural tributary that is WOUS, or if jurisdiction would be asserted based on some other criteria (e.g., from the point of flow intercept and downgradient). Further, the Proposed Rule fails to define the term "upland". This uncertainty is highlighted at what is designated in the Evaluation as Locations 4 and 6.

At Location 4, Feature 5 is a constructed roadside ditch, which collects overland surface flow along its uppermost reach. Roughly 600 feet from Feature 5's confluence with a natural wetland swale, it intercepts flow from a natural active channel that would likely be considered WOUS under the Proposed Rule. The Proposed Rule does not provide sufficient explanation to allow Douglas County to determine if all of Feature 5 would be considered WOUS or if only some portion thereof would be WOUS.

At Location 6, Feature 7 is a constructed roadside ditch which departs the road course and develops the characteristics of a natural active channel. It is not readily apparent if the portion of the ditch that resembles an active channel was present prior to the construction of the road. The Proposed Rule does not identify if the ditch would be WOUS along its entire length that has an Ordinary High Water Mark (OHWM), if jurisdiction would begin when the channel departs the road, or if no portion of the ditch would be WOUS based on the fact that it was not constructed in, or draining WOUS. (p. 12)

Agency Response: **See Agencies' Summary Response in 14.1. The agencies heard from many stakeholders that additional clarity was needed in regards to ditches and several changes were made to provide that clarity. . The term "upland" has been removed from the regulation. See Ditches Compendium.**

14.39 Based on the attached Douglas County Waters Evaluation, the Proposed Rule retains uncertainty regarding the identification of an OHWM on features that have been fortified to prevent erosion. For example, certain stormwater ditches may not have a natural OHWM but have been armored with angular cobble to prevent headcutting. This uncertainty is highlighted at Locations 3 and 5 where upland vegetated swales have been fortified with angular cobble to prevent erosion. Based on conversations with EPA and USACE staff, the OHWM along fortified channels should be identified using water stains on the channel fortification. This guidance presents a dilemma to MS4 permittees when determining whether or not to fortify upland vegetated swales: they can either leave the swale unprotected (but retain its non- WOUS status; or they can fortify the swale but increase the potential that it will be WOUS. Douglas County requests that the Proposed Rule clarify how OHWM should be identified in these situations. Further, Douglas County requests that the Agencies evaluate the advisability of imposing regulatory burden at locations that have been protected from future erosion and sediment transport events. (p. 12-13)

Agency Response: See Agencies' Summary Response in 14.1, the Compendiums for Ditches and Features and Waters Not Jurisdictional.

14.40 Based on the attached Douglas County Waters Evaluation, the Proposed Rule retains substantial uncertainty regarding the waste treatment system exclusion, a source of current uncertainty regarding the scope of WOUS. This is highlighted at Locations 1, 2 and 7. At these locations, ditches, ponds and outfalls have been constructed in non-WOUS in order to collect, detain and treat stormwater runoff prior to discharge to WOUS.

In comparing the Waste Treatment Exclusion in Current Guidance and the Proposed Rule, and reviewing substantial EPA documents which reference this exclusion, it is abundantly evident that at the national level, EPA does not intend to assert jurisdiction over features constructed in uplands that are designed to meet CWA requirements. However, the current practice by USACE is much more limited—the USACE's Denver Regulatory Office will only apply the exclusion for features that treat certain types of classified "waste". The Proposed Rule should be revised to specify that these types of features constructed in uplands that are designed to meet CWA requirements are intended to be excluded from WOUS.

Further, the Agencies have indicated that this exclusion does not apply to ditches. Douglas County requests that the Proposed Rule consider that ditches are critical components of many waste treatment systems—how can a detention pond improve water quality if it does not have the upgradient ditch infrastructure to collect untreated water and then the downgradient ditch infrastructure to convey treated stormwater to WOUS? The Proposed Rule should exclude ditches constructed in uplands when they are integral and necessary components of a waste treatment facility. (p. 13)

Agency Response: See Agencies' Summary Response in 14.1and the Ditches Compendium.

14.41 The Proposed Rule does not affect the scope of potential Waters of the U.S.—Waters of the U.S. will typically be restricted to areas meeting the USACE definition for wetlands or have an ordinary high water mark OHWM (e.g., creeks, ditches, streams, ponds, etc.).

Ditches which lack an OHWM and do not contain wetland would appear to remain nonjurisdictional (i.e., not Waters of the U.S.). This is relevant at Location 1 where Feature 1 currently lacks an OHWM and is therefore, not a potential Water of the U.S. (p. 19)

Agency Response: **See Agencies' Summary Response in 14.1 and Preamble Sections IV.F (Tributaries), III.B (Science Report) as well as the associated compendiums. A water that otherwise qualifies as a tributary under the rule's definition, does not lose its status as a tributary if there are constructed or natural breaks so long as a bed and banks and an ordinary highwater mark can be identified upstream of the break. Further, the final rule provides for an exclusion specific to stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.**

14.42 The Proposed Rule would likely expand jurisdiction to certain active channels that do not have a direct surface connection with a downstream Water of the U.S. or do not flow regularly and do not have a substantial effect on the integrity of downstream waters. This potential expansion of Waters of the U.S. would affect both the channel's jurisdiction, but also expand the jurisdiction of all features that flow into that channel. Location 2 and Location 7 provide examples of how this change could affect jurisdiction of natural drainages and MS4 facilities. (p. 19)

Agency Response: **See Agencies' Summary Response in 14.1.**

14.43 The Proposed Rule includes language that would appear to include certain constructed ditches as Waters of the U.S. if they were constructed in other Waters of the U.S. It is not clear if a roadside ditch constructed primarily in uplands would be considered jurisdictional along its entire length if it intercepted flow from a natural ephemeral tributary that is Waters of the U.S., of if the USACE and EPA intend to assert jurisdiction based on some other criteria (e.g., from the point of flow intercept and downgradient). This uncertainty could be relevant at Location 3 (Feature 4) and Location 4 (Feature 5). (p. 19-20)

Agency Response: **See response 14.38. See Agencies' Summary Response 14.1. The agencies heard from many stakeholders that additional clarity was needed in regards to ditches and several changes were made to provide that clarity. . The term "upland" has been removed from the regulation. See Ditches Compendium.**

14.44 The Proposed Rule does not provide clarification regarding the identification of an OHWM on features that have been fortified to prevent erosion. For example, certain stormwater ditches may not have a natural OHWM but have been armored with angular cobble to prevent headcutting. The Proposed Rule could provide clarity if it provided guidance on how OHWM should be identified in these situations. Location 5 (Feature 6) provides an example of this scenario. (p. 20)

Agency Response: **See Agencies' Summary Response 14.1. In response to comments, and to increase clarity, the rule adds the Corps' existing regulatory "ordinary high water mark" definition to EPA's regulations. As discussed in the Preamble, the Corps technical manuals are available to help identify ordinary high water mark.**

14.45 The Proposed Rule does not provide additional clarification regarding the waste treatment system exclusion, a source of current uncertainty regarding the scope of Waters of the U.S. The existing regulations and Proposed Rule both identify that waste treatment systems designed to meet the requirements of the Clean Water Act are not Waters of the U.S. This exclusion would appear to include MS4 facilities as excluded features, but in WWE's experience, the USACE often does not consider them as qualifying for the exclusion. This uncertainty would be particularly relevant at Location 7 where Feature 12 is a stormwater pond constructed in uplands but discharging to a Water of the U.S. (p. 20)

Agency Response: **With Respect to the waste treatment systems exclusion and the exclusion added to the final rule for certain stormwater control features created in dry land, please see the Compendium for Features and Waters Not Jurisdictional Compendium at Section 7.4.4.**

14.46 Location 1: Happy Canyon Creek, Grandview Estates (Figures 1.a-1.b, Photos 1-2) Location 1 is situated south of the E-470 Toll Road in northern Douglas County. Grand View Estates is a residential subdivision with larger lot sizes (roughly two acres and larger) and dirt roads. Potential Waters of the U.S. at this location include Happy Canyon Creek and possibly roadside ditches which drain to Happy Canyon Creek. Happy Canyon Creek is an ephemeral channel with a clearly defined OHWM and bed width of roughly 10-20 feet and bank depth of roughly 6-12 inches.

1) Potential Waters of the U.S.: The evaluated feature (Feature 1) at this location is a roadside ditch that flows from south to north along North 4th Street. This ditch is currently vegetated with upland plants and does not have a clear OHWM (see Photo 1). Based on this, Feature 1 is not currently a potential Water of the U.S. However, if hydrology changes at this location (e.g., if road paving increasing surface runoff) or if the ditch bottom becomes less permeable due to settling of fine sediments, this ditch could likely develop wetland vegetation or a clear OHWM. If these changes occur, Feature 1 would appear to be a potential Water of the U.S.

2) Connectivity to Downstream TNW: The evaluated feature discharges to Happy Canyon Creek through a stormwater outfall. Happy Canyon Creek flows in a northeast direction through the north portion of the evaluated location (see Figures 1.a and 1.b). Happy Canyon Creek flows into Cherry Creek at a confluence located roughly 2.5 miles northeast of the evaluated location. Cherry Creek is a relatively permanent water that is used for recreational navigation downstream at Cherry Creek reservoir. As such, Cherry Creek is a TNW at Cherry Creek Reservoir. Based on observations of USGS topographical mapping and aerial imagery, Happy Canyon Creek has a continuous surface connection to Cherry Creek.

3) Potential qualification for the Waste Treatment Exclusion: Feature 1 serves in part as a conveyance for a stormwater detention facility located south of Lincoln Avenue (see Figure 1.b and Photo 2). WWE did not confirm if this facility is designed to only attenuate flood flows, or if there is a water quality component to the pond. It appears that the facility would cause some settling of stormwater runoff and as a result, would likely reduce sediment transport from the landscape. Review of historic aerial imagery did not establish whether or not Feature 1 was constructed wholly in uplands or if it was partially constructed in a historic drainage channel. Based on the watershed size at this location, it

appears likely that prior to construction of Lincoln Avenue and the upgradient detention facility, there would have been an active channel conveying flow through this area. It is not readily apparent if Feature 1 was constructed in this historic potential Water of the U.S. and whether or not that would have bearing on the feature's potential conformance to the Waste Treatment Exclusion.

4) Potential Jurisdiction: Under both the Current Guidance and the Proposed Rule, Feature 1 does not appear to be a jurisdictional Water of the U.S. based on the lack of wetlands or OHWM. As noted above, this could change in the future if altered hydrology or deferred maintenance resulted in development of wetlands or an OHWM. In the event that Feature 1 develops an OHWM or wetland, Feature 1 would be jurisdictional under the Current Guidance only if it were determined to have a "significant nexus" to Cherry Creek at Cherry Creek Reservoir (and provided it did not qualify for the Waste Treatment Exclusion). In WWE's experiences on site specific projects, the USACE has often asserted that these types of features have a "significant nexus" to downstream TWN. Under the Proposed Rule, if Feature 1 develops an OHWM or wetland, it would appear to be jurisdictional (again, provided it did not qualify for the waste treatment facility exclusion). Feature 1 would likely be considered a tributary to a TNW, and all tributaries would be jurisdictional Waters of the U.S. without the need to establish a "significant nexus".

5) Considerations: Feature 1 can be used to highlight three areas of consideration for MS4 facilities:

a. Current and future conditions: Although Feature 1 does not currently have physical characteristics that make it a potential Water of the U.S., future develop an OHWM or wetland areas. And, if these changes occur and the Proposed Rule is adopted as written, Feature 1 would likely be a Water of the U.S.

b. Waste Treatment Exclusion uncertainties: Based on WWE's experience, Feature 1 would likely not be considered a qualifying waste treatment facility. This is primarily due to previously received feedback from EPA and USACE that identifies that in order to qualify for this exclusion, the facility must treat a waste as described by EPA and that ditches are not normally part of the treatment facility. Further, WWE expects that in order to establish that Feature 1 qualified for this exclusion, it would be necessary to demonstrate that there was not an active channel in this location prior to Feature 1's construction. Based on the history of land modification in this area, it could be infeasible to demonstrate this for regulatory purposes.

c. Requisite connectivity: Under the Current Guidance (and assuming that it developed wetlands or an OHWM), Feature 1 may or may not have the requisite connectivity to the South Platte River to be considered a Water of the U.S. The USACE would need to establish that it had a significant effect on the physical, chemical and biological integrity of the South Platte River at its confluence with Cherry Creek. When the magnitude of Feature 1's hydrology is compared to the South Platte River at this location, it could be difficult to establish this "significant nexus". (Please note that WWE has not calculated the flow

contribution for Feature 1.) Conversely, under the Proposed Rule (again, assuming that Feature 1 develops an OHWM), the USACE would not need to establish a "significant nexus" and the feature would likely be Waters of the U.S. (p. 25-27)

Agency Response: See Agencies' Summary Response 14.1 above, the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional.

14.47 Location 2: Kinney Creek at The Pinery (Figures 2.a-2.b, Photos 3-4)

The Pinery is a residential subdivision with lot sizes of roughly 1/4 acre and paved road surfaces. Adjacent terrain consists of primarily native upland grassland with some mixed conifer woodland. The Pinery includes internal stormwater collection and detention facilities which work to offset (at least partially) increased runoff resulting from the development's increased impervious area. The evaluated features (Features 2 and 3) are part of a detention system which discharges to Kinney Creek.

1) Potential Waters of the U.S.: WWE evaluated two features that are part of The Pinery's MS4 facilities. Feature 2 is a potential wetland that has developed in the bottom of a dry stormwater detention facility (see Photo 3). Feature 2 is primarily vegetated with sandbar willows, a hydrophytic shrub that often indicates the presence of wetlands in this part of Colorado. Feature 3 is an ephemeral active channel which receives flow from the detention facilities during runoff events (see Photo 4). Feature 3 is vegetated with upland weeds and does not contain potential wetlands. Feature 3 has an OHWM and sufficient bed and bank to be a potential Water of the U.S.

2) Connectivity to Downstream TNW: Feature 2 appears to be hydrologically isolated during smaller storm events—this potential wetland is located at an elevation that is slightly below the elevation of the outlet from the detention pond. However, larger runoff events would result in sufficient water within the pond to discharge to the stormwater outlet which has a direct surface connection to Feature 3. Feature 3 appears to have a continuous surface channel connection to Kinney Creek, a relatively permanent water that drains toward Cherry Creek. As stated above, Cherry Creek is a TNW at Cherry Creek Reservoir. It is important to note that Kinney Creek does not have a continuous surface channel connection to Cherry Creek. Kinney Creek loses an OHWM in an upland field, roughly 1,000 feet from Cherry Creek. Although Kinney Creek likely has a hydrologic connection to Cherry Creek, the USACE determined that it was isolated under the Current Guidance. Based on this, the USACE provided an approved jurisdictional determination in 2013 that identifies the Kinney Creek is not Waters of the U.S. Thus, Kinney Creek and all waters that drain to Kinney Creek are not currently jurisdictional under the CWA.

3) Potential qualification for the Waste Treatment Exclusion: Feature 2 is located within a stormwater detention facility which likely confers some water quality benefits to downstream waters. This facility does not have a water quality outlet structure and it is not certain whether the detention facility would meet the criteria for a qualifying treatment facility. Also, it is difficult to determine if the detention facility was constructed wholly in uplands—the reviewed mapping does not allow determination of whether a natural drainage occurred at this location prior to development of The Pinery.

Feature 3 appears to be a channel that was constructed to convey flow from the detention facilities to Kinney Creek. Assuming that the detention pond is considered a qualifying waste treatment facility, this channel would appear to be an integral component of the overall facility, but based on recent feedback, EPA and USACE would likely not consider it an excluded waste treatment system.

4) Potential Jurisdiction: Under the Current Guidance, Kinney Creek and all features that drain to Kinney Creek are not Waters of the U.S. and as such, Features 2 and 3 are not Waters of the U.S.

Under the possible future scenario where Kinney Creek is a Water of the U.S. (for example, if it is assessed following adoption of the Proposed Rule), Feature 2 could be considered to be a wetland that is adjacent (but not abutting) a non-relatively permanent tributary (Feature 3) to Kinney Creek. Assertion of Feature 2's adjacency to Feature 3 would likely be based on geographic proximity and hydrologic connectivity. Thus, under the Proposed Rule, both Feature 2 and Feature 3 would likely be Waters of the U.S (notwithstanding their potential qualification for the Waste Treatment Exclusion or Feature 3's qualifying for a ditch exclusion).

5) Considerations: Features 2 and 3 can be used to highlight several areas of consideration regarding the Proposed Rule and MS4 permittees:

a. Downstream jurisdictional determinations affect upstream permitting: In the case of Features 2 and 3, these facilities are not currently Waters of the U.S. due to the USACE's determination that Kinney Creek is not Waters of the U.S. Under the Proposed Rule, Kinney Creek would likely be Waters of the U.S. and Features 2 and 3 would possibly be Waters of the U.S. This contrast highlights how the agencies' approach to asserting jurisdiction over tributaries can have significant effects on the jurisdiction of upstream natural and manmade features.

b. Waste treatment facility criteria: Feature 2 is located in a detention pond that appears to have been designed to capture and slowly release stormwater runoff to mitigate flood and channel erosion. The reviewed regulations and guidance do not specify if these design criteria would be sufficient to be designated as a facility designed to meet CWA requirements (and thus, qualify for the Waste Treatment Exclusion).

Feature 3 is a conveyance feature that is an integral component of a detention facility. Assuming that the upstream detention facility qualified for the Waste Treatment Exclusion, Feature 3 would likely not qualify for the exclusion based on feedback from EPA and USACE staff that ditches are not normally waste treatment facilities. This highlights the potential importance of specifying that MS4 facility points of discharge are at the receiving water and not the outlet from a detention facility. Additionally, it may be helpful to incorporate and highlight water quality improvement components in the MS4 ditches—measures implemented to increase channel stability and slow water flow are commonplace but their role in improving downstream water quality is not always recognized.

c. Ditches and active channels: Assuming that Feature 3 does not qualify for the Waste Treatment Exclusion, there is some question regarding whether it would be

a jurisdictional tributary under the Proposed Rule, or if it would be considered an excluded ditch that was constructed in, and drains only "uplands" and does not have perennial flow. On one hand, the feature has the appearance of a natural channel and appears to convey flow to a downstream water during relatively frequent storm events (and as such, would likely not be an exempt ditch). On the other hand, Feature 3 is a constructed flow conveyance structure that only receives flow from managed stormwater outfalls (and as such, could possibly be an exempt ditch). (p. 27-29)

Agency Response: **See Agencies' Summary Response in 14.1, and the Compendiums for Adjacent Waters, Ditches, Tributaries, and Features/Waters Not Jurisdictional.**

14.48 Location 3: Lake Gulch Road and Castlewood Canyon Road (Figures 3.a-3.b, Photos 5-7)

Location 3 includes Lake Gulch, a perennial tributary to Cherry Creek. The vicinity of Location 3 is primarily non-irrigated pasture with large ranch and farming properties. Lake Gulch is a perennial waterway that flows north from Location 3 for approximately 2.5 miles before reaching Cherry Creek.

1) Potential Waters of the U.S.: Feature 4 is a roadside ditch that drains into Lake Gulch. For the majority of its length, Feature 4 is vegetated with upland plants and lacks an OHWM (see Photo 5). This reach of Feature 4 is not potential Waters of the U.S. Prior to reaching Lake Gulch, Feature 4 heads south and away from Lake Gulch Road. Here, Feature 4 flows are concentrated into a smaller channel that has been fortified with angular cobble as a means to dissipate energy and reduce erosion (see Photos 6 and 7). It is not clear if Feature 4 would have an OHWM in the absence of the cobble fortification and regular maintenance. WWE expects that the steeper grades and concentrated flow could be sufficient to create an OHWM in the absence of the fortification measures. This situation highlights current uncertainty regarding constructed or maintained features and whether a feature that lacks an OHWM due to maintenance is still a potential Water of the U.S.

2) Connectivity to Downstream TNW: Feature 4 discharges to wetlands adjacent to Lake Gulch, a perennial tributary to Cherry Creek. Cherry Creek becomes TNW downstream at Cherry Creek Reservoir.

3) Potential qualification for the Waste Treatment Exclusion: Feature 4 does not appear to have specific design components that are intended to treat waste and as such, would not likely qualify for the Waste Treatment Exclusion.

4) Potential Jurisdiction: If EPA or USACE determined that there was an OHWM where Feature 4 is fortified with angular cobble, it could be considered a tributary to Lake Gulch under the Current Guidance. Under this scenario, if Feature 4 were found to have a "significant nexus" to Cherry Creek at Cherry Creek Reservoir, it would be Waters of the U.S. (notwithstanding its potential qualification as an exempt ditch).

Under the Proposed Rule, if Feature 4 was determined to have an OHWM, it would likely be a jurisdictional tributary (again, notwithstanding its potential qualification as an exempt ditch).

5) Considerations: Feature 4 can be used to highlight two considerations for MS4 permittees:

a. Features with maintained/fortified banks that lack OHWM: In the case of Feature 4, it appears likely that it would have an OHWM were it not for the installation and maintenance of erosion prevention measures. It does not appear likely that this could be used to prevent certain larger features from being considered Potential Waters of the U.S. (e.g., the Los Angeles River where it is lined with concrete is still considered Waters of the U.S.). It is not readily clear how this type of maintenance and protection relates to the identification of an OHWM on smaller drainage features. WWE could follow up with EPA and USACE to identify if the agencies have developed a standard approach to these types of features.

b. Constructed and maintained features status as "ditches": The portion of Feature 4 that could be potential Waters of the U.S. was likely constructed and receives flow from a roadside ditch, but it is not clear if it would be classified as a ditch and thus, possibly qualify for the upland ditch exclusion. (p. 29-31)

Agency Response: **See Agencies' Summary Response in 14.1, and the Compendiums for Tributaries, Ditches, and Features/Waters Not Jurisdictional.**

14.49 Location 4: Upper Lake Gulch Road (Figures 4.a-4.b, Photos 8-9)

Location 4 is in a sparsely populated portion of Douglas County that has prairie valleys and gentle hill slopes with pockets of conifer woodland. Location 4 includes a wetland swale that drains toward Upper Lake Gulch, a tributary of Lake Gulch.

1) Potential Waters of the U.S.: Feature 5 is a roadside ditch that has an OHWM (see Photos 8 and 9 and Figure 4.b). This feature intercepts flow from "upland" areas as well as from a natural drainage that is also potential Waters of the U.S. (see Figure 4.b and Photo 9). Feature 5 discharges to a potential wetland swale that drains toward Upper Lake Gulch.

2) Connectivity to Downstream TNW: Feature 5 drains to a potential wetland swale that is identified as a dashed blue-line feature on USGS mapping. This swale appears to drain to Upper Lake Gulch which is tributary to Lake Gulch and subsequently Cherry Creek. Cherry Creek is TNW at Cherry Creek Reservoir, which is located downstream from the confluence with Lake Gulch.

3) Potential qualification for the Waste Treatment Exclusion: Feature 5 does not appear to qualify for the Waste Treatment Exclusion. It appears to serve stormwater collection and conveyance purposes, but does not appear to have water quality control components.

4) Potential Jurisdiction: Under the Current Guidance, Feature 5 could be jurisdictional Waters of the U.S. if it has a "significant nexus" to Cherry Creek at Cherry Creek Reservoir. The Current Guidance does not include exclusions for ditches that convey flow to Waters of the U.S. Although WWE is aware that certain USACE offices will not take jurisdiction over various ditch types based on construction in "uplands", hydrologic regime, connectivity to downstream waters, or other attributes, WWE has not evaluated these practices with respect to Feature 5.

Under the Proposed Rule, Feature 5 (or at least portions) would likely be Waters of the U.S. Feature 5 has an OHWM, contributes flow to Waters of the U.S., and does not appear to qualify for either of the two ditch exclusions because it receives flow (and was likely constructed in) from a natural drainage features that is likely Waters of the U.S. under the Proposed Rule.

5) Considerations: Location 4 can be used to highlight an area of uncertainty:

> a. Ditches and Waste Treatment Facilities that intercept flow from natural drainages that are Waters of the U.S.: The exclusions for ditches and waste treatment facilities both require that the excluded structures not be constructed in Waters of the U.S. In the case of Feature 4, the ditch develops OHWM prior to intercepting flow from a potential Water of the U.S., and then continues to flow roughly 600 feet before discharging into a wetland drainage. Based on this, it is not clear if the portion of Feature 4 that is upgradient of the intercepted Water of the U.S. is itself excluded or a potential Water of the U.S. In communication with EPA and USACE staff, there appears to be uncertainty regarding the extent that ditches and waste treatment facilities are captured into jurisdiction when a portion of the ditch or treatment facility is constructed in Waters of the U.S. (p. 31-32)

Agency Response: **See Agencies' Summary Response in 14.1, and Compendiums especially those for Tributaries, Ditches, and Features/Waters Not Jurisdictional.**

14.50 Location 5: Upper Lake Gulch Road near Interstate 25 (Figures 5.a-5.b, Photos 10-11)

Location 5 is near Interstate 25, in the vicinity of the East Plum Creek valley bottom. At Location 5, surface drainage is flowing west off of moderately steep slopes vegetated with a mixture of open grassland and open conifer woodland.

1) Potential Waters of the U.S.: Feature 6 is a manmade drainage feature that receives flow from a natural drainage channel that has an OHWM and conveys flows toward a perennial tributary to East Plum Creek. Feature 6 lacks a clear OHWM at this location, likely a result of the channels fortification with angular cobble (see Photos 10 and 11). Downstream of the fortification measures, Feature 6 appears to dissipate in flat terrain and flows would travel downgradient as sheet flow, toward the unnamed tributary to East Plum Creek.

2) Connectivity to Downstream TNW: Feature 6 conveys flow through a maintained and unmaintained channel, portions of which lack an OHWM, to an unnamed tributary to East Plum Creek. East Plum Creek flows north toward its confluence with West Plum Creek, whereupon it becomes Plum Creek. Plum Creek continues north and flows into Chatfield Reservoir, which is TNW.

3) Potential qualification for the Waste Treatment Exclusion: Feature 6 does not appear to qualify for the Waste Treatment Exclusion.

4) Potential Jurisdiction: Under the Current Guidance, Feature 6 would not likely be Waters of the U.S. This statement is based on the observation that Feature 6 lacks an OHWM downstream of Upper Lake Gulch Road, where the channel is not manipulated and flows over flatter terrain. As observed with Kinney Creek, breaks in OHWM can be used to establish that a feature is not Waters of the U.S. Thus, even if EPA or USACE determined that Feature 6 is an active channel in the vicinity of the fortifications, it would

likely be considered isolated non-Waters of the U.S. due to the break in surface channel connection.

Under the Proposed Rule, if Feature 6 were found to have an OHWM by the USACE or EPA, it would likely be considered Waters of the U.S., regardless of the break in OHWM observed downgradient from Location 5. This is based on the Proposed Rule's definition for tributaries and the fact that there would not be a requirement to establish a "significant nexus" at this location.

5) Considerations: Feature 6 provides an additional example (see Feature 4) of the uncertainty regarding channels that have been fortified and lack readily apparent OHWM. If fortification of a channel can be used as a proxy for an OHWM, a key question for the regulators is: Are the limits of that feature's jurisdiction the extent of the cobble, or where flows are expected to occur during some specified return frequency flow? If it is the former, then there is a disadvantage to fortifying channels beyond the bare minimum (additional fortification would increase the area of jurisdictional Waters of the U.S.). If it is the latter, then additional guidance or specificity is required regarding which regular flow events occupy the areas within the OHWM and which rarer flow events exceed the OHWM. For example, the USACE's Regulatory Guidance Letter No. 05-05 on Ordinary High Water Mark Identification states that "a litter or wrack line resulting from a 200-year flood event would in most cases not be considered evidence of an OHWM." This guidance identifies that a 1-in-200 year storm event likely exceeds the magnitude of an event that would delineate the OHWM, but it does not provide a guideline for a more frequent storm that could be used for these purposes. (p. 32-33)

Agency Response: See Agencies' Summary Response in 14.1. See also the Preamble Section IV.F, the TSD Section V.III, and the Tributary compendium.

14.51 Location 6: South Perry Park Road and Tall Horse Trail (Figures 6.a-6.b, Photos 12-13)

Location 6 includes South Perry Park Road, a roadside ditch and a natural drainage that flows west toward West Plum Creek. 1) Potential Waters of the U.S.: Feature 7 consists of a roadside ditch which flows north along South Perry Park Road. This ditch departs the road near the intersection with Tall Horse Trail, where it flows northeast from the road course and toward a natural drainage. Feature 7 has an OHWM along South Perry Park Road and downgradient to its confluence with the natural drainage. Based on this, Feature 7 is potential Waters of the U.S. 2) Connectivity to Downstream TNW: Feature 7 drains to an unnamed drainage that is tributary to West Plum Creek. West Plum Creek flows north toward its confluence with East Plum Creek, whereupon they become Plum Creek. Plum Creek continues north until it discharges into Chatfield Reservoir. Chatfield Reservoir is TNW. Potential qualification for the Waste Treatment Exclusion: Feature 7 does not appear to qualify for the Waste Treatment Exclusion because it does not appear to have been designed or constructed to treat water quality as part of CWA requirements. 4) Potential Jurisdiction: Under the Current Guidance, Feature 7 could be considered Waters of the U.S. if it were found to have a "significant nexus" to Chatfield Reservoir. It is not readily apparent that Feature 7 would qualify as an excluded ditch feature. If it did qualify as an excluded ditch, it is not readily apparent if the exclusion would stop where Feature 7 departs from the alignment of the road or if the excluded areas would extend down to the natural drainage. Under the Proposed Rule, Feature 7 would likely be

considered Waters of the U.S., notwithstanding it qualifying for one of the proposed ditch exclusions. The portion of Feature 7 that runs adjacent to South Perry Park Road appears to meet the ditch exclusion which states that ditches constructed wholly in uplands, draining only uplands and having less than perennial flow. However, after the ditch departs South Perry Park Road and flows northeast toward the natural drainage, it is not clear if the ditch exclusion would continue to omit this reach from Waters of the U.S. 5) Considerations: Feature 7 can be used to highlight the uncertainty regarding roadside ditches that depart their roadside courses and take on more natural, and less managed, characteristics. It is difficult to definitively demarcate where the roadside ditch becomes a natural drainage way, but this boundary appears relevant for features which would otherwise qualify for one of the ditch exclusions provided in the Proposed Rule. (p. 33-34)

Agency Response: **See Agencies' Summary Response in 14.1 and the Ditches Compendium.**

14.52 Location 7: Waterton Canyon Road and Rampart Range Road (Figures 7.a-7.b, Photos 14- 20)

Location 7 includes terrain occupied by a shopping center, residential housing, roads and pastureland. The location generally drains to the west toward the South Platte River. Location 7 includes five evaluated features (Features 8-12).

1) Potential Waters of the U.S.:

a. Feature 8: Feature 8 is a wetland complex that receives flow from natural drainage in addition to runoff from adjacent residential and roadway areas. Water was present at the surface of this area and based on the prevalence of cattails, it is likely that this area is perennially saturated at the surface. WWE did not find an outlet from Feature 8 to downstream waters. In lieu of a constructed outlet, Feature 8 appears to have a shallow subsurface connection to a roadside drainage located to the east of Rampart Range Road.

b. Feature 9: Feature 9 is a drainage ditch that is lined with wetland. This feature appears to receive flow from an adjacent residential neighborhood and drains north toward Feature 8. The extent of this feature that could be potential Waters of the U.S. includes the OHWM or wetland boundary, whichever is larger. This feature appears to have perennial flow, as evidenced by observed flow in mid-July and the prevalence of cattails and other plants adapted for especially wet conditions.

c. Feature 10: Feature 10 is a wetland complex that generally follows Rampart Range Road and flows north toward Willow Creek.

d. Feature 11: Feature 11 is a drainage channel that receives flow from a road side ditch (which conveys flow from Features 8-10). This drainage channel has an OHWM in the vicinity of Rampart Range Road, but loses the OHWM prior to reaching Willow Creek.

e. Feature 12: Feature 12 is a water quality and stormwater pond that receives flow from the shopping center. This pond has a water quality control outlet that controls releases to a wetland complex located adjacent to Little Willow Creek.

2) Connectivity to Downstream TNW:

a. Feature 8: Feature 8 appears to have a shallow subsurface hydrologic connection to a road side ditch that runs north along the east side of Rampart Range Road. This ditch drains into a natural channel (Feature 11), which subsequently loses an OHWM prior to reaching Willow Creek. Willow Creek is a tributary to the South Platte River, a TNW.

b. Feature 9: Feature 9 drains to Feature 8, which is described above.

c. Feature 10: Feature 10 drains to the roadside drainage that also appears to receive flow from Features 8 and 9. As discussed above in part a. of this section, these features drain into a channel that loses OHWM prior to reaching Willow Creek.

d. Feature 11: As described above, Feature 11 loses OHWM prior to reaching Willow Creek.

e. Feature 12: Feature 12 drains directly to wetlands adjacent to Little Willow Creek which is tributary to the South Platte River, a TNW.

3) Potential qualification for the Waste Treatment Exclusion: Of the features evaluated at Location 7, Feature 12 appears to be the only candidate for the Waste Treatment Exclusion. Feature 12 was constructed to help manage increased runoff from the shopping center. It includes a water quality outlet structure that provides a controlled release of flows during storm events. These types of outlets are commonly used when management of discharged water volume and quality are important for managing receiving water quantity and quality. Based on this features design and construction to meet water quality goals and its construction in an upland area, this feature would appear to qualify for the Waste Treatment Exclusion.

4) Potential Jurisdiction: Under the Current Guidance and Proposed Rule, the potential jurisdiction for Features 8-12 is as follows:

a. Current Guidance

i. Features 8-11: Based on the USACE's determination of no-jurisdiction for Kinney Creek, it appears likely that they would issue the same determination for Feature 11, which loses an OHWM at least 500 feet prior to reaching Willow Creek. If this determination was made for Feature 11, all those features draining to it (Features 8-10) would also appear to be not Waters of the U.S.

ii. Feature 12: Feature 12 appears to conform to the Waste Treatment Exclusion. If EPA or USACE determined that it did not, this area would likely be considered a jurisdictional Water of the U.S. due to its hydrologic connectivity to Little Willow Creek.

b. Proposed Rule

i. Feature 8: Under the Proposed Rule, Feature 8 would likely be considered to be part of the tributary network to Willow Creek. WWE assumes that EPA or USACE would assert that the wetland contributes

flow to Willow Creek through a combination of surface and shallow subsurface connections. As a wetland that is part of the tributary network to a TNW, this feature would likely be jurisdictional Waters of the U.S. (notwithstanding its conformance to a waste treatment or other exclusion).

ii. Feature 9: Under the Proposed Rule, Feature 9 would likely be considered a tributary to Feature 8, which as described above, would likely be Waters of the U.S. As such, Feature 9 would too be Waters of the U.S. Feature 9 does not appear to qualify for one of the two available ditch exclusions because it contributes flow to a Water of the U.S. and appears to have perennial flow.

iii. Feature 10: Under the Proposed Rule, Feature 10 would likely be considered a tributary wetland that is Waters of the U.S. Preliminarily, this area would not likely qualify for a Waste Treatment Exclusion nor as an irrigation dependent wetland.

iv. Feature 11: Under the Proposed Rule, Feature 11 would not lose its tributary status due to the existing break in OHWM prior to reaching Willow Creek. As such, Feature 11 would likely be considered a jurisdictional tributary that is Waters of the U.S.

v. Feature 12: Under the Proposed Rule, Feature 12 would likely qualify for the Waste Treatment Exclusions, which is not proposed to be changed. If this feature was found to conform to this exclusion (nor other exclusions for the so-called "preamble waters"), Feature 12 would likely be jurisdictional Waters of the U.S. due to its flow contribution to the tributary network draining to the South Platte River.

5) Considerations: Features 8-12 can be used to highlight several considerations regarding jurisdictional determinations and the Proposed Rule, as they relate to MS4 permittees:

a. Proposed definition for tributaries would expand jurisdiction beyond existing practice under the Current Guidance: In a similar scenario as described above for Location 2, the jurisdiction of Features 8-10 depends on the jurisdiction of Feature 11. Thus, if the definition of tributaries is expanded to include features that have breaks in their OHWM, there will likely be an increase in the number of features that are considered jurisdictional in upper portions of those watersheds.

b. The Waste Treatment Exclusion can provide flexibility to MS4 permittees: If interpreted consistently with EPA and USACE headquarters' guidance, the Waste Treatment Exclusion could be used to obtain determinations of no-jurisdiction for many MS4 facilities throughout Douglas County. This would provide greater flexibility to maintain, repair and enhance these features. Conversely, if the Waste Treatment Exclusion is interpreted narrowly (as WWE has observed on occasion), conducting routine maintenance and expansion work on a facility such as Feature 12 can trigger additional permitting requirements. (p. 34-37)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Tributaries, Adjacent Waters, and Features and Waters Not Jurisdictional Compendium.**

City of Portland, Maine (Doc. #8659)

14.53 Even though the City has made a substantial commitment to comply with Clean Water Act compliance requirements, the City of Portland was issued a notice of violation of the CWA in 2012, due to the reporting of several SSO's over a period of time, within the City's sanitary sewer system. The notice led to the City initiating a sanitary sewer CMOM audit of the sanitary sewer infrastructure, looking at a wide range of elements including condition assessment, staffing organization and maintenance needs. The report is informing current funding levels in the sewer fund. We are concerned that this proposed new Rule on Waters of the US, and expanding EPA's regulatory authority will lead to similar violation notices. (p. 2)

Agency Response: **See Agencies' Summary Response in 14.1. The rule is a definitional rule that reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule does not establish new regulatory requirements of any CWA program. Past or future actions resulting from non-compliance with the CWA are outside the scope of the rulemaking.**

Office of the City Attorneys, City of Newport News, Virginia (Doc. #10956)

14.54 The examples given of "shallow subsurface connections" are clearly groundwater and included steeply sloping forested areas, which are uplands (in spite of the fact that the rule states that the definition does not include "uplands"). The Tidewater area of Virginia is characterized by high water tables. Thus, virtually all waters are subject to "shallow subsurface connections". The only exceptions would be shallow ephemeral streams, which are elsewhere defined as tributaries. In short, this rule would render any body of water east of the fall line in Virginia a Water of the United States per se. This is directly contrary to the rulings of the Court and the CWA itself. See, pages 22207, 22208, 22209 and 22211. (p. 3)

Agency Response: **See Agencies' Summary Response in 14.1. In response to public comments, the final rule no longer contains 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. See preamble to the final rule at section IV.G.2, TSD at Section VIII, and Adjacent Waters Compendium for a discussion.**

Weld County (Doc. #12343)

14.55 The County maintains over 3,200 miles of roadways. As part of this maintenance, the County constructs and maintains borrow pits, roads, ditches, and culverts. The County works closely with local agencies and individuals to make sure that water stays off of the roads and is able to be used by those who need it. Under the proposed new definition of "Waters of the U.S.," these ditches, culverts and borrow pits will potentially be determined to be tributaries. Due to the lack of clarity in the proposed definitions, Weld

County is left in a position where it cannot tell which parts of its infrastructure will become regulated by the federal government. If these projects become regulated then the County will be required to seek permits. This will significantly increase the time and money needed to perform routine maintenance on basic county infrastructure.

In an attempt to clarify the new definitions of "tributary," "ordinary high water mark," "perennial flow," "upland," Weld County provides the following examples. Weld County seeks clarification both on the definitions provided, as well as whether the following waterways would be subject to regulation under the new rule.

[Photos of Waterway 1] This waterway is adjacent to and underneath a County maintained paved road. The County maintains the culvert that allows rain water and irrigation tail water to flow under the road and into the concrete ditch on the other side. The concrete ditch is privately owned and maintained, and flows directly into the Platte River. Water flows through this channel only periodically. When there is significant rainfall, or snow, or runoff from irrigation, this culvert and ditch will have water.

The concrete ditch certainly has a bed and banks, though it is unclear whether there is an ordinary high water mark. It does not have a perennial flow. The culvert does not have perennial flow. The culvert and ditch combination is perhaps a few hundred yards long, and does not cross any wetlands, or drain into any wetlands. As a result of this, Weld County takes the position that this is an upland ditch and is exempt. However, it does drain into an interstate waterway. Therefore, it would potentially fall into the definition of tributary. Weld County takes the position that because this culvert serves simply as a conduit for occasional water flows, it should not be regulated. The difficulty in assessing this type of waterway pursuant to the new definitions is that it would appear to be excluded because it is an upland ditch. Alternatively, despite having only intermittent flow, it would likely be considered a tributary because it flows directly into an interstate waterway. Weld County believes that this culvert and ditch should be exempt. If the agencies disagree Weld County requests notification and an explanation. (p. 9-11)

Agency Response: See Agencies' Summary Response in 14.1 above and the Compendiums for Ditches. Adjacent Waters, and Features/Waters Not Jurisdictional.

14.56 [Photos of Waterway 2] This waterway is a borrow pit next to a paved county road. In this instance it has pools of standing water as a result of rain. This waterway does not drain into any adjacent waterway. It contains water only because of the rain. It is isolated, and the water does not flow. The agencies state that water which stands or pools in this kind of a ditch would be excluded. For the vast majority of the year this waterway will be empty. However, under the definition of tributary, it is possible to identify a bed, bank, and ordinary high water mark. Weld County believes that this borrow pit is exempt because it is water that pools, has no flow, and is less than perennial. If the agencies disagree Weld County requests notification and an explanation. (p. 12-13)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Ditches. Adjacent Waters, and Features and Waters Not Jurisdictional.

14.57 [Photos of Waterway 3] This waterway involves tail water from irrigation draining into the borrow pits next to a county maintained road. The water pools on the south side of the road, and the County therefore installed a culvert in order to drain the water onto an adjacent field on the north side, which is lower. Here the water pools and stands periodically throughout the growing season. The elevated road acts as a dam. The County must create a channel for the water so that it does not damage the road. Pursuant to the definitions provided in the new rule, this water does not qualify as a ditch, or a tributary. It does not have a bed, bank, and ordinary high water mark. The culvert does have a flow that goes through it during certain times of the year. However, the water is better described as standing or pooling water that would disperse if not for the impediment created by the road. It does not flow into any other body of water and as the irrigation stops, is absorbed back into the ground. The road establishes a relatively permanent standing body of water for several months throughout the year. Weld County believes that this waterway is exempt because it does not have a bed, banks, or ordinary high water mark. Further, Weld County takes the position that because this water is simply standing and poling, it should be exempt. If the agencies disagree Weld County requests notification and an explanation. (p. 13-14)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Ditches. Tributaries, Adjacent Waters, and Features/Waters Not Jurisdictional.

14.47 [Photo of Waterway 4s] This waterway is a culvert underneath County Road 48. It allows water from a canal to enter into an irrigation storage reservoir. This is a ditch in the sense that it has a bed, banks, and an ordinary high water mark. Pursuant to this definition, it would be a tributary. Ultimately, this waterway drains back into the Platte River. However, this canal is utilized for agricultural purposes. The reservoir, canal, and ditches that feed into and out of it would all disappear absent continued maintenance and the diversion of natural waterways. All of the waterways in this system exist for irrigation purposes, and for the diversion of water from natural waterways. Therefore, according to the rule, this should be exempt because it would revert to uplands I not irrigated. Further, the flow of these canals, and the level of water in the reservoir, is dependent on the season and precipitation. Weld County believes that this culvert and canal are exempt because they would revert to Uplands absent irrigation practices. Further, the County maintains the culvert is exempt because it is not a tributary, and exists only to facilitate agricultural irrigation. If the agencies disagree Weld County requests notification and an explanation. (p. 15-16)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Ditches.

14.58 [Photos of Waterway 5] This waterway is an example of tail water running off of a farmer's field and into a borrow pit adjacent to a road. The irrigation water establishes a flow and runs next to the road. The water ultimately is drained into a ditch which then flows back into a river. The amount of irrigation water that is applied to the field varies throughout the day, and throughout the growing season. This borrow pit may have flowing water in it for several days in a row, then none in it for weeks. It will have water in it for less than half of the year. Again, this is not a waterway in the traditional sense. It is an elevated road and a borrow pit that establishes a barrier to the drainage of irrigation

water. Depending on the amount of irrigation water being applied to the field, there may or may not be a flow.

Under the proposed rule, it is unclear whether this ditch would be excluded. While the water has at least one definite boundary or bank (the road) it does not have a clearly defined bed. It may periodically have a high watermark. However, it has less than perennial flow. Additionally, were the irrigation water not to be applied then there would be no water in this area anyway. Under the theory that land which would revert to uplands without the application of irrigation water, this ought to be exempt. Throughout the year the County is required to clear and empty this borrow pit in order to maintain the structure of the road. If this borrow pit becomes jurisdictional under the new rule, then the County will have to go through the permit process each time it simply needs to grade the road. This is an unnecessary burden. The County seeks clarification as to whether it may continue to maintain this road without federal permission. The County believes that this should be exempt because there is no clearly defined bed, bank, and ordinary high water mark, and because there is less than perennial flow. (p. 17-18)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Features/Waters Not Jurisdictional.

14.59 [Photos of Waterway 6-7] These waterways are examples of borrow pits collecting tail water from irrigation, and also rain water draining off of fields. In these examples there is no flow. The elevation of the road means that water collects in the borrow pits. The borrow pits provide a place for the water to stand and pool. The level of water in these areas can vary from day to day and hour to hour. During rain storms the side of the road may fill with water, or during times when lots of water is being used for irrigation. This area will be dry throughout the majority of the year. The County has to periodically remove debris from these borrow pits, and grade the road to maintain its integrity. There are hundreds of miles of these types of pits throughout the county. It will be unreasonably cumbersome if the county is forced to seek a permit for the maintenance of these roads. Because there is no defined flow of water, no ordinary high water mark, and no clear bed and bank, this borrow pit ought to be excluded. Also, the waterways would not exist without the application of irrigation water, and therefore should be exempt. If the agencies disagree Weld County requests notification and an explanation. (p. 18-19)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Adjacent Waters and Features and Waters Not Jurisdictional. 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 are not "waters of the United States."

City of Palo Alto, California (Doc. #12714)

14.60 Palo Alto is an active participant in the Regional Water Quality Control Plant Water Reuse Program. Since 1980 this program has reused over 10 billion gallons of water for irrigation and cooling, reducing the need to import potable water and reducing discharges of wastewater into San Francisco Bay. Water reuse in California is an essential requirement to meet demand, particularly at a time of recurring droughts. Investing in the necessary infrastructure and facilities to increase water reuse is expensive, and while

government must ensure public safety and environmental compliance, it should not discourage the investment. Unfortunately, the proposed rule introduces impediments to water reuse and does not protect investments made in water reuse, even though federal agencies encourage such activity. (p. 3)

Agency Response: The agencies are supportive of water reuse and recycling and the final rule includes exclusions specifically for wastewater recycling structures created in dry land, including groundwater recharge basins and percolation ponds built for wastewater recycling. See Section 7, Features and Waters Not Jurisdictional Compendium of the Response to Comments.

Association of California Water Agencies (Doc. #12978)

14.61 As proposed, the new definition of "tributary", if interpreted to include water conveyance and delivery systems, would have broad implications for California's water delivery system. For example, El Dorado Irrigation District's ("EID") FERC licensed hydroelectric project, Project 184 (Figure 1), could constitute a "tributary" under the proposed rule. Many, if not all, of the facilities encompassed within Project 184 include a bed, banks, a mean high water mark, and contribute flow to the South Fork American River, a navigable water. Accordingly, EID would be subject to all the permitting requirements in the CWA, including needing to obtain a section 404 dredge and fill permit when, for example, it replaces a generator in the Project 184's power house, or a section of penstock, flume, siphon, or canal.

Project 184 consists generally of four high- alpine on- stream water- storage reservoirs (Caples, Silver, Aloha, and Echo Lakes), a fish screened diversion facility on the South Fork American River, 22 miles of canals, flumes, and tunnels (collectively, the "El Dorado Canal"), an off- stream regulating reservoir ("Forebay"), two miles of penstock, and an off- stream 22 megawatt hydroelectric generating plant (the "Power House"). EID stores water in Caples, Silver, Aloha, and Echo lakes, and releases water from these reservoirs into tributaries of the South Fork American River, a navigable stream. Near the town of Kybrz, California, the District diverts water from the South Fork American River, through a state- of- the- art fish screen, into its El Dorado Canal. Once in the El Dorado Canal, water flows through 22 miles of canal, flumes, tunnels, and siphons before it reaches the artificial, off stream Forebay regulating reservoir. From Forebay, water enters two large penstocks and travels approximately two miles, losing approximately 1,300 ft in elevation, before entering the Power House, where it spins two eleven megawatt generators to generate hydro- electricity. After generating electricity, water leaves the Power House, and re- enters the South Fork American River.

Examples of similar man- made, non- stream conveyances exist all over California (Figure 2):

> The Coachella Canal is a concrete conveyance that carries Colorado River water 123 miles west to Lake Cahuilla, a terminal reservoir in La Quinta, California. The Coachella Canal and Lake Cahuilla supply water to the Coachella Valley Water District's agricultural irrigation system. The irrigation return water subsequently enters drainage facilities that flow to the Salton Sea.

The Irvine Ranch Water District (IRWD), in coordination with local partners, conveys stormwater flows in the Central Valley during wet years for storage in groundwater banking facilities. When needed in dry years or emergencies, the water is extracted and conveyed back to IRWD and its local partners for use.

The Nevada Irrigation District collects, stores and conveys water from the upper Yuba and Bear River watersheds (over 8,000 feet elevation) through 700 miles of canals and pipelines for hydropower generation and consumptive uses at elevations as low as 150 feet as part of its FERC –licensed Yuba- Bear Project.

Placer County Water Agency owns and operates the FERC licensed, Middle Fork Project that diverts, stores, and transports water through a series of stream diversions, reservoirs, water conveyance systems, and powerhouses in the Middle Fork American River watershed at elevations from 5,300 to 1,100 feet before being released back into the Middle Fork American River. The Interbay Powerhouse, one of the hydroelectricity facilities licensed by the Middle Fork Project, is fed by a 17- mile tunnel from Hell Hole Reservoir. PCWA's canal system (not the hydro system) consists of 157 miles of canals, including random—short sections of natural channels that are used as part of the canal system, normally connecting two man- made ditches or canals.

Modesto Irrigation District and Turlock Irrigation District jointly own and operate the FERC licensed Don Pedro Hydroelectric Project, which is operated for hydroelectric generation and other consumptive beneficial uses, and include miles of pipelines, ditches, penstocks, and similar man- made infrastructure.

Water purveyors across the Sierra Nevada continue to operate hundreds of miles of Gold- Rush- era earthen ditches that transport water from upper watersheds to municipal and agricultural customers downstream, for example, the Georgetown Divide Public Utilities District (70 miles of earthen ditches) and Tuolumne Utilities District (57 miles of earthen ditches).

None of the above examples are currently "waters of the United States," and we understand that the Agencies do not intend the proposed rule to change the regulation of water supply infrastructure. However, if the above facilities all constitute "tributaries" under the proposed definition simply because these conveyances contribute flow to traditional navigable waters, these agencies would need to obtain CWA, section 404 permits when, for example, they replace a generator, or a section of penstock, flume, siphon, or canal. It would be a tremendous and unnecessary burden on both the project sponsors and federal agencies if all of these facilities become jurisdictional with no corresponding improvements to water quality. (p. 4-5)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional.

14.62 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. Thus, under the water transfers rule, EID is not required to obtain a section 402 permit for this activity. 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. For example, as explained above, replacing a length of pipe on a flume that may indirectly contribute flow to a traditional navigable water would require a section 404 permit, even though that activity does not affect the chemical, physical, or biological integrity of that water. 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. 9)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.

City of Greeley, Colorado, Water and Sewer Department (Doc. #15258)

14.63 The extensive network of irrigation ditches ensures a steady stream of CWA compliance obligations arising from general construction activities, utility crossings, road crossings, and operation and maintenance of the ditches themselves. These compliance obligations typically arise under CWA Section 404.

Even nationwide permits ("NWPs") can trigger consultations under the Endangered Species Act ("ESA") and the National Historic Preservation Act ("NHPA"), since basically all irrigation ditches and related facilities in this part of the country are more than 50 years old.

So, for example, Greeley may wish to install a headgate in a seasonally-operated irrigation ditch to divert non-potable water to irrigate an existing park it currently irrigates with potable water, which both the Corps and EPA strongly encourage.

If the ditch is a Water of the United States, Greeley may be required to seek ESA and NHPA consultations, in addition to obtaining CWA authorization. If a nearby landowner objects to the project, the process can be expensive and time-consuming. Further, the Corps retains considerable discretion to require a permittee to proceed under an individual permit instead of an NWP for projects facing opposition.

But the Corps would apply the statutory exemption differently to the same project in Colorado based solely on the end use of the water transported by the ditch. The Colorado Guidance provides that if the ditch is owned by a mutual ditch company and the company proposes maintenance on the ditch, "the work will be exempt if greater than 50 percent of

the water conveyed in the ditch is used, under normal circumstances, for agricultural purposes:[3]

While this guidance specifically addresses only the "maintenance" component of the exemption, we understand that the Denver Regulatory Office also applies it in the context of "construction". Through this guidance, the Corps has substantially increased the regulatory burden on Colorado municipalities, without public notice and comment. (p. 2-3)

Agency Response: **Agencies' Summary Response above and the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. Additionally, nothing in this rule changes the permitting exemptions provided by the CWA and nothing changes the permitting requirements and process required by the CWA. All of these things are outside the scope of this rule. The Nationwide Permit Program regulations can be found in 33 CFR Part 330. These regulations explain the impact thresholds that can be verified under a nationwide permit depending on the activity and impact to waters of the U.S. .**

Another important reference is Corps Regulatory Guidance Letter 07-02, which contains additional information on the Clean Water Act Section 404(f)(1) exemption for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches.

City of Portland, Bureau of Environmental Services (Doc. #16662)

14.64 In Portland, intermittent and ephemeral streams make up approximately 60% of the total stream miles. Since 2010, BES has been monitoring watershed health through a program called "Portland Area Watershed Monitoring and Assessment Program" (PAWMAP), modeled after the EPA's EMAP program. Four years of data show how these intermittent and ephemeral waters influence the water quality of downstream traditionally navigable waters both during and between storm events. This work is currently unpublished, but the underlying data is available to be shared with the Agencies. The quantifiable difference in water quality between storm and non-storm events of intermittent and perennial streams indicates that more oversight and protection is needed in these waters to improve the chemical and biological integrity of downstream waters. (p. 3)

Agency Response: **The agencies believe that the studies reviewed in the Science Report also demonstrate the importance of intermittent and ephemeral streams. The agencies look forward to reviewing the results of your study. This information was sent to EPA's Office of Research and Development.**

[3] Id. Mutual ditch companies are non-profit corporations formed to finance and maintain ditches, reservoirs, and associated facilities, and to distribute water to stockholders. A share of stock in a mutual ditch company typically entitles the holder to a pro-rata share of the water owned by the company. The shareholder's use of the water is dictated by the corporate documents and the underlying water right decrees held by the company.

Southwest Quay Soil and Water Conservation District (Doc. #19560)

14.65 SW Quay Soil and Conservation District is basically a flat rolling landscape with no live water. The only water available is ephemeral surface runoff from precipitation events and it is 40-70 miles to the nearest traditional water of the US. SW Quay believes the agriculture exemptions in the Interpretive Rule will not exist after litigation by environmental groups resulting in no protections for farmers and ranchers and other landowners from over zealous bureaucrats. How does the EPA/COE propose to monitor chemical, biological, and physical contaminants in ephemeral surface runoff? Will data from one monitoring station be applicable on a watershed-wide basis? Will EPA/COE have legal access to private lands to establish more than one monitoring station in a watershed? If not, will the monitoring data collected by EPA/COE be scientifically valid from only one monitoring station to represent a watershed of several hundred thousand acres? If a contaminant, such as sedimentation, is found to be above some chosen limit, will all landowners within a watershed be required to get a permit? If all landowners within a watershed are required to get a permit, wouldn't that requirement violate the Constitutional protection of being "innocent before proven guilty"? (p. 4)

Agency Response: As stated in the summary in 14.2 the Interpretive Rule has been withdrawn and is outside the scope of the rule. Nothing in this rule changes how the agencies and states monitor and implement water quality standards and permit discharges to "waters of the United States," which is outside the scope of this rule.

Western Coalition of Arid States (Doc. #14407)

14.66 One California WESTCAS member operates 10 recycled water facilities, covering 500 acres that have an aggregate storage capacity of 2-billion gallons (6,137 AF). Each facility was constructed in an alluvial basin immediately adjacent to a TNW. The sites were intentionally selected to ensure incoming recycled water could be rapidly infiltrated and stored in the underlying aquifer. Under the proposed rule, each facility is a surface water directly adjacent to a TNW, has a shallow subsurface connection to the TNW, and is located either in or near a floodplain. As such, most of these basins will also meet the definition of a (a)(6) water adjacent to a TNW, and therefore become jurisdictional. (p. 8)

Agency Response: See Agencies' Summary Response in 14.1.The agencies are supportive of water reuse and recycling and had added an exclusions specifically for wastewater recycling structures created in dry land, including as well as groundwater recharge basins and percolation ponds built for wastewater recycling see the Features and Waters Not Jurisdictional Compendium for a discussion on the water reuse and recycling exclusion.

14.67 In locations throughout the arid West, many upland ephemeral waters have lost their connections to downstream waters after local agencies constructed flood retardation structures (FRS), dams, and/or retention basins as a means of protecting infrastructure and private property from flooding.

For example, in the Phoenix metropolitan area, numerous flood retardation structures (i.e., dams) constructed above the Central Arizona Project (CAP) canal have created basins that intercept and impound upstream ephemeral flows during storm events. These

basins have no physical connection to, or man-made conveyances that would allow impounded waters to flow downstream to, (a)(1) through (a)(3) waters. But, under the proposed rule, these same ephemeral tributaries, if they have a bed, bank and ordinary high water mark upgradient from the cut-off impoundment, are still jurisdictional. (p. 13)

Agency Response: See Agencies' Summary Response in 14.1 and the Tributaries Compendium.

Georgia Municipal Association (Doc. #14527.1)

14.68 In 1993 the City of Griffin started planning for its long term water supply, eventually called the Still Branch Regional Reservoir, a 4.1 billion gallon off steam storage facility. It is common knowledge that the process of planning, permitting, and constructing a reservoir is laborious and time consuming. In 2002, the project finally was awarded its 404 Permit. Prior to any construction, the process of obtaining approval cost the city over 1.75 million dollars and an additional $275,000 million dollars for mitigation. Beyond the costs, it was a monumental task to get federal agencies to talk to one another to move forward with the project. The initial meeting s with GAEPD, COE, and USEPA started in late 1998 and did not come to conclusion until late 2001. The short of it is that USFWS and USEPA went back and forth over in -stream condition s, endangered species, and historical issues. Agencies did not even talk to one another for months on end. Finally in mid-2001 the City of Griffin and GAEPD sought congressional intervention to get everyone to finalize the project and the COE issue the permit and the withdrawal Permit.

The proposed rule of the Waters of the United States raises several concerns. Federal agencies are already understaffed. Communications are slow at best because of process management. If local governments are tasked with a requirement for an individual permit, it could take years to rehabilitate or re store a ditch if the project is subject to an individual permit the backlog of requests that this proposed rule would create. The potential of application costs, mitigation costs, avoidance costs, and minimization costs will be significantly more than 2.7% as stated Economic Analysis in the proposed rule. (p. 7)

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. Nothing in the rule changes the permitting requirements in the CWA and as such permitting is outside the scope of the rule. The economic analysis was updated for the final rule. See summary response for Costs/Benefits Compendium and Economic Analysis document for details on the estimated costs and benefits of the rule.

14.69 In 2012, the City of Griffin sought to construct a stormwater BMP and restoration project on what we thought was a ditch which flows only under wet weather conditions. The short of it is that the COE deemed it to be a Water of the United States, and JD was

required. Two redesigns and minimization efforts, and two years later, 2014 the project has started. If the proposed rule is adopted, local governments will have to spend a significant amount of funds and time obtaining COE approval for permitting to correct stormwater conveyance systems, more importantly the potential lawsuits for failure to perform in a timely manner when private properties and adjacent properties could be affected negatively. This particular ditch was eroding an industrial business building; fortunately we were not challenged. Ditches as defined in the proposed rule which are subject to the CWA would be expanded thus the process to address local stormwater management controls would be subject additional length of the project and unnecessary additional funds allocated to the project. (p. 7)

Agency Response: **Agencies' Summary Response 14.1 above and the Compendiums for Ditches and Features and Waters Not Jurisdictional. 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. Nothing in the rule changes the permitting requirements in the CWA and as such permitting is outside the scope of the rule.**

County Commissioners Association of Pennsylvania (Doc. #14579)

14.70 Chesapeake Bay TMDL: More than 50 percent of the land (more than 14 million acres) in Pennsylvania drains to the Chesapeake Bay, currently subject to Total Maximum Daily Load (TMDL) requirements as established by the EPA in 2010 pursuant to Section 303 of the Clean Water Act. The TMDL requirements set limits for the amount of nitrogen, phosphorus and sediment runoff into the Bay and its tidal tributaries, both from point sources like sewage treatment plants and nonpoint sources such as agricultural lands and storm water. Pennsylvania is currently in the process of implementing its Phase II Watershed Implementation Plan (WIP), whose primary goal has been to ensure local partners, including local governments, are engaged in helping to meet TMDL requirements. Under the state's WIP, landowners and local governments have implemented innovative green infrastructure to reduce storm water runoff, and the agriculture community has made significant investments into best management practices (BMPs) to reduce nutrient runoff, often going above and beyond requirements.

The 2014-2015 programmatic milestones in Pennsylvania's WIP include having county conservation district staff make field visits to farms to provide education and outreach materials on Pennsylvania's existing regulatory programs. The county conservation districts have also been engaging the farm community in the technical assistance necessary for implementation of BMPs. Grant funding continues to be focused on BMPs that provide cost-effective solutions for the reduction of nutrient and sediment loads to the Bay, including no till/conservation tillage, cover crops, conservation and nutrient management planning activities, and stream bank fencing using federal Chesapeake Bay Implementation Grant (CBIG) grant monies. The state DEP also plans to conduct a series of five to ten MS4 workshops and/or webinars across the state to educate the regulated community on the implementation of the MS4-PA General Permit 13, including TMDL plans and Chesapeake Bay Pollutant Reduction Plans. If the proposed WOTUS rule goes forward as is and federal jurisdiction is not clear, or is expanded, as a result, Pennsylvania

will have to go back to the drawing board to revisit all of the work it has already done on education and BMP implementation to provide new information on any new permitting requirements.

Furthermore, if states do not make progress toward achieving the TMDL goals, EPA has the option of strengthening permits, so if federal permits now become necessary under the WOTUS definition proposed by the agencies where they had not been required before, this would have a tremendous impact on the costs and burdens of compliance with the TMDL. It is very likely that the agricultural community would be unable to continue the positive work they have done thus far, and may even have difficulty maintaining those best management practices they have already put in place if new federal permits are required. In addition, the need for additional funding is already one of the challenges most consistently raised when it comes to complying with the TMDL; if the commonwealth is to continue its progress to meet nutrient and sediment reductions to improve the quality of the Chesapeake Bay, available funds must be put to use on the ground and not on needless paperwork and administrative burdens. However, the proposed WOTUS definition and the apparent expansion of jurisdiction make it almost certain this is what would happen, again doing nothing to assist Pennsylvania and its local governments with the goal of protecting our water. (7-8)

Agency Response: **See Agencies' Summary Response in 14.1. This is a definitional that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. Nothing in this rule changes how water quality standards, TMDLs and permitting required by the CWA are implemented and these comments are outside the scope of the rule.**

Wyoming County Commissioners Association (Doc. #15434)

14.71 Consider for example the case of Sublette County, Wyoming. Sublette County has an estimated population of 10,041 spread out over approximately 4,886 square miles for a density of about 2 people per square mile. The county is home to one of the largest public lands oil and gas developments in the United States, the Jonah Field, but also boasts 398 farms and ranches that average nearly 2,000 acres in size. These farms and ranches produce approximately $54 million in annual market value of products sold. Additionally, Sublette County's agriculture and energy rich lands are situated in the sagebrush steppe eco-region surrounded on three sides by mountain ranges that produce significant spring runoff each year.

Sublette County's water resources are primarily headwaters, and the county has partnered with the Conservation District to develop ways to conserve and store water during the critical spring runoff months. By controlling spring runoff, the county is able to divert and recapture water for use in agriculture irrigation, often on private lands, while simultaneously providing flood mitigation for county residents. The diversion technique effectively raises the water table, allowing for a more controlled release of waters through a series of intermittent, ephemeral, and perennial streams that have been created by this process. In other words, the dual purpose diversion practice creates perennial streams that would otherwise be intermittent, and ephemeral streams that otherwise would not display a bed, bank, and ordinary high water mark.

The proposed rule appears clear that "prior converted croplands," "artificially irrigated areas that would revert to upland," and "ditches that are excavated wholly in uplands" are exempt from the rule. However, with respect to prior converted croplands, the proposal also makes clear that the EPA is the sole arbiter of whether a ditch or diversion qualifies as a prior converted cropland even if another federal agency has already determined it as such. [4] Further, the lack of clear definitions of these words and phrases, the expansive definition of tributary, and the proposed rule's silence on dual-use diversions provide no certainty to a county like Sublette that its snow melt diversion/irrigation system would not be jurisdictional. Proving that the system of streams created by the diversion practice would revert to uplands or croplands would require ending the practice of diversions itself. Thus the WCCA believes the proposed rule would leave little choice but to presume these ditches and streams would be jurisdictional. Even the mere presumption of federal jurisdiction creates a burden on the county and creates a perverse incentive for actively controlling potential flood water in a beneficial way. (p. 3-4)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Ditches and Features and Waters Not Jurisdictional.

14.72 Consider for example Campbell County in northeast Wyoming. Campbell County is home to the Powder River Basin coal seams that provide the nation with over 40% of all the coal used to generate electricity in America. Coal mines in Campbell County are surface mines that are in a constant state of movement. As coal is recovered on the western edge of the mine, topsoil is replaced on the eastern boundaries of the mine to begin reclamation. As a result Campbell County must continually build new roads, divert existing roads, or rebuild roads on reclaimed lands as the mines migrate. While the proposed rule claims to maintain the existence of an exemption for "temporary mining roads,[5] it is unclear if roads in Campbell County qualify as temporary given the long-term nature of their construction and existence. Many of Wyoming's counties experiencing significant mineral extraction face similar pressures as Campbell County on their roads, but do not enjoy even the potential for temporary exemptions offered to mining roads. These impacts are not contemplated in the EPA's analysis. (p. 9)

Agency Response: See Agencies' Summary Response 14.1 above. This rule is a definitional rule that defines "waters of the United States" and does not change the permitting exemptions provided in the CWA for mining, which are outside the scope of this rule.

City of Pompano Beach, Florida (Doc. #16438)

14.73 While the proposed rule attempts to exclude ditches from the tributary definition, the exclusion appears to apply only to waters excavated "wholly uplands" or that do not contribute any flow to waterbodies in categories 1-3 of the navigable water definition. Florida has an extremely large number of ditches (dry during many months of the year) that should not be identified or permitted. (p. 1)

[4] 79 Fed. Reg. at 22,193.
[5] 79 Fed. Reg., at 22,] 94.

Agency Response: **See Agencies' Summary Response in 14.1 above and the Compendiums for Tributaries and Ditches.**

Washington State Water Resources Association (Doc. #16543)

14.74 In 2004, the Sunnyside Valley Irrigation District (SVID) was performing routine maintenance in a ditch within its system. Because the ditch had meandered over the years, it was creating erosion and drainage issues that needed to be fixed. The ditch was straightened and armored with rock to correct the problem. This reduced erosion and improved the efficiency of operations. The activity performed by SVID was a routine action that is likely performed on an almost daily basis by other irrigation providers in the West. In SVID's 100 years of existence, at no time had it been advised that a Section 404 permit would be needed for such routine work. Later, a complaint was filed with the Army Corps. The Army Corps investigated and advised SVID that project ditches were "waters of the U.S." and therefore subject to the Corps' Sec. 404 permitting process.

The Army Corps advised SVID that it's only option was to return the ditch back to its previous improperly working condition, and any permit request by SVID to do the repair work was likely to be denied. Despite its lack of expertise in the management of irrigation waters, the Army Corps added that in its opinion, the work performed on the irrigation ditch by SVID was not necessary or justified. The Army Corps also advised SVID that virtually all of the operation and maintenance activities that take place on a daily basis are subject to Army Corps jurisdiction; meaning that even if such activities were to fall under an exemption, contact must be made with the Army Corps for them to make that determination. In other cases where permits could be required, it was made clear the Army Corps would not approve much of the regular and necessary work needed by the Irrigation District to maintain its canals and ditches, and that requesting a permit to do such work could be futile.

After four years of negotiation, numerous meetings and trips to Washington D.C. to meet with EPA and the Army Corps, and the issuance of the Army Corps Regulatory Guidance Letter 07-02, Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act; the Army Corps eventually advised SVID that its work on the ditch did not require a permit. SVID and other water suppliers cannot afford to wait four years for determinations as to whether a permit is required. Many irrigated water users worry that uncertainty created by the proposed rule will put them in a situation similar to SVID's. Greater clarity in the proposed rule is needed to ensure that this does not happen. SVID's experience was with a relatively small ditch; it is troubling to consider what could happen should a larger irrigation facility come under CWA jurisdiction. (p. 10)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Ditches and Features and Waters Not Jurisdictional. The exemptions provided by the CWA and discussed in the Corps Regulatory Guidance Letter are outside the scope of this rulemaking.**

14.75 The proposed rule raises numerous questions about how manmade irrigation infrastructure, both large and small, will be treated. In Idaho, the New York Canal is an integral part of the Boise Project and is used to help irrigate hundreds of thousands of

acres of productive agricultural land. The New York Canal is a concrete lined canal that has the capacity to transport 2,800 cubic feet of water per second -a considerable amount of water. The New York Canal initially takes water from the Boise River and transports it more than forty miles. Along its path the New York Canal provides water for several other canals and distribution systems before eventually delivering water into Lake Lowell, an off stream reservoir southwest of Nampa, Idaho. The New York Canal is not currently, nor-should it be, subject to CWA jurisdiction. However, the proposed rule creates a certain amount of ambiguity and confusion over whether the Agencies or third parties would attempt to consider it jurisdictional. This lack of clarity extends to numerous other irrigation canals and projects. (p. 10-11)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendium for Features and Waters Not Jurisdictional. The agencies have consistently regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) of the rule codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.**

Office of the City Manager, City of Scottsdale (Doc. #17159)

14.76 The City believes that the Proposed Rule will result in an unreasonable expansion of jurisdiction that will affect the City in many ways. This will include creating a greater expense in capital projects as well as hinder development and economic growth within the City. The City 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 on the City. The Proposed Rule will have detrimental impacts to AZPDES MS4 permit-related activities, proposed development, and city transportation, parks, drainage and flood control, and water resources capital improvement projects. The following paragraphs demonstrate how the Proposed Rule may affect water resources capital improvement projects:

The Proposed Rule and the Impacts on the Central Arizona Project (CAP). The Central Arizona Water Conservation District (CAWCD) has notified the EPA in their letter dated June 19, 2014, that the proposed rule can be interpreted to encompass the CAP under the definition of "tributary" with regards to the phrase that states "contribute flow directly or indirectly", as the CAP discharges water directly into Lake Pleasant for water storage. In addition to the numerous burdens the proposed rule will have on the CAP, these changes will also have direct impacts upon the City of Scottsdale, as the third largest entitlement holder of Colorado River water in the state. This water supply is transported and delivered by the CAP canal to the City's service area.

As an example of how the proposed rule will impact Scottsdale, the City is in the process of developing the infrastructure to bring additional water supplies to our service area by transporting the water in the CAP canal. The proposed rule will require the City to obtain a §404 permit to construct the turnout at the canal, as well as an Arizona Pollutant Discharge Elimination System (AZPDES) §402 permit to wheel non-project water in the canal. The CAP could also be in violation of the anti-degradation policy by allowing this non-project water to be wheeled in the canal. This additional water supply has been in the

planning stages for decades, with millions of dollars having already been invested, on the premise the City would be able to wheel this supply in the CAP canal. (p. 5)

Agency Response: See Agencies' Summary Response14.1 and the Compendiums for Tributaries and Features and Waters Not Jurisdictional. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. The economic analysis was updated for the final rule; See summary response for Topic 11: Costs/Benefits and Economic Analysis document for details on the estimated costs and benefits of the rule. The agencies have consistently regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) of the rule codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.

Pendleton County Economic and Community Development Authority (Doc. #4877)

14.77 [T]he Pendleton County Economic and Community Development Authority owns an industrial park and another site. We feel that this change in regulations would be detrimental to selling lots in our property since there are drainage ditches on the property. This will also affect other land in Pendleton County and throughout the nation. (p. 1)

Agency Response: See Agencies' Summary Response in 14.1 and the Ditches Compendium.

Delta Council (Doc. #5611.1)

14.78 Because Northwest Mississippi is a levee-protected, but alluvial floodplain, it is covered with ephemeral streams, field depressions, riparian areas and ditches. Our interpretation of your proposed rule is that these areas, which are not currently considered jurisdictional waters, would fall within the scope of the CWA under the proposed rule. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. The scope of regulatory jurisdiction in this final rule is narrower than that under the existing regulation, in part because the rule puts important qualifiers on some existing categories, such as tributaries. See the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional.

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

14.79 Manufacturers – At one company's facilities in the Midwest, projects such as building a loading dock and leveling a soil pile to reduce erosion were previously evaluated by the Corps. They were determined to be not subject to federal jurisdiction under the current definition. Under the proposed rule, these same areas are likely to be subject to federal permitting, increasing the potential for delay and possible denial. Moreover, other facilities report they will face increased federal jurisdiction because of their proximity to wetlands on or near the site. (p. 11)

Agency Response: See Agencies' Summary Response in 14.1and the Compendiums for Features and Waters Not Jurisdictional and Adjacent Waters.

This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.

14.80 Mineral processing – A mineral processor in the West has a facility that processes bentonite. Although the State carefully regulates sediment in the plant's stormwater, the company has never had to obtain section 404 permits to remove sediment from its on-site ditches and impoundments. The revised WOTUS definition will subject the facility to federal permitting requirements. The federal regulation of ditches beside roads also makes road maintenance more complicated and subject to delays. Moreover, facility expansion projects will be much more likely to require federal permits, including a section 404 permit, which would also likely trigger extensive environmental project reviews by multiple federal agencies. (p. 12-13)

Agency Response: See Agencies' Summary Response in 14.1 and see the Compendiums for Ditches and Features and Waters Not Jurisdictional. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.

14.81 Asphalt plants – Asphalt plants typically store process materials and recycled asphalt on site. A company in the Southeast reports that they have ditches and impoundments that are currently regulated under the stormwater program. As part of that program, the asphalt plant must treat their stormwater by running it through an oil-water separator. These plants will probably have to obtain NPDES permits under the revised WOTUS definition, as well as section 404 permits for the maintenance work that is routinely done in their ditches and impoundments. (p. 13)

Agency Response: See Agencies' Summary Response in 14.1. With respect to stormwater control features, please see the summary response at 7.4.4. Nothing in the rule changes the permitting requirements in the CWA and as such permitting is outside the scope of the rule.

14.82 Pulp and paper plants – A pulp and paper company in the West has several surface impoundments at its mill that can flow into bigger waterbodies during heavy rains. Routine maintenance and operations in or near these impoundments would likely trigger federal permitting requirements under sections 402 or 404 under the new WOTUS definition. (p. 13)

Agency Response: See Agencies' Summary Response in 14.1. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.

14.83 Paint manufacturers – These facilities often have ditches that originate at a facility and flow into offsite ditches. They also typically have impoundments for stormwater and fire control. These ditches and impoundments are currently subject to local stormwater management plans, but may fall under federal permitting requirements if the WOTUS definition becomes final. Paint plants are also likely to need to have more extensive SPCC programs for the raw materials that they use and store onsite. (p. 13)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Ditches and Features and Waters Not Jurisdictional, especially 6.0, 6.2 and 7.4.4.**

14.84 In 2010, Aurora Water in Aurora, Colorado completed, with the support of the environmental community and other stakeholders, its award winning Prairie Waters Project (PWP). The PWP is an approximately $638 million pump-back reuse project which Aurora uses to recapture its treated re-usable return flows downstream of Aurora and, utilizing a thirty-four mile pipeline, three pump stations, and a state-of-the-art water treatment plant, deliver potable water back to its customer base. Aurora, working cooperatively with the Army Corps of Engineers, was able to go from alternatives analysis, to final design, to construction, to grand opening in approximately five years, with less than $2 million in total permitting and mitigation costs. The individual permit provisions of section 404 were never triggered, a situation that it is doubtful could be repeated if the current proposal becomes the law. Though Aurora employed some re-design efforts and micro-tunneling to avoid traditional navigable waters, it nevertheless did cross a number of what were, at the time, "non-jurisdictional" dry arroyos, washes, swales and ditches, or waters which then qualified for "nationwide" status. Under the proposed revised WOTUS definition, the Aurora project would be unlikely to avoid jurisdictional "waters of the U.S.," triggering additional federal permits. Obtaining these permits would be much more costly and time-consuming, making it far less likely the project would have gone forward. (p. 18)

Agency Response: **See Agencies' Summary Response in 14.1. The agencies are supportive of water reuse and recycling and have added an exclusion specifically for wastewater recycling, including groundwater recharge basins and percolation ponds built for wastewater recycling. See the Features and Waters Not Jurisdictional Compendium, for a discussion on the water reuse and recycling exclusion. Erosional features are excluded from waters of the U.S. in (b)(4)(F) of the final rule. The rule also contains a revised and expanded exclusion for ditches. See summary responses in the Ditches Compendium, sections 6.0 and 6.2 for a discussion of the regulation and exclusion of ditches. 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.**

14.85 The Nampa and Meridian Irrigation District in Idaho was formed in 1904 and operates hundreds of miles of canals, laterals, ditches and drains to provide water to their hundred square mile service area. The District's operation depends on approximately eighty drains, and regular maintenance of these drains is needed to ensure safe and effective system use. If the District were required to obtain a section 404 permit for each such activity, as would be required under the proposed WOTUS rule, then these routine activities would become exponentially more expensive, time consuming and difficult. This would not only adversely affect system operations, but would likely cause increased water costs, unintentionally creating an incentive to increase groundwater pumping. (p. 25)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Ditches and Features and Waters Not Jurisdictional. The**

agencies have consistently regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another.

American Coatings Association (Doc. #15138)

14.86 With regard to paint and coatings manufacturers, our members' facilities often have ditches that originate at a facility and flow into offsite ditches. These also typically have impoundments for stormwater and fire control. These ditches and impoundments are currently subject to local regulations but may fall under federal permitting requirements under this proposal. Furthermore, facilities would have to consider expanding existing Spill Prevention Control and Countermeasures (SPCC) programs for their raw materials that they use and store onsite. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. See Compendiums for Ditches and Features and Waters Not Jurisdictional.

Placer County Water Agency (Doc. #17027)

14.87 The proposed definition is so broad that virtually the entire 165 miles of PCWA's man-made water conveyance system of canals, flumes, and short randoms could be characterized as WOTUS, requiring a Corps permit for every repair, maintenance project or improvement, no matter how distant from any traditionally navigable stream Congress intended to protect by enacting the CWA. It would arguably characterize as WOTUS the 24 miles of tunnels and penstocks of PCWA's hydroelectric project, even though these wholly artificial facilities are already comprehensively regulated by the terms and conditions of the license issued by the Federal Energy Regulatory Commission. Further conditioning the maintenance of these public facilities on obtaining a section 404 dredge-and-fill permit would add nothing to the protection of the nation's streams—the CWA prohibition in its section 402 fully covers the effect of operation of such conveyance systems. The reliability and cost of essential public services dependent on these facilities would, on the other hand, be compromised. (p. 3)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendium of Features and Waters Not Jurisdictional. The agencies have consistently regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) of the rule codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial. The final rule contains a revised and expanded exclusion for ditches. See summary responses in the Ditches Compendium, sections 6.0 and 6.2 for a discussion of the regulation and exclusion of ditches. The final rule also includes a number of exclusions for certain waters and features constructed in dry land.

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

14.88 Almost all of the upper tributaries and isolated waters of the WGCP are or have been highly manipulated in the past for agricultural purposes. Typical manipulations include deepening, widening, straightening and rectification of streams; and, drainage by land leveling, ditching, levee construction and dewatering. Such manipulations were aimed at management of water on the landscape -either to move it off quickly or retain the water for irrigation. Pumps, wells, reservoirs and canal systems were constructed to effectively deliver irrigation water to crops. As a result of the land leveling for agricultural production, the natural depressional wetlands are generally degraded by filling and wholesale changes of biota. A typical example of the WGCP west of Houston is comprised of 10-20% isolated wetlands randomly scattered about a matrix of flat uplands. The flatness of the Plain and tight soils (high clay content) typically allow even the shallowest of remnant depressions to hold water during wet times, due to slow percolation and regular and plentiful rainfall. Runoff of water from high intensity events is unidirectional and typically overland and/or into man-made upland ditches that are directed to native streams. In this WGCP setting two outcome scenarios are clear. First, application of the new rule that includes "similarly situated" wetlands of the WGCP as de facto jurisdictional, will cause lengthy (2-4 years) and costly ($100,000+/acre) permitting efforts in an area that already contains six million people. Secondly, avoidance of these WGCP wetlands as prescribed by the regulations and preferred by government regulators results in isolated wetland spots that are mostly removed from the natural hydrologic cycle and all ecological context, a result which nearly negates any "preserved" wetland function or value. These are the two real life scenarios that will occur with adoption of this rule on the WGCP. Neither result is an outcome that is beneficial to the environment. Both scenarios are very costly, either by direct payouts for permitting and mitigation or in opportunity costs resulting from land being made nonusable. (p. 4-5)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Adjacent Waters. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act. This rule does not establish any regulatory requirements. The rule provides that Texas coastal prairie wetlands are "similarly situated," based on their close proximity to each other and the tributary network, their 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. The agencies concluded that it is appropriate to evaluate these waters in combination, and the Science Report and SAB concluded that the contributions of these similarly situated waters are cumulative across entire watersheds. The economic analysis was updated for the final rule. See summary response for Topic 11: Costs/Benefits and Economic Analysis document for details on the estimated costs and benefits of the rule.**

North Houston Association, West Houston Association, Woodlands Development Company (Doc. #12259)

14.89 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. (p. 3)

Agency Response: **See Agencies' Summary Response in 14.1. Overall, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation in part because the rule puts important qualifiers on some existing categories, such as tributaries**

Certain waters common to the Western Gulf Coastal Plain, such as Texas coastal prairie wetlands, may be jurisdictional under the rule when they are found to have a significant nexus with downstream waters when their functions are analyzed in combination with "similarly situated" waters in the watershed. The collective functions provided by these waters may have a significant cumulative impact on water quality maintenance and improvement. This is further discussed in the preamble to the rule and the Science Report. In addition, the economic analysis was updated for the final rule. See summary response for Topic 11: Costs/Benefits and Economic Analysis document for details on the estimated costs and benefits of the rule.

El Dorado Holdings, Inc. (Doc. #14285)

14.90 Examples where the proposed rule would likely result in assertion of jurisdiction over ephemeral washes that were held not to be jurisdictional in approved jurisdictional determinations under the current guidance:

The agencies assert that the proposed rule, if adopted, will result in a small number of additional waters (approximately 2.7% of those evaluated annually) being found jurisdictional as compared to current practice. The agencies also state that these waters are in fact jurisdictional under the current guidance, but that asserting jurisdiction over them was too resource-intensive. See, e.g., Facts About the Waters of the U.S. Proposal, at 4.[6] At least with respect to ephemeral waters in Arizona, the joint commenters question this assertion. Several examples are provided below of approved jurisdictional determinations that found washes to be non-jurisdictional under the current guidance, but where we fear that a different result would be mandated if the proposal is adopted unchanged.

(a) Washes at the Silver Bell Mine in Pima County, Arizona: On August 9, 2011 Silver Bell Mining, L.L.C. received an approved jurisdictional determination ("AJD") from the Corps (Corps File No. SPL-2010-00102-MB) that covered two areas at the Silver Bell Mine in Pima County, Arizona. The AJD addressed the status of 4.76 acres of ephemeral drainages in the two areas. The applicant contended that the washes all lacked a significant nexus to the nearest TNW, a stretch of the Gila River located over 120 river miles from the mine. The Corps ultimately agreed with this conclusion, and determined that no jurisdictional waters were present in the two areas. EPA, which had an opportunity to review the proposed Corps determination before it was finalized under the terms of the agencies' 2008 guidance, did not comment on the Corps' determination.

[6] Available at http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf (accessed on October 1, 2014).

In one area covered by the AJD, the Corps concluded that the all the washes in question possessed an ordinary high water mark and bed and banks. The Corps determined that the washes were approximately 121 river miles from the nearest TNW, and had to flow through at least 7 other tributaries to reach the TNW. Part of the route ran through an area of flat topography known as the Santa Cruz Flats where channel topography is poorly defined. A hydrologic analysis concluded that in a 100-year, 24-hour storm event, water in the washes at the mine would flow only approximately 12.9 miles from the site before percolating into the ground. Based on the foregoing facts, the Corps concluded that a "flow path can be traced" between the washes and the TNW, but the hydrologic connection between the two is "tenuous," and that the washes lacked a significant nexus with the TNW.

The ephemeral drainages in the other area covered by the AJD followed a different flow path, but ultimately the same stretch of the Gila River represented the nearest TNW to these washes. The Corps again concluded that the washes possessed an OHWM and bed and banks. In this case, the distance to the Glia River was approximately 132 river miles. The Tat Momolikot Dam is located approximately 35 miles from the mine, and interrupts the flow of water toward the TNW; the Corps noted that flow from the dam is "rare." For these washes, a hydrologic analysis concluded that in a 100-year, 24-hour storm event, and pretending that the Tat Momolikpt dam did not exist, water in the washes at the mine would flow approximately 53.6 miles before percolating into the ground. With respect to these washes, the Corps again concluded that while a flow path could be traced to the TNW, the hydrologic connection between the washes and the TNW was "tenuous" and no significant nexus existed.

The Silver Bell Mining AJD is an example of a case under the current guidance where the Corps concluded (and EPA did not disagree) that washes possessing an OHWM and bed and banks were not jurisdictional, even though a flow path could be traced from the washes to a TNW, because the washes lacked a significant nexus with the TNW. It is not clear that this same conclusion would or could be reached under the proposal.

We assume that these washes would not qualify as exempt gullies or rills because they possess an OHWM, at least as that term has been interpreted by the Corps in Arizona. See 79 Fed. Reg. at 22218 (both gullies and rills "typically" lack an OHWM and thus are distinguishable from regulated streams). Moreover, pursuant to the definition of "tributary" at proposed 33 C.F.R. § 328.3(c)(5), the fact that there are breaks in the (theoretical) tributary relationship between the washes at the mine and the nearest TNW (the Gila River) would not prevent the areas above the breaks from nevertheless still being considered tributaries "so long as a bed and banks and an ordinary high water mark can be identified upstream of the break" (which they were, in this case). Thus, the presence of natural (the Santa Cruz Flats) or man-made (Tat Momolikot Dam) features that interrupted the connection between the ephemeral washes at the mine site and the TNW would not prevent the washes from being considered tributaries and therefore automatically regulated under the proposal.

Although it is far from clear that this is the agencies' intent, it is possible that the washes could be excluded under the proposal on the theory that they do not "contribute flow" to the TNW, given the distances involved and the hydrologic analysis referenced

above, which concluded that even in a 100-year, 24-hour storm event, flows in the on-site washes at the mine would not reach the Gila River. However, the agencies have offered no guidance and set no criteria for determining whether a tributary "contributes flow" to a downstream TNW. Therefore, it is possible, and perhaps likely, that the ephemeral washes at Silver Bell would have been considered jurisdictional tributaries if assessed under the proposed rule.

(b) Washes at the Trillium project in Maricopa County, Arizona: The Trillium site is a 3,049 acre parcel located in Buckeye, in western Maricopa County, Arizona. Prior to the decision in Rapanos, a jurisdictional determination had been approved by the Corps finding that 184 acres of ephemeral washes on the site constituted jurisdictional waters. A single large wash (Wagner Wash) that ran through the site represented approximately 115 acres of these jurisdictional waters. The remaining roughly 69 jurisdictional acres were spread among 10 smaller washes on the site, all of which were tributary to Wagner Wash. Wagner Wash is tributary to the Hassayampa River, which is also ephemeral except in some downstream stretches where agricultural return flows result in the more frequent presence of water. The Hassayampa is tributary to the Gila River west of Phoenix.

Following the Rapanos decision, the applicant requested a re-delineation of the site using the agencies' June 2007 guidance on jurisdiction. An AJD ultimately determined that only Wagner Wash was jurisdictional under the post-Rapanos guidance, and that the smaller washes that were tributary to Wagner Wash were not jurisdictional (Corps File No. SPL-2008-00333-SDM, determination issued October 30, 2008 and renewed on July 1, 2012). The basis for this conclusion was that the smaller washes lacked a significant nexus with the nearest TNW, a segment of the Gila River located approximately 21 river miles from the Trillium site. Jurisdictional waters at the Trillium site therefore decreased from approximately 184 acres to approximately 115 acres (roughly a 37.5% reduction) as a result of implementing the significant nexus standard articulated in Rapanos.

As with the washes at Silver Bell, the Corps felt that the washes at Trillium possessed on OHWM, as that concept has been interpreted in Arizona. However, the Corps concluded that the smaller tributaries to Wagner Wash lacked a significant nexus with the nearest downstream TNW (which as noted above is located roughly 21 river miles from the site). The applicant presented information and analysis showing that in the smaller washes on the site, water was present on average for parts of four days per year. The average ordinary high water flow in these washes was estimated at 0.08 cfs, which corresponds to water being present at a depth of less than ¼ inch on those infrequent occasions when water is present at all.

Even more so than the washes at Silver Bell discussed above, the washes at Trillium likely would be considered "tributaries" under the proposed rule. Unlike at Silver Bell, there are no man-made or natural obstructions or breaks in channel between the washes in question and the TNW. Thus, absent some limiting interpretation of the "contributes flow" requirement (i.e., a minimum frequency or extent of flow contribution), the small washes at Trillium that have been formally determined to lack a significant nexus to a TNW likely would be considered jurisdictional under the proposal.

(c) Other ephemeral washes subject to approved jurisdictional determinations in Arizona in 2013-14: As described below in Section I(1)(b) of these comments, the joint commenters reviewed information on approved jurisdictional determinations completed for waters in Arizona in 2013-14. Of 13 determinations in this time period involving ephemeral washes that possessed an OHWM, 12 found that the washes lacked a significant nexus to a TNW. Under the proposal, however, it is possible that some or all of these would be regulated as "tributaries." The Silver Bell and Trillium examples provided above thus are not unique or unusual cases in Arizona.

Recommendation: The agencies should make several clarifications to the proposed definition of "tributary": (a) in determining whether a feature "contributes flow" to a downstream TNW (and thus constitutes a tributary), the presence of natural or man-made interruptions between the feature and the TNW should be considered; (b) transmission losses between the feature and the TNW also should be considered when assessing whether the feature "contributes flow" to the TNW; and (c) the agencies should provide objective criteria that would set a minimum threshold (expressed in terms of frequency and/or extent of contribution) that would have to be met before a feature could be held to "contribute flow" to a downstream TNW. (p. 18-22)

Agency Response: See Agencies' Summary Response in 14.1, the Tributaries Compendium and the Preamble VII at and the Significant Nexus compendium, and TSD at Section III.C.

Newmont Mining Corporation (Doc. #13596)

14.91 All of Newmont's U.S. operations are located in northern Nevada, an arid/semi-arid region of the nation where annual precipitation averages from 8 to 18 inches per year, and where the evaporation rate greatly exceeds the precipitation rate. The nearest body of water considered a TNW by EPA and the Corps is the Rye Patch Reservoir, which is anywhere from approximately 50 to over 200 miles from the various Newmont facilities in northern Nevada. See Exhibit A at slide 2.[7]

Newmont's operations utilize large volumes of water, and as such, Newmont's facilities contain numerous types of industrial ponds that collect and then recycle solutions, wastewaters, stormwater, and other liquids to on-going production operations in closed-loop systems to make use of their water values. Newmont also goes to great lengths to ensure that the waters in these ponds are not lost to the environment. Newmont's artificial ponds include the following:

a. Tailings Storage Facilities: A typical Newmont facility mines, and processes on a daily basis, thousands of tons of precious metal-bearing ores. As part of the beneficiation process, some of these ores are crushed, mixed with water, and chemically treated, in order to concentrate the gold and silver contained in them. The waste stream from these operations, called "tailings," is a slurry composed of the ground ore and solutions from the mill. The tailings, which contain residual amounts of gold and silver from the ore, are conveyed to large artificial impoundments known as Tailings Storage

[7] We attach as Exhibit A excerpts from a slide presentation given by Newmont to EPA and Corps officials on September 29, 2014, and incorporate that presentation by reference.

Facilities, where the solids in the slurry settle and the solutions are captured and recycled back to the mill to recover the gold and silver in them, and, most importantly, to make use of the water values in further production operations.

Newmont's TSFs are permitted by the State of Nevada pursuant to its State Water Pollution Control Act ("WPCA"), and are designed and operated to achieve zero discharge to surface water, as required by Nevada regulations and EPA's Effluent Limitation Guidelines ("ELGs") applicable to wastewaters from precious metals mining operations. See NAC 445A.424(1); 40 C.F.R. §§ 440.100 - 440.105. The TSFs are also designed so that 100% of the solutions that enter the TSF will eventually be recycled to production operations, except for that portion that evaporates. Modern TSFs are lined, typically with a combination of engineered soils and synthetic geomembranes. As required by Nevada law and Newmont's permits issued pursuant to the State's WPCA, Newmont's TSFs must be underlain by a 12-inch natural clay liner, compacted to a measured permeability of 1x10-6 cm/sec, or by competent bedrock or other geologic formations that provide an equivalent degree of containment. NAC 445A.437. Newmont is also required to, and does, implement a program to monitor the quality of all groundwater and surface water that could even be potentially affected by its TSFs. NAC 445A.440. If monitoring reveals any constituents have been released into the environment, Newmont must conduct an evaluation, and if appropriate, undertake remedial measures. NAC 445A.441.

Newmont's TSFs are, with minor exception, located entirely in uplands, far from any TNW or tributary system. Due to the fact that minor ephemeral drainages crisscross Newmont's properties (see discussion in Part II below), however, it is sometimes necessary to divert portions of ephemeral drainages in order to construct or expand a TSF. Where the drainages have been deemed jurisdictional by the Corps, Newmont has obtained CWA 404 permits to divert them. After diversion, the drainages remain jurisdictional waters. At times, therefore, TSFs are located adjacent to jurisdictional ephemeral drainages, even though there is no risk that any solutions or other "waters" associated with the TSF could impact in any way the chemical, physical, or biological integrity of the drainage, or any downstream TNW. (p. 13-15)

Agency Response: See Agencies' Summary Response in 14.1 and the Features and Waters Not Jurisdictional Compendium.

14.92 Heap Leach Pregnant and Barren Solution Ponds: As part of its production operations, Newmont engages in "heap leaching" of certain precious-metals bearing ores. The heap leach process consists of placing the ore on a fully-lined, impermeable pad, applying a very dilute sodium cyanide solution to the ore pile, collecting the gold and silverladen solution that emerges from the bottom of the pile in "pregnant solution ponds," processing the pregnant solutions to remove the gold and silver, and then sending the now "barren" solution back to the barren solution pond, where it is recycled and reused as part of the heap leaching process. As with TSFs, these ponds are designed, operated and permitted to ensure zero discharge to surface water and to protect groundwater. Pursuant to Nevada regulations, and the WPCA permits issued by the State to Newmont, leach pads must consist of an engineered liner system that provides containment equal to or greater than that provided by a synthetic liner placed on top of a prepared sub-base of 12 inches of soil, which has a maximum re-compacted in place coefficient of permeability of

either: (1) 10-6 cm/sec; or (2) 10-5 cm/sec when combined with the leak detection system. NAC 445A.434. Moreover, all ponds that are intended to contain process fluids must be double-lined with a leachate collection system between the liners. NAC 445A.435. No discharges to surface water from the ponds are allowed. Monitoring is required to detect any releases of contaminants to groundwater or surface water, and necessary remedial actions must be undertaken if there is a release. NAC 445A.440-.441. As in the case of TSFs, at times pregnant and barren solution ponds may be located near ephemeral drainages that traverse Newmont's properties, some of which might be deemed jurisdictional currently by the Corps, and which potentially could be considered jurisdictional under the Agencies' Proposal. (p. 15-16)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendium for Features and Waters Not Jurisdictional.

14.93 Stormwater Collection Ponds: Newmont's facilities have CWA 402 general permits from the State of Nevada that address potential point source stormwater discharges to surface water. To comply with these permits, Newmont has prepared Stormwater Pollution Prevention Plans that set forth the measures taken by Newmont to ensure that no stormwater is discharged via point source to waters of the United States. At many Newmont facilities, stormwater retention ponds are located at various points on the property, and if there is any runoff (mainly in the spring), it is directed by constructed channels (some lined and some not) around disturbed areas to the stormwater retention ponds (some of which, but not all of which, are lined). The water in the stormwater retention ponds is never discharged to surface water. (p. 16)

Agency Response: See Agencies' Summary Response in 14.1, the Compendium for Features and Waters Not Jurisdictional, and for stormwater control features, see especially the summary response at 7.4.4.

14.94 Quench Ponds: In connection with various of Newmont's production operations, gases that are generated by processing operations must be cooled in order to be transformed into liquid form and be usable in further stages of the operations. At times, Newmont uses groundwater for this cooling process. Prior to and after use in cooling operations, the groundwater is collected in artificial impoundments called "quench ponds," and then cycled in a closed loop operation to and back from production operations to be used in cooling gases. The quench ponds are lined to ensure no release of water to the environment. They are permitted by the State, as part of Newmont's WPCA permit, to ensure that there will be no discharge to surface water, and that any loss to groundwater will be detected through groundwater monitoring and remedial action taken. (p. 16-17)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendium for Features and Waters Not Jurisdictional.

14.95 Summary of Ponds: In sum, Newmont, as a necessary concomitant of its production operations, uses a variety of artificial ponds to collect and recycle wastewaters, process solutions, groundwater, and precipitation runoff. Because water is dear in the arid West, and also because Nevada and federal law requires zero-discharge to surface water, these ponds are designed and operated so that there is no loss of water to the environment. While, technically, some of these ponds (particularly TSFs and pregnant and barren solutions ponds) may be "adjacent" to ephemeral drainages (which, in the typical

scenario, carry virtually no flow except for a few days every few years during heavy snow melt or precipitation events – see discussion in Part II below), they do not impact those ephemeral drainages, and certainly do not impact any downstream TNW, given the zero discharge surface water standard applicable to the ponds, the liners preventing any migration of waters to groundwater, and the extensive groundwater monitoring that takes place. (p. 17)

Agency Response: See Agencies' Summary Response in 14.1 and the Features and Waters Not Jurisdictional Compendium. The agencies have determined that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, and artificial lakes and ponds created in dry land and used primarily for uses such as settling basins and cooling ponds are not "waters of the United States" even if the otherwise meet the other definitions of "waters of the United States".

14.96 Most of the drainages on Newmont's property are ephemeral, in that the only waters that flow in them are from precipitation – normally snow melt or rain during the spring run-off season. Some of these drainages are fed occasionally by seeps or springs (and are therefore considered intermittent by the Corps and EPA), and they flow more frequently – although still ordinarily for only a matter of days or weeks per year. Flow in these ephemeral and intermittent drainages does not typically reach another surface water. There are at times wetlands abutting these intermittent drainages fed by the seeps or springs, but the wetlands do not impact or affect any "waters" other than the intermittent stream segments to which they are adjacent.

The ephemeral drainages on Newmont properties in Nevada rarely have water in them, much less flow. The upper reaches might typically flow once every few years and the lower reaches once every 10 years. Flow normally occurs only when there is a very heavy snow pack during the winter that melts in the spring or during very heavy rainfall. Even intermittent streams are normally dry. Flow in these intermittent streams, as in the ephemeral drainages, rarely occurs every year.

Ephemeral drainages typically flow only for the duration of a given storm event – usually for a matter of hours to a day or two. Most of the water in these drainages and streams evaporates; rarely, if ever, would the waters connect to downstream surface waters by means of a confined surface connection. With very rare exception, the ephemeral drainages and intermittent streams on Newmont's properties fan out and lose definition (including losing a definable bed and banks and ordinary high water mark) before they reach another surface water. (p. 28)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Adjacent Waters, and Features and Waters Not Jurisdictional.

14.97 Newmont's Mule Canyon Project

An example of the chaos that could be created were the Agencies' Proposal to be finalized in its current form is presented by the ephemeral and intermittent drainages and upland swale associated with Newmont's Mule Canyon reclamation project near Beowawe, Nevada. This project (which was discussed on September 29, 2014 with

representatives of the Corps and EPA responsible for the Agencies' current Proposal and is addressed in Exhibit A) is located in the northern Shoshone Mountain Range between two valleys: the Whirlwind Valley to the east and the Reese River Valley to the west. See Exhibit A, slides 24-25. The Whirlwind Valley contains a playa two miles east of the project border. See id. at slides 26-27, 30. The nearest perennial/seasonal waters (flow for greater than three months) are: (1) to the east, Coyote Creek, a tributary to the Humboldt River, 3,000 feet east of the large playa that is itself about 2 miles from the project area border; and (2) to the west, the Reese River, which is more than 7.5 miles from the project border. *Id*. at slides 24, 26.

The project area contains 5 ephemeral or intermittent channels (some of which are fed by natural seeps or springs) that flow to the east of Newmont's property and all of which have a bed and banks and ordinary high water mark while on Newmont's property. There is also an upland swale which does not have a bed and banks. *Id*. at slide 28. As shown in slides 28 and 29 of Exhibit A, the Eastern drainages fan out and lose definition on the flats in the Whirlwind Valley before reaching the playa. Only in an extraordinary rain event or large snow pack melt could water from the swale theoretically reach the playa. *Id*. at slide 29. However, any water reaching the playa infiltrates or evaporates. *Id*. The playa itself does not drain to Coyote Creek, the nearest surface water, and the Corps determined in 2011 that it would require repeated, extremely large (100-year) storm events to fill the playa to a level that could even potentially result in flow down the valley to Coyote Creek, which is 3,000 feet away. *Id*. In 2011, the Corps determined that these ephemeral drainages and intermittent streams, and the swale, are not jurisdictional waters. *Id*. at slide 25.

Three drainages from the western half of the property that have a defined bed and banks while on the property travel west toward the Reese River Valley. *Id*. at slides 53, 54. However, these drainages fan out and lose channel definition and infiltrate into the ground on the mountain slope or in the valley well before reaching a County Road on eastern edge of the valley. *Id*. at slide 54. The County Road is 7.5 miles east of the Reese River. Again, in 2011 the Corps determined that these streams are not jurisdictional waters. *Id*. at slide 25.

If the Agencies' Proposal was finalized in its current form, the 2011 jurisdictional determination outcome might be called into question. Although none of the Mule Canyon drainages reaches a tributary system to a TNW via confined surface hydrological connection, under the Agencies' Proposal, the Agencies' might determine that if there were a series of 100- year storms within a short period of time the playa might overflow and surface waters reach Coyote Creek, such that the playa, and water carried by the swale reaching the playa, are "adjacent to" Coyote Creek or "other waters," thereby making all of the Eastern Drainages on the Mule Canyon property jurisdictional waters. (p. 34-35)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Tributaries, Adjacent Waters, Other Waters, and Features and Waters Not Jurisdictional.**

Freeport-McMoRan Inc. (Doc. #14135)

14.98 Figure 1 is a photograph of the Santa Cruz River in Arizona taken near the Continental Gauge on June 9, 2014. As this Figure clearly shows, the river is completely dry. This is the normal condition for the Santa Cruz River, which on average has 326 days a year with no flow.[8] In contrast, the San Pedro River—on which the Draft Connectivity Report and Proposed Rule rely—only experiences an average of 104 days a year with no flow. As a result the Proposed Rule's near-exclusive reliance on a highly studied but demonstrably unrepresentative river system in the arid west renders its broader conclusions about the "significant nexus" that exists in arid west "tributaries" invalid.[9] Because of the lack of flow in many arid west systems, the chemical and biological connections that the Proposed Rule asserts do not actually exist. Furthermore, while a channel feature may be evidence that a physical connection existed at one time, channels carved in the arid west landscape are known to persist and are not necessarily reliable indicators of lands that will convey water in the future.[10]

The plain text of the Clean Water Act limits EPA and the Corps' jurisdiction to waters of the United States.[11] While it is well-established that this means something more than simply navigable waters,[12] Justice Kennedy's concurrence in Rapanos requires the Agencies to demonstrate that waters "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood to be 'navigable'" in order to establish jurisdiction.[13] The Agencies themselves recognize this in their proposed definition of "significant nexus," which requires that the connection be more than speculative and insubstantial.[14] However, when applied to the arid west, the Proposed Rule's definition of "tributary" and its conclusion that all tributaries are jurisdictional does not meet this requirement.

II. Features that would be defined as "tributaries" in the arid west under the Proposed Rule may not have the biological connection to traditional navigable waters that the Draft Connectivity Report and Proposed Rule assert. With respect to biological connectivity, the Proposed Rule concludes that "[t]ributaries, including intermittent and ephemeral streams, are critical in the life cycles of many organisms capable of moving throughout

[8] Technical Comments at 15.
[9] Id. at 13.
[10] Id. at 7.
[11] See 33 U.S.C. § 1362(7) (defining "navigable waters" to be "waters of the United States, including the territorial seas.").
[12] United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985).
[13] 547 U.S. 715, 780 (2006) (emphasis added). In rejecting the Corps's existing standard for tributaries at the time of Rapanos, Justice Kennedy noted that the standard "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it." Id. at 781. Justice Kennedy stated that this flawed standard "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." Id. (emphasis added). The existing standard for tributaries rejected in Rapanos (i.e., "the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark" (id.)) is the same flawed standard that the Agencies are attempting to support in the Proposed Rule.
[14] 79 Fed. Reg. at 22,220.

river networks."[15] The Proposed Rule further finds that tributaries "have important effects on the biological integrity of . . . [traditional navigable] waters, contributing materials to downstream food networks and supporting populations for aquatic species, ..."[16]

With respect to ephemeral streams specifically, the Proposed Rule notes that they can play an important role in sediment storage that improves downstream water quality. [17] While all of these observations may be correct in humid systems and perennial streams that receive regular flows, they do not hold when applied to the channels of the arid west, in which the impact of ephemeral tributaries in particular is frequently insignificant and insubstantial, much less critical.

Most biological communities require the sustained presence of water in channels to form.[18] As a result, they are unlikely to exist in arid west channel systems where flow is an abnormal condition.[19] The Draft Connectivity Report notes that isolated pools in dryland rivers are key refuges for fish and aquatic insects to survive in ephemeral waters during periods when there is no flow.[20] However, the Draft Connectivity Report provides no evidence of biological connectivity or support of fish or aquatic insect populations in cases where the predominant condition of the water is not only no flow but also a completely dry channel bed for most of the year. In cases such as the Santa Cruz River where both the mainstem and channels flowing into it are nearly always dry, the biological connections posited by the Draft Connectivity Report and the Proposed Rule simply do not exist. (p. 2-4)

Agency Response: **See Agencies' Summary Response in 14.1. The agencies recognize that ephemeral, intermittent and perennial tributaries in the arid West are characterized by a gradient of hydrologic connectivity. The Science Report is based on a review of more than 1,200 publications from the peer-reviewed literature, including publications relevant to the full range of hydrological and hydraulic characteristics of arid West tributaries. The agencies also solicited local, regional expertise from staff with expertise in arid West tributaries in the development of the rule. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule, including the scientific basis for defining "tributaries". The scientific literature unequivocally demonstrates that streams, individually or in aggregate, exert a strong influence on the chemical, physical and biological integrity of downstream waters. All tributary streams, including intermittent and ephemeral streams, are chemically, physically and biologically connected to downstream waters through channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed and transported to downstream waters. The SAB concluded that there is strong evidence in support of the agencies proposal to include all tributaries as**

[15] 79 Fed. Reg. at 22,205.
[16] Id
[17] Id. at 22,231.
[18] Technical Comments at 3.
[19] Id. at 4.
[20] Draft Connectivity Report at 4-68.

jurisdictional. The SAB found that tributaries, as a class of waters, exert a strong influence on the chemical, physical and biological integrity of downstream waters, even though the extent of connectivity is a function of the frequency, duration, magnitude, predictability and combined outcomes of chemical, physical and biological processes.

Freeport-McMoRan Inc. (Doc. #14135.1)

14.99 There are several avenues to potentially pursue in identifying the upstream extent of a channel (i.e., some potential upstream limit of tributaries vis-à-vis gullies). In arid landscapes a single avenue should not be chosen, as has been noted by the Corps. In arid landscapes it will be necessary to rely on local, site-specific data combined with some expert judgment and deep understanding of the processes at work which are to be regulated, rather than regulation based on features and snapshot indicators alone. Again, the Corps has shown that snapshot indicators have limited value in arid landscapes.

As an example of the subtleties involved in arid river systems and the potentially dramatic differences between nearby systems, here we briefly show the hydrologic differences between the Santa Cruz River and the San Pedro River, both located in similar landscapes in southern Arizona. It is important to note that the San Pedro River is one of the primary rivers that the EPA has relied on from which to develop its science of arid rivers, particularly in Arizona. Along with the San Pedro, one of its tributaries—Walnut Gulch—is one the most studied arid watersheds in the world, as it is a long-term agricultural experiment watershed studied and monitored by the USDA Agricultural Research Service. Yet it is important to bear in mind that Walnut Gulch is not necessarily representative of arid landscapes in general, or even representative of nearby watersheds; in particular, as we will show below and as other scholars have shown, Walnut Gulch generates unusually large runoff, or more thoroughly "WGEW [Walnut Gulch Experimental Watershed] experiences greater runoff due to the gravelly soil composition and presences of a calcite layer which prevents water from passing through it to greater depths."[21]

Using publically available stream flow data shows that these two rivers of almost identical drainage area behave quite differently in terms of hydrology. We use the upper Santa Cruz River (SCR) at Continental, AZ (USGS gage 09482000) vs. upper San Pedro River (SPR) near Tombstone, AZ (USGS gage 09471550). These two stations drain almost identical drainage areas (Table 1) and are thus directly comparable. In addition to these gages, there are also upstream gauges in both, and again, they drain remarkably similar drainage areas. The Tubac station on SCR (USGS gage 09481740) is approximately 20 river miles upstream of the Continental gage on the Santa Cruz River; the Charleston station on the San Pedro River (USGS gage 09471000) is approximately 11 river miles upstream of the Tombstone gage. There are no known large water diversions in either reach (i.e., between the upstream and downstream gage). Each reach has one relatively large ephemeral tributary that can add considerable surface water during localized rainfall events.

[21] Cavanaugh, M.L., S.A. Kurc, and R.L. Scott, 2011. Evapotranspiration partitioning in semiarid shrubland ecosystems: a two-site evaluation of soil moisture control on transpiration. Ecohydrology 4(5): 671-681.

Flow regime comparisons of upstream vs. downstream gages revealed that both of these river reaches (SCR and SPR) are predominantly "losing streams," meaning that the water table is below the channel bed which causes surface water to seep in to the ground and results in lower water discharge downstream during normal and low flows. For the San Pedro River during above-average flows, the Tombstone gage (downstream gage) usually has a higher discharge relative to the Charleston gage (upstream) due to the water table being higher than the channel bed (i.e., "gaining stream") or from tributary/springs inputs. That is, during storm flows and for a while after, the San Pedro River increases in discharge as we move downstream.

In contrast, even during high flows, the Santa Cruz River diminishes as it moves downstream, and this is the case for virtually all flows. This means that most of the flow (if not all) at Tubac (upstream) is lost before it reaches Continental. There are a number of reasons for this major hydrologic difference between these two rivers (e.g., a lower water table for SCR, perched water table for SPR, land use and water demands, underlying hard rock geology[22]; Wood et al., 1999), including that the San Pedro River reach is part of the protected San Pedro Riparian National Conservation Area. Regardless, the result is that these two rivers are hydrologically distinct: while the San Pedro River has fairly continuous flow, the nearby Santa Cruz river only has surface water flow during large or long rainstorms (Table 2): the majority of flows on the Santa Cruz River only last 2 days or less. Even small floods, which occur every 3 years on average, only last 9 days on average. That is, the typical condition for this river with almost 1,700 square mile drainage area is to be dry with only very brief flow events.

It is important to point out that the Santa Cruz River is not an outlier; its flow regime is characteristic of many of the rivers in Arizona (Table 3), and likely the broader desert southwest. When all rivers with USGS gages in Arizona with similar drainage areas as SCR and SPR are assessed (n = 6), half have a median flow of 0 cfs and are dry for more than three quarters of the year (Table 3). These insights from the comparison among these rivers lead to two key conclusions. First, it is imperative to bear in mind that the jurisdictional status of the Santa Cruz River itself is not the issue. Rather, the important aspect is that many of the features being considered as potentially jurisdictional tributaries have drainage areas significantly smaller and are usually hydrologically disconnected (in terms of surface water) from the mainstem river. Thus, the hydrologic behavior of these headwater features is more likely to be similar to the Santa Cruz River than to the San Pedro River. That is, the San Pedro River should not be assumed to be the prototype or typical arid river system; it is clear that it is not hydrologically characteristic of the region, and thus, would not be chemically or biologically representative of other arid river systems. (p. 11-13)

Agency Response: **See Agencies' Summary Response in 14.1. The agencies recognize that ephemeral, intermittent and perennial tributaries in the arid West are characterized by a gradient of hydrologic connectivity. We disagree with the assertion by the commenter that the agencies assumed the San Pedro River, AZ, to**

[22] Wood, M.L., House, P.K., and Pearthree, P.A. 1999. Historical Geomorphology and Hydrology of the Santa Cruz River. Arizona Geological Survey Open-File Report 99-13.

be the prototype or typical arid river system for purposes of defining "tributaries" under the rule. The Science Report is based on a review of more than 1,200 publications from the peer-reviewed literature, including publications relevant to the full range of hydrological and hydraulic characteristics of arid West tributaries. The agencies also solicited local, regional expertise from staff with expertise in arid West tributaries in the development of the rule. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule, including the scientific basis for defining "tributaries". The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the chemical, physical and biological integrity of downstream waters. All tributary streams, including intermittent and ephemeral streams, are chemically, physically and biologically connected to downstream waters through channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed and transported to downstream waters.

Freeport-McMoRan Inc. (Doc. #14135.2)

14.100 A number of "approved jurisdictional determinations"[23] have been completed by the U.S. Army Corps of Engineers in Arizona under the 2008 Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decisions in *United States v. Rapanos* and *Corabel v. United States*, which was issued jointly by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers in December 2008. These jurisdictional determinations have recognized that minor ephemeral washes, especially those distant from a traditional navigable water, do not constitute waters of the United States and do not therefore fall under federal jurisdiction. Table 1, below, provides a summary of the key elements from three such Corps-approved jurisdictional determinations. In all three jurisdictional determinations, none of the surface water features on the sites (all ephemeral washes) was considered waters of the United States, but under the Draft Proposed Rule this outcome would be reversed and fill of the ephemeral washes within those sites would fall under federal jurisdiction. The Draft Proposed Rule thus reflects a substantial expansion of Clean Water Act regulation. (Additional information regarding these three Corps-approved jurisdictional determinations is provided after Table l.)

[23] On June 26, 2008, the Corps issued a Regulatory Guidance Letter ("RGL") that explained the two types of jurisdictional determinations issued by the Corps (i.e., an "approved" jurisdictional determination and a "preliminary" jurisdictional determination). According to the RGL, an "approved" jurisdictional determination "is an 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." A "preliminary" jurisdictional determination, on the other hand, is a non-binding opinion that there may be jurisdictional water of the United States on a particular site.

Table 1. Summary of Three Approved Jurisdictional Determinations Completed in Arizona under the 2008 Guidance

Project Name (*Corps File No.*)	Analysis Area (acres)	Total Area of Features with "OHWM" (acres)	Approved Jurisdictional Area under 2008 Guidance (acres)	Anticipated Jurisdictional Area under Draft Proposed Rule
Hyder Valley Solar Project (*SPL-2009-00639-MB*)	4,012	29.3	0	29.3
Sonoran Solar Energy Project (*SPL-2009-00397-SDM*)	11,500	101.5	0	101.5
Lost Dutchman Heights (*SPL-2008-00674-SDM*)	7,700	47.6	0	47.6

(p. 4)

Agency Response: **See Agencies' Summary Response 14.1. The waters must meet the definition of "tributary" to be considered jurisdictional under (a)(5). The rule definition of "tributary" is a water that contributes flow to an (a)(1), (2), or (3) water that is characterized by the presence of the physical characteristics of a bed and banks and an ordinary high water mark. Some ephemeral features may include an ordinary high water mark without the characteristics of bed and banks; such ephemeral features would not be considered a tributary under the rule. The rule expressly indicates in paragraph (b)(4)(F) that ephemeral features that do not meet the definition of tributary are not "waters of the United States." See preamble section IV.F and Tributary Compendium for additional discussion.**

The Science Report and the SAB support that tributary streams, including those with perennial, intermittent, and ephemeral flows, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters. See Preamble Section III for a summary of these Reports.

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. See Tributary Compendium and the Technical Support Document VII for additional discussion.

14.101 The Hyder Valley Solar Project comprises just over 4,000 acres approximately 40 miles northwest of Gila Bend, Maricopa County, Arizona. The site occurs on a relatively flat valley floor between minor mountain ranges, approximately two miles north of the Gila River. The nearest designated traditional navigable water is the Colorado River, approximately 98 river miles from the project site. The only surface water features that occur on the site are dry ephemeral washes, fill of which were determined to be nonjurisdictional by the Corps applying the current guidance. Figure l presents a map of the ephemeral features within the analysis area; Exhibit l provides selected photographs of this area. (p. 4-5)

Agency Response: **See Agencies' Summary Response 14.1 and the Compendium for Features and Waters Not Jurisdictional.**

14.102 Sonoran Solar Energy Project The Sonoran Solar Energy Project was proposed on approximately 4,000 acres of lands managed by the Bureau of Land Management west of Phoenix, Maricopa County, Arizona. The analysis area for the project included 11,500 total acres to allow a more thorough assessment of project siting considerations. Similar to the Hyder Valley Solar Project, topography within the Sonoran Solar Energy Project analysis area is relatively flat, with the only drainage features consisting of ephemeral washes. To the east, the nearest downstream traditional navigable water is the Gila River at Powers Butte, approximately 19 river miles downstream of the analysis area boundary. To the west, the nearest downstream traditional navigable water is the Colorado River, over 140 river miles downstream. Figure 2 provides a map of the ephemeral features within the analysis area; Exhibit 2 provides selected photographs of this area. (p. 6)

Agency Response: See Agencies' Summary Response 14.1 and the Compendium for Features and Waters Not Jurisdictional.

14.103 The Lost Dutchman Heights project comprises approximately 7,700 acres of lands managed by the Arizona State Land Department, which were evaluated for development by a private interest. The analysis area for this project is located in Apache Junction, Pinal County, Arizona, just east of Phoenix. Surface water features on the parcel consist solely of ephemeral washes, including the named Siphon Draw. Stormwater flows discharging from the analysis area are significantly influenced by flood control structures in the east Phoenix valley, severely limiting their potential to discharge to the nearest downstream traditional navigable water, the Gila River at Powers Butte, which is approximately 91 "river miles" downstream of the analysis area. Figure 3 provides a map of the ephemeral features within the analysis area. (p. 8)

Agency Response: See Agencies' Summary Response 14.1 and the Compendium for Features and Waters Not Jurisdictional.

Sinclair Oil Corporation (Doc. #15142)

14.104 Sinclair's primary concern with the proposed rule is that it improperly calls into question, for the first time, the jurisdictional status of certain features in and around Sinclair's operations. Sinclair seeks clarification and assurances from the Agencies that these features will not be deemed to be "waters of the United States" under the proposed rule. As noted in the introduction, Sinclair operates two refineries in Casper and Sinclair, Wyoming. Both of these refineries are located within the watershed of the Ninth Platte River, a traditional navigable water and interstate water. Sinclair's refineries are considered zero discharge facilities that do not discharge to the North Platte or any other "water of the United States." Waste water is treated and managed in compliance with each facility's Resource Conservation and Recovery Act ("RCRA") permit, through a series of drains, ditches, pipes, tanks, evaporation ponds and irrigation structures, to ensure that the zero discharge status of the facilities is maintained. Wastewater is collected and directed to treatment structures that separate oil from the water and settle out solids. After wastewater is treated to meet the standards of the refineries' RCRA permits, it is conveyed to evaporation ponds where the water is evaporated.

At the Sinclair refinery, the evaporation ponds are located approximately one mile northeast of the refinery. Wastewater is commingled with stormwater from around the

refinery and storm water from the town of Sinclair, Wyoming in a ditch that conveys this water to the evaporation ponds. Historically, the Sinclair refinery used three evaporation ponds (east, west and middle), but only the middle evaporation pond is currently being used. To augment the efficiency and capacity of the evaporation ponds, Sinclair operates two center-pivot irrigation systems directly south of the evaporation ponds and a flood irrigation area directly north of the evaporation ponds to expedite the evaporation of wastewater. The surface of the middle evaporation pond generally ranges between 200 and 320 acres at any given time and always contains standing water. However, there is no outfall from the evaporation ponds or irrigation areas and there is no subsurface hydrologic gradient that would allow subsurface water to migrate toward the North Platte River.

Much of the refinery, including the waste water ditch, the evaporation ponds, and the flood and center pivot irrigation areas, are located in an isolated hydrographic basin in which ground water gradients all flow towards the middle evaporation pond. The State of Wyoming has determined that the western edge of the refinery is located outside of this isolated basin and that the ground water gradient from that edge of the refinery would naturally flow west towards Sugar Creek, a tributary of the North Platte River. However, the refinery operates a ground water barrier system along the western boundary of the refinery property to prevent the migration of groundwater in that direction. Accordingly, all refinery operations are hydrologically isolated from the North Platte River, any tributary to the North Platte River, or any other "water of the United States."

The Casper refinery is hydrologically separated from the North Platte River by a barrier system that prevents the migration of ground water from the refinery towards the river - this barrier is maintained and monitored in compliance with the Casper refinery's RCRA Permit. The evaporation ponds are located approximately two miles northwest of the refinery. Because the North Platte River separates the refinery from the evaporation ponds, waste water is conveyed to the evaporation ponds via a fully enclosed pipe system that is bored approximately 6 feet under the river. The evaporation ponds at the Casper refinery are comprised of three evaporation ponds, which are approximately 20 feet lower in elevation from the North Platte River and combine to cover approximately 60 acres. These ponds always contain standing water. However, there is no outfall from any of the ponds and the subsurface hydrologic gradient prevents any subsurface water from migrating away from the evaporation ponds. In addition, the North Platte River and the evaporation ponds are separated by a bedrock high which serves as a lithographic barrier between the ponds and the river. There is no hydrologic connection between the refinery and evaporation ponds and the North Platte River or any other "water of the United States."

While each component of these wastewater treatment systems is permitted under the facilities' RCRA permits, none of these facilities have ever been subject to regulation under the CWA. Under the current regulatory definitions, these features have never been considered "waters of the United States." More importantly, even if the components of the waste treatment systems had ever been determined to meet the definition of "waters of the United States," the existing exemption for waste treatment systems makes clear that they are not waters of the United States for purposes of the CWA: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of

CWA (other than cooling ponds as defined in 40 CFR 423.1 l(m) which also meet the criteria of this definition) are not waters of the United States." See e.g. 33 C.F.R. § 328.3.

Under the proposed rule, the jurisdictional status of these features, particularly the evaporation ponds and flood irrigation areas, becomes questionable. The definition of "waters of the United States" provided in the proposed rule is so ambiguous that it could be interpreted as covering these man-made components of the refineries' waste treatment system for the first time as impoundments, tributaries, adjacent waters or other waters. The practical effect of the proposed rule's expansion of the scope of jurisdictional waters is compounded by the proposed changes to the text of the waste treatment system exemption which could be interpreted as eliminating the exemption for waste treatment systems permitted under environmental statutes other than the CWA.

The preamble to the proposed rule makes clear that the Agencies' intent was to narrow the definition of "waters of the United States" and not substantively alter the waste treatment exemption. See 79 Fed. Reg. 22,189 and 193. Defining components of Sinclair's waste treatment systems as "waters of the United States" is inappropriate and inefficient. These facilities are permitted and operated with the specific purpose of preventing the discharge of pollutants to waters of the United States. Consequently, subjecting them to regulation as "waters of the United States" would frustrate the very purpose for which they exist. Yet, as explained in detail below, that is exactly what is likely to happen under the definition of "waters of the United States" proposed because the definitions of impoundments, tributaries, adjacent waters, and other waters can be reasonably read to cover the components of the RCRA-permitted waste treatment system and the exemption that has always ensured these features are not "waters of the United States" can reasonably be read to no longer apply. (p. 9-11)

Agency Response: **See Agencies' Summary Response in 14.1, Features and Waters Not Jurisdictional Compendium. Under the final rule, waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, and artificial lakes and ponds created in dry land and used primarily for uses such as settling basins and cooling ponds are not "waters of the United States" even if the otherwise meet the other definitions of "waters of the United States."**

14.105 Under the proposed rule, an isolated feature located miles from a tributary that is itself miles from a traditional navigable water could be deemed a "water of the United States" because the land between that otherwise isolated feature "influences the exchange of energy and materials between" the terrestrial and aquatic ecosystems. Since there is no objective boundary defining the extent of the riparian area, all of the land underlying and surrounding Sinclair's refineries, including the evaporation ponds, that are part of the refineries' waste treatment system, could be interpreted as falling into the riparian area of the North Platte River or one of its tributaries based on nothing more than an assertion that they "influence the exchange of energy and material between" the terrestrial and aquatic ecosystem.

Existing Supreme Court precedent does not allow the definition of "waters of the United States" to cover otherwise isolated waters simply because they are located within a land mass determined to "influence the exchange of energy and material between" terrestrial

and aquatic ecosystems. However, the proposed rule does just that, and unsettles the jurisdictional certainty regarding the status of the evaporation ponds and other components of the waste treatment system at Sinclair's refineries. (p. 15)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Legal Justification.

14.106 The evaporation ponds and other components of the waste water treatment systems at both the Sinclair and Casper refineries are located within a few miles of the North Platte River. Based on the topography of the area, known flooding of the North Platte River and its tributaries has never reached the evaporation ponds at either refinery. However, under the proposed rule, all that would be required for the Agencies or a third party to allege that the ponds were "adjacent waters" is some evidence of sediment deposition extending beyond the location of the ponds. Such a result is inconsistent with the existing case law. The Supreme Court's precedent in SWANCC and even Justice Kennedy's concurrence in Rapanos do not allow the definition of "waters of the United States" to cover otherwise isolated waters simply because they are located within an area that has been flooded at some time since the end of the last ice age. (p. 15-16)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Features and Waters Not Jurisdictional and Adjacent Waters. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, and artificial lakes and ponds created in dry land and used primarily for uses such as settling basins and cooling ponds are not "waters of the United States" even if the otherwise meet the other definitions of "waters of the United States."

Interstate Mining Compact Commission (Doc. #16514)

14.107 In North Dakota, many of the hazardous abandoned coal mines that the state reclaims hold water in final mine pits and in mine spoils. It is unclear whether these areas would be considered "water filled depressions created incidental to construction activity" which would be exempt from the proposed "waters of the United States" definition. We urge EPA and the Corps to clearly exempt waters held in abandoned mines from the definition. Otherwise, reclamation work to eliminate hazardous conditions will unnecessarily be subject to the lengthy Section 404 permitting process. (p. 5)

Agency Response: See Agencies' Summary Response in 14.1 and Features and Waters Not Jurisdictional. The final rule includes a clarified exclusion under paragraph (b) 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.

Kentucky Oil and Gas Association (Doc. #16527)

14.108 The changes proposed by the agencies to CWA Section 404 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 "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. The topographic maps (included as an Attachment) with the shaded pink area depict a reasonable estimate by a regulated entity of the proposed jurisdictional expansion in the Illinois basin. The area depicted in "Example 1" of our attachment – an oil and gas producing area in Kentucky - is now expanded to approximately 1,500 acres and the area depicted as "Example 2" – an oil and gas producing area in Illinois – is expanded to approximately 4,000 acres for regulatory purposes. 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. (p. 4)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Adjacent Waters and Compendium for Significant Nexus.**

Barrick Gold of North America (Doc. #16914)

14.109 In its meetings with agency officials on September 29, Barrick provided details about a water feature at its Goldstrike/Arturo operation as a way to understand how the proposed rule would affect actual features with which Barrick is familiar. See Figure 4. The unnamed channel connects to Antelope Creek, which flows into Rock Creek, which in turn flows into the Humboldt River. Under current rules and under the proposed rule, Antelope Creek, Rock Creek and the Humboldt River are "tributaries" to the Rye Patch Reservoir, the nearest traditionally navigable water. The unnamed channel is three feet wide and approximately 0.6 miles long. It is located 40 river miles from the Humboldt River, and over 160 river miles from the Rye Patch Reservoir. The unnamed channel has a bed, banks, and an ordinary high water mark to Antelope Creek. However, no Barrick representative has ever observed flow in the channel. Barrick's expert believes there is no clear evidence that the channel carries regular or frequent flows. It is impossible to determine how many times the channel has carried water in the last 50 years.

Nevertheless, under the proposed rule, the channel would be a tributary, and "waters of the United States." Barrick's example illustrates the drastic overreach of the proposed rule. There is no evidence that the unnamed channel carries any flow, other than the existence of bed, banks and ordinary high water mark. Those features may have been created by a flood 10, 20 or 50 years ago, or longer. Even if there were current flow from this channel to Antelope Creek, it is so infrequent that it has never been observed. And even if these infrequent flows were documented, the likelihood that they might ever reach the Humboldt River (40 river miles away), much less the Rye Patch Reservoir (160 plus river miles away), is *de minimis*. The unnamed channel is a perfect illustration of what Justice Kennedy must have meant when he wrote in Rapanos that to establish a significant nexus, impacts must be more than speculative and insubstantial. See 547 U.S. at 780. The impacts of this unnamed channel on the Rye Patch Reservoir are speculative by definition. (p. 16-17)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Significant Nexus, and Legal Analysis.**

CountryMark Cooperative (Doc. #17075)

14.110 As a general comment, CountryMark believes the Proposed Rule expands the regulatory authority for the EPA and the Corps without justification. Examples of this expansion:

a) Under the current regulations CountryMark does not need to obtain a permit from the Corps when building an access road to a new drill site when the road crosses a blue line 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 attached topographic maps show these streams for Example #1 in Kentucky and Example #2 in Illinois. The blue line streams are shown in these areas. These are both areas where CountryMark has conducted and continues to conduct new well drilling operations.

b) Under the current regulations CountryMark does not need to obtain a permit from the Corps when maintaining or replacing flowlines (oil transfer lines), regulated DOT pipelines, and gathering lines, in many areas that it currently operates. CountryMark currently maintains approximately 550 miles of DOT-regulated pipelines and gathering lines. This is routinely done as a preventative measure and, in the event a line failure occurs, repaired in an efficient and expeditious manner so as to comply with each state's Department of Natural Resources, rules and regulations, current EPA regulations and other regulatory agencies for which compliance is required. As interpreted, the proposed expanded WOTUS jurisdictional changes would significantly lengthen response time for both maintaining and replacing flowlines, 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).

c) Proposed WOTUS jurisdictional changes, as understood, are so all encompassing that in all likelihood, normal operations will be adversely affected resulting in premature abandonment of well(s). This will result in a monetary lose to CountryMark, a major employer in Southern Indiana, Kentucky and Illinois, and would necessitate termination of employees which would have deleterious effects on working individuals as wells as local and state tax bases.

The changes proposed by the Corps and EPA to Section 404 of the Clean Water Act could significantly impact CountryMark's oil and 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 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. The attached topographic maps with the shaded pink area depict the proposed jurisdictional area for Example #1 and Example #2 areas. The Example #1 area in Kentucky expanded to approximately 1,500 acres and the Example #2 area in Illinois expanded to approximately 4,000 acres. 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 have a "nexus" to a navigable river, or the entire upland around a wetland to have a "nexus," and could therefore require permits to disturb any land in that watershed or upland area if water flows across it when it rains. The result of these changes will likely mean that every stream crossing and well pad would require a nationwide permit from the Corps, and possibly an individual permit. Further, as proposed, the limits of that expansion are not defined. The result will be increased costs and delays for oil and gas exploration. Ultimately, the result will be less domestic energy production and increased reliance on foreign sources.

In addition to the impact on CountryMark's oil and gas operations, the Proposed Rule would likely impact CountryMark's pipeline operations. Finished petroleum products are delivered to customers via pipeline and CountryMark also utilizes crude oil gathering pipelines. The delivery of finished petroleum products requires the building, operation, and maintenance of pipelines and the rights-of-ways in which they are located. The construction, operation, and maintenance of pipelines often require permits under section 404 of the CWA for crossing streams or wetland areas. If, however, entire floodplains are considered waters of the United States, a new pipeline may in its entirety require permits, with ensuing costly permitting and mitigation requirements. These costs could reduce or eliminate the economic viability of many projects.

For example, when siting pipelines, it is easiest to use existing rights of way. These often can be ditches along a road. These ditches receive runoff from the road and from land. In rainy parts of the country, the ditches may hold water every month of the year. Such a ditch would not be exempt under the rule (which exempts only ditches with less than perennial flow) and thus could be considered a tributary. The ditch may begin to exhibit wetland characteristics. A ditch should be exempt even if it turns into a wetland, but the rule is not clear on this point. Ditches along interstate highways may cross state lines. Such a ditch would be per se jurisdictional under the proposed rule. Thus, the proposed rule would hinder the siting of new pipelines and would make it more difficult to maintain existing pipelines. Cross-country delivery also will be hindered. Unless completely flat, land is usually crisscrossed with erosion features that channel water into real streams when it rains. The Proposed Rule would assert jurisdiction over such features where an agency official believes he can discern a bed, bank and ordinary high water mark (OHWM). As has been noted by many, including Justice Kennedy, the identification of an OHWM is highly subjective and inconsistent. As a result, the existing Nationwide Permit for gas pipelines may be useless. Although each crossing is a separate project, if a line continuously crisscrosses erosion features, it may be considered to have a single impact of more than one-half acre. (p. 2-3)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendious for Adjacent Waters, Ditches,, and Significant Nexus. The agencies respectfully disagree that the rule will expand regulatory authority. The scope of regulatory jurisdiction in this rule is narrower under the final rule than under the existing regulation, in part because the rule puts important qualifiers on some existing categories such as tributaries and adjacent waters. The agencies believe that the commenter has described the use of CWA 404 nationwide and/or general permits for discharge of dredge or fill material for CWA Section 404 impacts that result in minimal environmental effects, associated with maintenance and**

construction of certain structures. The rule does not change or impact the regulatory requirements of the CWA permitting programs, including the use of nationwide permits.

Independent Petroleum Association of America (Doc. #18864)

14.111 Kentucky's Appalachian basin operators also are very concerned about the rule's jurisdictional expansion within a watershed. The rule indicates that waters adjacent to traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries are jurisdictional. The rule indicates that adjacent is defined as bordering, contiguous, or neighboring. *Id*. at 22199. The term "neighboring" includes waters within the riparian area or floodplain of a water. *Id*. The rule further indicates that the riparian area means, "... an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in the area." *Id.* Floodplain means " ... an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high flows." *Id.* Under these definitions, federal regulators could expand jurisdiction to include the watershed in its entirety. In eastern Kentucky, there will be seeps from mountains, ponded or wet areas that form features in the landscape, either natural or manmade, that are in no way in proximity to a tributary. However, because of the definition of adjacent in this rule and the breadth for which it allows jurisdiction to expand, these features would be "waters of the United States." As a result, any impact to the feature, such as filling or excavating, would require a Section 404 permit from USACE. (p. 8-9)

Agency Response: See Agencies' Summary Response 14.1 and the Compendium for Adjacent Waters.

Maryland Farm Bureau (Doc. #10755)

14.112 Maryland has participated in the Chesapeake Bay Cleanup program for decades. The foundation of the Chesapeake Bay cleanup program is based on a Bay model that was originally created to only be an evaluation tool. Unfortunately, agencies like the EPA turned this evaluation estimate tool into a regulatory assessment. Unfortunately, since its inception, Maryland stakeholders along with the other bay region states have systematically proven that there are inaccuracies and flawed data being used in the model. These inaccuracies would have been prevented if there would have been site specific data and analysis used to properly access that Best Management Programs currently being used as well as the actual amount of nutrients and sediment entering the bay through tributaries and waterways in the localized areas. Under this proposed rule change EPA would have authority to enact programs based on flawed federal data and mandate that the stakeholders follow the program or suffer a substantial fine until they are followed. (p. 2)

Agency Response: See Agencies' Summary Response 14.1. This is a definitional rule that does not that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. Establish regulatory requirements. The regulatory assessment referred to in the comment is beyond the scope of the rulemaking.

Kentucky Milk Commission (Doc. #11987)

14.113 The Commission feels strongly that jurisdiction of Kentucky ditches, drainage areas, grass waterways, and other areas in question in the proposed rule changes would be better served by state agency more familiar with the issues unique to Kentucky. Changing jurisdiction of certain segments would add confusion rather than create clarity as to who has oversight and slow the process of addressing potential problems. KMC believes the effort to monitoring and maintaining consistent clean water standards is best served by the people most familiar with Kentucky. The KY Agricultural Water Quality Act of 1994 (KRS. 224.71-100 through 224.71-140) codified into KY Revised Statute established the KY Ag Water Quality Authority to address non-point source water issues. (p. 1-2)

Agency Response: The Agencies agree that protecting water quality is of the utmost importance and believe this rule will more effectively focus 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. The agencies also recognize the vital role that states and tribes play in the implementation and enforcement of the Clean Water Act. This rule does not affect the authority of states and tribes to implement their programs to more broadly and more fully protect the waters in their jurisdiction. This subject is addressed in the Executive Summary of the preamble and within the Federalism sections of the response to comments for Topic 13: Process concerns and administrative requirements.

See also the Compendiums for Ditches and Features and Waters Not Jurisdictional Compendium.

Colorado Farm Bureau (Doc. #12829)

14.114 In Colorado we see the use of "augmentation" ponds. These ponds are used to supply irrigation water to the South Platte River. They are normally found far outside of anything that could be considered "navigable" water or any floodplain. Yet, these ponds, under this rule proposal, will become jurisdiction of the EPA via "groundwater". It is troubling to think that ponds, which have not been regulated before, will now suddenly have to comply with the federal regulations. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendium for Features and Waters Not Jurisdictional.

Kennewick Irrigation District (KID), Kennewick, WA (Doc. #13571)

14.115 Additional regulation of irrigation drains and wasteways can actually have the effect of reducing the ecological and aesthetic functions that such regulations are intended to protect. Since KID has the right to recapture and reuse these flows, it is in the KID ratepayer's fiduciary best interest to do everything that can be done to dry up the perennial drains and wasteways within the district so that there is no water left in them to regulate, especially if the proposed rule is adopted. Efficiency measures are already being completed to some extent on the District through canal lining (which prevents seepage), re-regulation reservoirs (which collect and store operational spill), recapture, and elimination of drive water spill through the conversion of hydraulic pumps to electric

power. Other options include capturing these flows in lined channels, all of which would eliminate the existing wetland habitat and riparian vegetation that the irrigation drains have created. KID would rather not do this; we believe that the drains and wasteways mostly function as intended the way that they are currently situated, and do so in an ecologically beneficial manner. While the added benefits of ecosystem services, community aesthetics, and wildlife habitat are assets to the community, it is important to remember that these drains are intentionally created, artificial components of the landscape, and they should not be regulated as if they were naturally occurring systems. Without irrigation influence, they would be nothing more than dry washes, with no "nexus" to navigable waters or other jurisdictional waters. (p. 3-4)

Agency Response: **See Agencies' Summary Response in 14.1.**

Wastewater recycling structures constructed 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. These structures include groundwater recharge basins and percolation ponds built for wastewater recycling. Artificially irrigated areas that would revert to dry land should application of water to that area cease are not waters of the United States under (b)(4) of the rule. See the Features and Waters Not Jurisdictional Compendium.

Rancho Mission Viejo (Doc. #13662)

14.116 RMV is a roughly 25,000 acre family owned ranch located in southern Orange County California. The same family has owned the ranch since 1882 and we live by the saying "Take Care of the Land and the Land will take Care of You." To perpetuate this culture of care and stewardship, in 2000 RMV began a comprehensive planning effort to determine the future of the ranch. This effort involved the USACE, the U.S. Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW) on the federal and state levels and the County of Orange (County) at the local level. Our goal was to develop a comprehensive conservation plan while at the same time addressing needed new housing and infrastructure.

The regulatory vehicles for achieving our goals were a Special Area Management Plan (SA.MP) with the USA.CE, a Habitat Conservation Plan with the USFWS, a Master Streambed Alteration Agreement with the CDFW, and a Zone Change and General Plan Amendment with the County. [...]

The Proposed Rule is silent regarding the status of existing permits, including SA.MPs, and jurisdictional delineations. For the reasons set forth below, RMV requests that the Final Rule include language to categorically grandfather and exempt from alteration or modification based solely on the Proposed Rule, as a class, operating SAMPs.

1. **The SAMP allows for "landscape-scale conservation measures" not achievable by project-by-project permitting procedures. [...]**

   The USACE also clearly recognized that the SAMP provides greater benefits to both RMV and the USACE than would have been achieved through a traditional project-by-project review.[...]

2. **RMV has already actively relied upon the provisions of the SAMP for both development and conservation activities, including pre-impact (i.e., preconstruction) conservation measures.** [...]

3. **Mitigation commitments and impacts analysis, including 404(b)(l) Guidelines, were expressly calculated and committed to based upon the 2004 Jurisdictional Delineation (JD).**

[...] But as the USACE is aware, the SAMP is far more than a document outlining a regulatory process. It makes commitments of substance, for both RMV as the pe1mittee and the USACE as the regulator. Of critical importance to RMV is the SAMP's express provision that the 2004 JD will serve as the baseline for future consideration of impacts and related conservation measures. As provided above, RMV has already made significant monetary expenditures and irrevocable legal dedications in direct reliance on that provision.

4. **Recommended grandfathering language**

The justification for grandfathering SAMPs also applies to any active authorization by the Corps at the time of the Proposed Rule's adoption. NWPs, individual permits, and SAMPs and jurisdictional determinations, both approved and preliminary, for which no modification of activities, impacts, or mitigation has occurred should not be subject to amendment, modification, or alteration based solely upon the adoption of the Proposed Rule by the agencies. Accordingly, RMV requests and recommends that the following provision be added to the Proposed Rule: "Notwithstanding any other provisions of this regulation, the following are not subject to modification or amendment based solely upon adoption of this regulation, provided that there has been no other alteration to the activities proposed or the impacts identified at the time of approval or adoption:

1. Active issued permits, including nationwide permits, individual permits, and special area management plans, and

2. Approved and preliminary jurisdictional determinations."

Conclusion

Both the USACE and RMV have invested considerable time and money to develop a well-functioning regulatory mechanism for the San Juan Creek Watershed and western San Mateo Creek Watershed. Additionally, RMV has taken legally irrevocable steps to constrain futures uses of its lands by recording, in advance of construction impacts, conservation easements in direct reliance on the provisions of the SAMP, including recognition of the 2004 JD as the controlling delineation (absent extraordinary circumstances not at issue here) for future planning purposes. The Final WOTUS Rule should recognize this fact and, in keeping with the Agency's stated desire to provide "clarity to regulated entities", include language that categorically grandfathers and exempts from modification or alteration based solely on the Proposed Rule's adoption, as a class, operating SAMPs. While our recommended language above recommends grandfathering for all levels of existing permits and jurisdictional determinations, in no instance is the justification and motivation for the grandfathering more appropriate or imperative than in the context of the substantial work and long-term commitments

inherent in a SAMP. A Final WOTUS Rule that categorically grandfathers operating SAMP's will:

1. Provide clarity to RMV as a regulated entity and permittee,
2. Illustrate USACE's continued support of an existing regulatory mechanism that it worked hard to develop, and
3. Allow the USACE to highlight a successful public -private partnership. (p. 1-5)

Agency Response: See Agencies' Summary Response.14.1. The Corps understands the time and resources that are required to develop a Special Area Management Plan (SAMP) as well as the potential benefits to the regulated community.

The rule only provides a definition for "waters of the U.S." The rule does not establish regulatory requirements; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.

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, are not modified in this rule; therefore, comments on those matters , are outside the scope of this rule making..

This includes the SAMP permitting framework established and approved by the Corps Los Angeles District for abbreviated permit processing procedures, including regional general permits (e.g., RGP 74) and Clean Water Act section 404 letter of permission procedures, in combination with the use of selected nationwide permits and standard individual permits. Watershed-specific mitigation policies implemented under the SAMP are also not expected to change. The SAMP permitting frameworks consider the type of regulated activity, permanency of impacts, and location of proposed activity within the SAMP Watersheds, that is, whether the activity would affect sensitive aquatic resources also identified as aquatic resource integrity areas.

Additional implementation guidance specific to section 404 will be provided by the Corps once the rule is effective which will contain more specific aspects of "grandfathering" situations.

Approved JDs associated with existing permits/verifications that were authorized prior to the publication of the final rule language in the Federal Register remain effective for the lifetime of the permit/verification. This would include the JD associated with the long-term individual permit issued for the RMV Planning Area. Additional implementation guidance will also 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. If there are questions about whether any of the potential changes in jurisdiction may affect the aquatic resources within the SAMP boundary, after the publication of the Rule, you may contact your local Corps District Office for clarification and assessment.

Sugar Cane Growers Cooperative of Florida (Doc. #14283)

14.117 A detailed technical analysis by the Florida Department of Agriculture and Consumer Services ("FDACS") reveals that "approximately 55% of the land area in Florida could be considered 'riparian area' under the proposed [rule] due to the presence of either a confining layer in the soil, a karst area, or the presence of a shallow aquifer." FDACS Comments, Technical Analysis at 9 (Oct. 31, 2014) (Attachment C). And based on a 100-year floodplain, the floodplain commonly used for insurance maps and emergency planning, one that considers land that is usually dry and not water (navigable or otherwise), "approximately 46% of the land area in Florida . . . could be considered a 'floodplain.'" *Id*. at 11. In other words, depending on how the federal government exercises its best professional judgment, much of Florida might categorically fall within the definition of adjacent (and thus jurisdictional) waters. (p. 8)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums Adjacent Waters and Implementation.

Kansas Farm Bureau (Doc. #14408)

14.118 Since its adoption, Kansas has conducted field use attainability analysis on approximately 2,222 stream segments at a cost of over four million dollars. This has allowed Kansas to focus resources on those areas that truly are waters of the U.S. and not on private, isolated waters or waters with no connection to other water bodies. EPA has recognized and approved Kansas Water Quality Standards (April 27, 2005 and updates through July 1, 2011) and thus this system of implementation of the CWA. The proposed rule would undo the very deliberate field work Kansas has done to assure water quality is protected. In fact, the proposed rule would use "desk top analysis" to overrule or substitute for field analysis that has been required by EPA. KFB strongly opposes the substitution of field analysis for the sake of "simplicity or efficiency" when it creates senseless duplication that wastes taxpayer money or jeopardizes the private property rights of landowners. (p. 9

Agency Response: See Agencies' Summary Response in 14.1. EPA recognizes the longstanding provisions in Kansas water quality standards that apply to unclassified waters. Nothing in this final rule replaces the outcome of approved WQS actions based on the UAAs referred to in the comment. Nothing in the final rule changes the status of classified waters or unclassified waters in the state of Kansas.

Kansas Agriculture Alliance (Doc. #14424)

14.119 EPA, in particular, since the WOTUS rule was published, has repeatedly indicted this rule is intended to clarify jurisdiction under the CWA, not expand it. If that is the whole intent of this proposed rule, it falls considerably far from the mark. This proposal will expand the scope of federal jurisdiction, especially through the definition of "tributaries", to a great many more waterways in Kansas. We use the term "waterways" loosely here, as many of the "streams" that will become jurisdictional under the proposal carry no water or carry it very infrequently. The KDHE calculates Kansas currently has

approximately 31,000 miles of "classified" waters in our state[24] Kansas considers classified streams as WOTUS under the CWA. After reviewing the rule, if it were finalized as proposed, KDHE estimates more than 174,000 additional stream miles will be added to that tally, an increase of more than 460 percent. [25] The dramatic increase is illustrated in the attached Appendix B that includes maps identifying current classified (WOTUS) waters in Kansas and KDHE's assessment of what will be classified (WOTUS) if the proposed rule is finalized as proposed.

That massive increase is significantly more than the 2.7 percent increase estimated in the economic analysis of the proposed WOTUS rule's impact. It will be a huge burden on the state, in terms of dollars and work hours, to address the additional stream miles. KDHE will have to divert personnel and funding away from projects that are making a real difference in improving our state's overall water quality to send people into the field to perform use-attainability analysis on remote streams, many of which will have no water in them at the time they are evaluated and rarely thereafter. (p. 9)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendium for Tributaries. EPA recognizes the longstanding provisions in Kansas water quality standards that apply to unclassified waters. Nothing in this final rule replaces the outcome of approved WQS actions based on the UAAs referred to in comments. Nothing in the final rule changes the status of classified waters or unclassified waters in the state of Kansas. For more discussion of the jurisdiction of ephemeral and intermittent streams and the legal basis, see the summary response in Tributaries Compendium at Section 8.1.1 and the Technical Support Document Sections I and VII.**

Southern Arizona Cattlemen's Protective Association (Doc. #14598)

14.120 There is no way our dry washes and dry "rivers" can be navigated by boats as clearly specified by the framers of the Constitution. Members of the Constitutional Convention, we are confident, would consider the proposed Rule to be both a federal power self-appropriation and, at best, a misinterpretation of clear Constitutional intent.

There are no navigable streams in Pinal, Pima and Santa Cruz counties. There are dry washes with infrequent ephemeral run-off water that join other dry washes and those dry washes connect to two totally nonnavigable, usually dry "rivers." The only truly perennial navigable water in Arizona is the Colorado River, w hich is hundreds of miles from Pinal, Pima and Santa Cruz counties. (p. 3)

Agency Response: **See the Compendiums for Legal Analysis and Tributaries, and Technical Support Document. Federal court decisions, some of which are decades old, have in fact supported that intermittent and ephemeral waters are jurisdictional. For example, the U.S. District court in Arizona held in 1975 that the definition of waters of the United States includes any waterway: " … a legal definition of 'navigable waters' or 'waters of the United States' within the scope of**

[24] Comments of Kansas Governor Sam Brownback and agency heads, on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Appendix B, submitted Oct. 23, 2014.
[25] d

the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, whether such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States." United States v. Phelps Dodge Corp, 391 F.Supp 1181, 1187 (1975).

Oregon Farm Bureau (Doc. #14727)

14.121 [M]any, if not all, ditches in Oregon would likely fail to meet the exemption requirements because at one point or another along a system, a ditch will likely collect runoff that now, by definition is likely a WOTUS. For instance, for a ditch to qualify for the proposed ditch exemption, such a ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in Oregon. For that reason, this exclusion is virtually useless. (p. 3)

Agency Response: See Agencies' Summary Response in 14.1 and the Ditches Compendium, especially sections 6.0 and 6.2.

National Corn Growers Association (Doc. #14968)

14.122 Table A-1 in Appendix One presents the calculated number of miles for many, but far from all, perennial, intermittent, and ephemeral streams in 20 states, as captured in the USGS National Hydrography Database (NHD). Using the 1:100,000 medium resolution dataset, which roughly approximates the perennial and intermittent streams, we estimate there are approximately 1.6 million miles of such streams in these 20 states alone. Using the 1:24,000 NHD dataset, which roughly approximates the perennial and intermittent streams plus about 35 percent of the ephemeral streams on average, we calculate that in these 20 states the number of stream miles jumps to approximately 3.5 million. That 1.9 million mile increase in streams between the medium resolution and high resolution estimates is due to a large extent to the addition of the 35 percent of the ephemeral streams to the calculation. The increase in stream miles would certainly be significantly higher if 100 percent of the ephemeral streams were included in the calculation. (p. 6)

Agency Response: See Agencies' Summary Response in 14.1 and Tributaries Compendium.

14.123 Appendix 1: Results from Agricultures' WOTUS Mapping Initiative (AWMI)

NCGA worked this summer and fall with several agricultural groups to map in 20 states streams and their floodplains to help visualize what the proposed rule means for farmers, and to calculate the affected stream miles and the acreage in floodplains that may be associated with these streams data. This effort was carried out to help visualize proposed jurisdictional tributaries and adjacent areas and to calculate certain statistics about the potential geographic scope or coverage of these proposed jurisdictional features. {...} The results of the AWMI efforts can be seen on a publicly available website that NCGA and the other agricultural groups have sponsored at www.tinyurl.com/EPAwaters. Note in this website that when you zoom in closer to the surface that the AWMI switches from the NHD streams data discussed above to the USGS NHDPlus dataset, that depicts

streams, canals, ditches, related waters and the wetlands identified in the Department of the Interior's National Wetlands Inventory. These NHDPlus data are available for all 50 states, not just the original 19 states mapped in the AWMI. The legend to the left of the screen indicate what the depicted features are. (p. 24)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Adjacent.

Tennessee Farm Bureau Federation (Doc. #14978)

14.124 The Agencies' proposal will require the state of Tennessee to regulate, enforce, permit, and protect thousands of miles of wet weather conveyances running across fields, forests, residences, businesses, and roadsides. Tennessee's 303(d) list will not be a document, it will be volumes. Tennessee uses sound science and sound reasoning to protect water quality. The Agencies' proposal uses vagueness, ambiguity, and controversial legal strategies. We are proud of our approach and frustrated the Agencies would proposed to put an end to something Tennessee worked so hard to accomplish and perfect. (p. 3-4)

Agency Response: See Agencies' Summary Response in 14.1. 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. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United 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 Compendiums for Ditches, Features and Waters Not Jurisdictional, and Tributaries

Finally, nothing in this rule changes how water quality standards, TMDLs and permitting required by the CWA are implemented, and these comments are outside the scope of the rule.

Missouri Soybean Association (Doc. #14986)

14.125 The definition of "tributary" creates another boundless regulated category that has the potential to bring ponds, isolated wetlands, and dry ditches into federal jurisdiction. This definition of tributary will encompass an enormous number of isolated and predominately dry features that, for no other reason that practicability should be far beyond EPA authority. We have enclosed Appendix A which provides images of several features that are common within farm fields across Missouri. The proposed rule's definition of "adjacent" and "neighboring" has made this other new category of "adjacent waters" perhaps even more boundless than the "tributary" definition. We believe the proposed rule's "adjacent waters" concept will include every square inch of land in a floodplain and riparian area, no matter how isolated it is or whether it has any connection to downstream water. We believe this portion of the proposed rule will impact every single river bottom farming operation in the state, which is some of our most productive. We have enclosed

Appendix B which illustrates via a GIS map the vast amount of crop land which could be captured within the adjacent waters and floodplain terms. The GIS map shows the extent of the 1993 flood (highlighted in light blue-green) within Chariton County, Missouri. (p. 5)

Agency Response: See Agencies' Summary Response in 14.1 and Compendiums for Tributaries, Adjacent Waters, and Features and Waters Not Jurisdictional and Adjacent 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 and adjacent waters and includes provisions for a number of excluded waters, some of which are excluded by rule for the first time.

National Pork Producers Council (Doc. #15023)

14.126 Miles of Likely Jurisdictional Features – Table A-1 in Appendix One presents the calculated number of miles for many but not all of the perennial, intermittent and ephemeral streams in 20 states, as captured in the USGS National Hydrography Database (NHD). Using the 1:100,000 medium resolution dataset, which roughly approximates the perennial and intermittent streams, we estimate there are slightly more than approximately 1.6 million miles of such streams in these 20 states alone. Using the 1:24,000 NHD dataset, which roughly approximates the perennial and intermittent streams plus about 35 percent of the ephemeral streams on average, we calculate that in these 20 states the number of stream miles jumps to approximately 3.5 million. That 1.9 million mile increase in streams between the medium resolution and high resolution estimates is because of, in large extent, the addition of the 35 percent of ephemeral streams to the calculation. The increase in stream miles would certainly be significantly higher if 100 percent of the ephemeral streams were included in the calculation.

EPA has conducted a similar mapping analysis of stream miles, and the results of that effort are posted on the U.S. House of Representatives Science Committee's website. The national analysis presented there indicates that there are 7,339,124 miles of linear streams in the United States (including Puerto Rico). Of these, 77 percent or 5,661,337 miles are intermittent or ephemeral streams.[26] (p. 10)

Agency Response: See Agencies' Summary Response in 14.1 and the Tributary Compendium.

For more information about the historical and proposed jurisdiction of ephemeral and intermittent tributaries, see summary response in Tributaries Compendium, including the relevance of flow regime at section 8.1.1.

Klamath Water Users Association (Doc. #15063)

14.127 [L]owland or roadside ditches common in the Klamath Reclamation Project could be brought under CWA regulation if they are determined to flow to navigable waters

[26] See http://science.edgeboss.net/sst2014/documents/epa/national2013.pdf

(tributary), are considered "adjacent" to a "water of the U.S.," or have a "significant nexus" to those waters, which would require a specific case-by-case determination by the agencies. This appears to be a gray area that could cause significant confusion and expense to operations of the Klamath Reclamation Project. These ditches typically do not have perennial flow and should be considered exempt from CWA jurisdiction. If they are not clearly exempted and are considered "waters of the U.S.," more of these ditches will likely fall under federal jurisdiction and certain maintenance activities may require a CWA Section 404 permit. This permitting process is very expensive and time consuming, creating legal vulnerabilities for small communities and the farms, ranches, and water delivery entities that are responsible for routinely maintaining these ditches. (p. 3)

Agency Response: See Agencies' Summary Response in 14.1, the Ditches Compendium and Preamble Section IV.I.

Florida Fruit & Vegetable Association (Doc. #15069)

14.128 [B]ecause of Florida's naturally wet climate, many of our urban storm water and agricultural ditches remain wet throughout the year, with some periodically hosting certain flora and fauna that might be deemed characteristic of a wetland. Although these are highly maintained and manmade systems, it is not uncommon for certain wetland species to appear between maintenance cycles. Per the rule, "the term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Based on the proposed definition of "tributary," it would appear that these ditches could potentially be classified as wetlands and now fall under CWA jurisdiction, despite current agricultural exemptions. (p. 2-3)

Agency Response: See Agencies' Summary Response 14.1 and the Compendiums for Tributaries and Ditches.

14.129 Additionally, there are water quality and water conservation programs that could be negatively impacted by the implementation of the Agencies' proposed WOTUS rule. South Florida's Dispersed Water Management Program, for example, encourages private property owners to retain water on their land rather than drain it and accept and detain regional runoff for storage. These projects reduce the amount of water entering Lake Okeechobee during the wet season, thereby alleviating damaging fresh water releases to the Caloosahatchee and St. Lucie estuaries, necessary to maintain the lake at safe levels with respect to its surrounding dike. Additionally, they help attenuate nutrients and also provide beneficial ground water recharge.[27] By retaining water on their lands, these ranchers and farmers could unknowingly be creating connectivity between jurisdictional waters, or, because of adjacency or the significant nexus provision, these waters themselves cold become jurisdictional, thereby extending the purview of the CWA to their on-site agricultural ditches and swales. The agricultural community will become

[27] See South Florida Water Management District, Dispersed Water Management, website: http://www.sfwmd.gov/portal/page/portal/xweb%20protecting%20and%20restoring/water%20storage%20programs#dwm

extremely reticent to become involved in these environmentally beneficial programs if they run the risk of inviting Federal jurisdiction over portions of their properties. Lastly, Florida's water management districts are legislatively mandated to update their respective water supply planning documents every five years for those regions where it is estimated that demand could outpace supply over the twenty year planning horizon.[28] For example, in an area of Central Florida comprised of five counties (South Lake, Orange, Osceola, Polk, and Seminole) where three separate water management districts converge, it was determined that the Florida Aquifer System had reached its sustainable limit of use[29] This lead to the formation of the Central Florida Water Initiative (CFWI), resulting in the districts "working collaboratively with other agencies and stakeholders to implement effective and consistent water resource planning, development and management."[30] To meet the projected demands through the year 2035, a suite of alternative water supply projects will be required to be designed, permitted and constructed.[31] As stated in the CFWI Regional Water Supply Plan, "a number of the possible surface water supply projects involve the construction of new reservoirs to create additional storage capacity."[32] This could involve the collection of storm water from retention ponds which would then be routed to surface storage basins for later potable and non-potable uses[33] Based on the Agencies' proposed definition of WOTUS, there exists great concern regarding how these particular water supply projects will be impacted by the rule. We fear that, due to prohibitive permitting costs and delays related to duplicative regulations, these necessary projects could be postponed indefinitely. (p. 5)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Ditches and Waters Not Jurisdictional. The agencies do not agree that the rule will prevent or discourage alternative water supply projects or water storage initiatives such as the Dispersed Water Management Program. The agencies cannot comment specifically on the jurisdictional status of every water on properties that are part of these programs, but the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United 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. .**

The final rule includes exclusions for certain f stormwater control features created in dry land and wastewater recycling structures are created in dry land.

[28] See Florida Department of Environmental Protection, Regional Water Supply Planning, website: http://www.dep.state.fl.us/water/waterpolicy/rwsp.htm
[29] See Central Florida Water Initiative, Overview of the Central Florida Water Initiative, website: http://cfwiwater.com
[30] Id.
[31] Central Florida Water Initiative, Regional Water Supply Plan 2014 (April 2014). Available at: http://cfwiwater.com/pdfs/CFWI_RWSP_FinalDraft_Vol1.pdf
[32] d
[33] d

Arkansas Farm Bureau Federation (Doc. #15145)

14.130 Precision agriculture could be the most impacted because many of these practices are considered cutting edge technologies and are not considered "normal" outside of Arkansas' Delta Region. Practices such as precision land leveling, zero-grade leveling, grid soil sampling, variable rate fertilizer application, tailwater recovery, cover crops, etc., are all relatively new and are being rapidly adopted. These practices significantly improve water use efficiencies and ensure that the precise amounts of nutrients are applied and that they stay in the field where they are needed. While these practices are being adopted for economic reasons, they provide environmental benefits.

To this point, when does an activity, such as those discussed in the previous paragraph, that has not been historically used but is becoming more common and widely adopted become considered a "normal" farming practice. Codifying specific practices will limit agriculture's ability to adopt new technologies that not only reduce the cost of food production but also reduce the impact on the environment. Does codifying these practices then mean that agriculture will be required to petition the EPA and the COE to include new practices on the list of exempt "normal" farming practices? If the answer is yes, then this will delay the adoption of these practices and places EPA and the COE in control of all agriculture activity, i.e. food production, and results in defacto federal land use planning.

Specific examples of precision agriculture practices with which there exists a NRCS Conservation Practice Standards (CPSs) that are not included in the list of 56 exempt "normal" farming practices are: CPS 462 - Precision Land Forming, CPS 464 - Irrigation Land Leveling, CPS 466 - Land Smoothing, and CPS 436-Irrigation Reservoir. These are practices that have become more common, i.e. "normal", and are being widely adopted in Arkansas' Delta Region. The vast majority are being implemented without NRCS cost share funds and may or may not have been implemented according to NRCS CPSs. If they were not, according to this proposed rulemaking, these farmers and landowners would now be in violation of the Clean Water Act (CWA) and subject to CWA Section 404 and Section 402 NPDES permitting requirements. The question then becomes who is going to be in charge of inspecting and enforcing these CPS? Will it be EPA Region VI enforcement, NRCS field staff, conservation district staff, Arkansas Department of Environmental Quality enforcement, or citizen lawsuits? (p. 1-2)

Agency Response: **For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2, 14.2.1, and 14.2.2.**

Snell & Wilmer L.L.P. (Doc. #15206)

14.131 The Proposed Rule also does not adequately address unique water conditions in the desert. The Phoenix area receives approximately 8 inches a year in precipitation. See Western Regional Climate Center, http ://www.wrcc.dli.edu/climatedata/cliimtables/citycompppt/. Further, what precipitation does fall in Arizona falls in few, but large, rainfall events. How could an area receiving this little water in the form of precipitation be subject to so much water regulation? The failure to consider varying geographic differences is readily apparent in the maps EPA prepared and the Science, Space and

Technology Committee made available. Below is a comparison of the Florida and Arizona maps. . Even in this reduced scale, the amount of color per map demonstrates the illogical consequences of the Proposed Rule's expansive reach. (p. 3)

Agency Response: See Agencies' Summary Response 14.1 above and the Compendiums for Scientific Evidence Supporting the Rule, Significant Nexus, and Tributaries.

El Dorado Irrigation District (Doc. #15231)

14.132 Under the proposed rule, numerous man-made, non-stream conveyances would constitute tributaries and become subject to the permit requirements of the CWA. For example, reservoirs and facilities of EID's FERC-licensed hydroelectric project, Project 184, may constitute tributaries under the proposed rule. Most, if not all, of the facilities encompassed within Project 184 include a bed, banks, a mean high water mark, and contribute flow to the South Fork American River, a navigable water. Accordingly, EID would need to obtain a CWA, section 404 permit when, for example, it replaces a generator in the Project 184's power house, or a section of penstock, flume, siphon, or canal. Project 184 consists generally of four high-alpine onstream water-storage reservoirs (Caples, Silver, Aloha, and Echo Lakes), a fish screened diversion facility on the South Fork American River, 22 miles of canals, flumes, and tunnels (collectively, the "El Dorado Canal"), an off-stream regulating reservoir ("Forebay"), two miles of penstock, and an off-stream 22- megawatt hydroelectric generating plant (the "Power House"). EID stores water in Caples, Silver, Aloha, and Echo Lakes, and releases water from these reservoirs into tributaries of the South Fork American River, a navigable stream. Near the town of Kyburz, California, the District diverts water from the South Fork American River, through a state-of-the-art fish screen, into its El Dorado Canal. To the left is an aerial photograph of the diversion facility. The water flows through 22 miles of canal, flumes, tunnels, and siphons before it reaches the Forebay regulating reservoir. The following pictures display the types of canal, flume, tunnel, and siphon structures included in the El Dorado Canal. (p. 3)

Beet Sugar Development Foundation (Doc. #15368)

14.133 The classification of stormwater ditches as "waters of the United States," would have important implications for sugar beet processors. Processing facilities in Michigan, for example, could no longer legally maintain stormwater ditches because only county drain commissions are allowed to dredge man-made ditches that are classified as "waters of the State." Given limited land availability (i.e., the facilities already utilize all land onsite and have no land in reasonable proximity available for purchase) and local use constraints, many processing facilities have no other option for stormwater systems and could be forced to curtail or cease operations. (p. 11)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional. The final rule includes certain stormwater control features created in dry land (see summary response at section 7.4.4) as well as several revised exclusions.

California Farm Bureau Federation (Doc. #16399)

14.134 Notwithstanding the concerns and flaws raised within, Farm Bureau presents the following concepts that may provide additional clarity within the Proposed Rule: […]

Analyze the possibility of utilizing effective pilot programs to account for geographic differences and existing stringent nonpoint source state programs, such as California's stringent regulation of irrigated agriculture, in order to comply with federal requirements. (p. 20)

Agency Response: This 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 rule does not establish any regulatory requirements.

Lake DeSmet Conservation District (Doc. #16441)

14.132 In Wyoming there are approximately 25 rivers and streams, which produce surface flow 365 days per year (perennial), and leave the Wyoming borders. Some of these 25 usually go dry during some portion of the year (intermittent streams).[34] Perennial stream miles in Wyoming constitute 45,470 miles, 16.70% of the total streams miles in the state. Intermittent miles in Wyoming total 200,909 which equates to over 73.79% of the stream miles and the remaining are ephemeral at 25,882 miles, 9.5%.[35] These miles of streams, rivers, creeks, dry draws, and gullies do not include irrigation ditches and canals which also may be encompassed in the rule. The state has another 9,426 miles of ditches and canals. Based on the map released by USGS and EPA[36] and cited above, EPA is fully aware and capable of disclosing the extent of this proposed regulations reach. (p. 7)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Significant Nexus.

Loup Basin Reclamation District, Farwell Irrigation District, Sargent Irrigation District, Nebraska (Doc. #16474)

14.135 Farwell Irrigation District is a large district that serves more than 53,000 acres of prime farmland via 110 miles of main canal, 38 pumping plants, and 255 miles of laterals. Sargent Irrigation District is smaller, serving more than 14,000 acres. Its infrastructure includes the Milburn Diversion Dam on the Middle Loup, the 40-mile Sargent Canal, more than 40 miles of laterals and a small pump. In addition to our water delivery conduits, there are hundreds of miles of drainage ditches and laterals—most of which are dry for long stretches of the year—that cross the individual farms that receive water via the districts.

Given the expansive area of Farwell and Sargent Irrigation Districts, and numerous water features that dot the farms within the district boundaries, the negative impact of the proposed rule on water and agricultural providers will be significant. Traditional farming

[34] Wyoming Watersheds and Riparian Zones; Q. Skinner, K. Crane, J. Hiller, J. D. Rodgers; 2000
[35] ftp://nhdftp.usgs.gov/DataSets/Staged/States/FileGDB/HighResolution/
[36] http://science.edgeboss.net/sst2014/documents/epa/wyoming2013.pdf; Prepared by INDUS Corporation under contract with U.S. Environmental Protection Agency Office of Water – Washington, DC October 2013

activities that once were addressed for the purposes of the CWA on a case-by-case determination will become jurisdictional by default. Ponds, ditches, and other agricultural features may be subject to regulation. Based on recent maps distributed by the agencies, there would be district facilities included under this new jurisdiction where water travels traditionally only a few months a year. Farmers and water districts could be subject to costly federal permits and restrictions— infractions of the Clean Water Act subject violators to civil penalties of up to $37,500 per violation per day.

In addition, 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.

Examples of Concerns In light of the proposed rule, it is unclear whether the following land features, which are representative of features across our districts, would be categorically considered a water of the United States. In the case of the first picture, Farwell's main canal, we believe that it is reasonable not to consider this a water of the United States, contravening the EPA's projected designation. WOTUS designation would seriously inhibit our ability to maintain and operate the canal without significant cost increases. (p. 1-2)

Agency Response: See Agencies' Summary Response in 14.2.2 and the Compendiums for Ditches and Features and Waters Not Jurisdictional.

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

Alabama Farmers Federation (Doc. #16539)

14.136 There are an estimated 77,000 miles of rivers and streams flowing though Alabama plus hundreds of thousands of acres of reservoirs, lakes and ponds. Just over three percent of Alabama's total area is covered in water by any logical definition. With all of the newly regulated land features under this proposed rule, the total percentage of Alabama's land mass that would fall under federal regulation would no doubt increase dramatically, but the EPA has stated that only a very small number of additional waters, approximately 3.2 percent nationally, will be found jurisdictional. We believe this number is based on flawed models because the incremental acreage estimation for all programs relies on data based on Section 404 permitting alone. The actual number of acres impacted will likely be much more significant. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1. The rule does not regulate land features, but is a definitional rule that clarifies the scope of "waters of the United States" and the agencies did update their Economic Analysis for this

final rule which estimates changes in jurisdiction from current practice. See Economic Analysis of the EPA-Army Clean Water Rule.

Utah Farm Bureau Federation (Doc. #16542.1)

14.137 For those "other waters" that are not categorized as "tributary" or "adjacent" waters, such as isolated ponds or wetlands would nevertheless impose jurisdiction based on a significant nexus to waters of the U.S. These possibilities are so broad and far reaching, the agencies will have no trouble finding a significant nexus for even the most minor wet spots.

As an example, the case of isolated livestock watering ponds, on private rangelands or approved for use on federally managed public rangelands in place to hold rainwater could be claimed as jurisdictional according to Region 8 EPA. During a presentation from EPA on WOTUS, this previously exempted practice may fall under EPA regulation. Stock water ponds are in place across Utah to hold melting show and summer rains. However, in the event of a major thunderstorm or fast snowmelt, water may overflow the stock pond and enter a nearby gully that is commonly dry. The volume of the water from the event pushes water from the stock pond down the gully and into a newly categorized "jurisdictional tributary." This commonly occurring overflow on an isolated stock water pond and escaped water entering a newly defined "adjacent" water and ephemeral drainage feature (dry gully) illustrates the potential of the expanded reach. Water which is far from any currently regulated CWA navigable water and the SCOTUS definition of WOTUS.

The possibilities are so numerous and broad that "best professional judgment" of the agency will allow regulators no difficulty in finding the necessary "significant nexus" for most if not all naturally occurring water flows or minor wet spots. Ranchers would be hounded by regulators where water escapes stock water ponds or other common food production activities and enters even a dry gully (ephemeral drainage) and may or may not enter a jurisdictional water of the U.S. This determination to be made based on the "best professional judgment" of the agencies! (p. 11)

Agency Response: See Agencies' Summary Response in 14.1 and Compendiums for Other Waters, Significant Nexus, and Features and Waters Not Jurisdictional.

New York Farm Bureau (Doc. #16547)

14.138 Particularly at risk are the valuable muck lands in New York State. Best known among these is the Black Dirt in Orange County, but rich muck soils exist in other parts of the state as well. These are some of our most sought after agricultural lands because they are extremely productive vegetable areas. All of these areas were originally drained as part of public works projects to convert them into farmland. The drainage ditches that run between the muck fields at regular intervals would very easily be considered "Tributaries" under this rule's definition. That would take large swaths of these lands out of production so that buffer zones could be created and/or significantly increase the cost of food production in these areas by requiring expensive and time consuming permits. (p. 6)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries and Ditches.**

Florida Crystals Corporation (Doc. #16652)

14.139 The Proposed Rule would subject most such artificial lakes and ponds in Florida to CWA regulatory jurisdiction. "All waters, including wetlands, adjacent to a water [otherwise subject to CWA jurisdiction]," would be presumptively regulated as "navigable waters." The term "adjacent" is defined as "bordering, contiguous, or neighboring," and "neighboring" includes "waters located within the riparian area or floodplain of a water [otherwise subject to CWA jurisdiction], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." Id. In Florida, where the topography is completely flat, it is hard to think of any pond or lake which is not the "floodplain" of a water over which the agencies assert jurisdiction (such as a canal). Figure 3 is a 100year floodplain map of Florida prepared by the Florida Department of Community Affairs, which shows virtually the entire state as being within the 100-year floodplain. This suggests that virtually every pond, lake, stream or even isolated ditch in Florida would be a jurisdictional "navigable water" under the Proposed Rule. (p. 5)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Adjacent Waters and Features and Waters Not Jurisdictional, and preamble section IV.G for a discussion.**

14.140 Figure 4 shows the surficial Biscayne Aquifer located in South Florida, which has a shallow water table located just a few feet below the surface. Presumably, any lake or pond located in this area, including those in the urban and farming areas of Miami-Dade and Broward Counties, would have a "shallow subsurface hydrologic connection" to an offsite water that the agencies now deem to be jurisdictional. This is just an example; other areas of Florida and other states have similar surficial aquifers. Based on this, we believe the Proposed Rule will capture virtually every surface water in Florida within the scope of CWA jurisdiction.

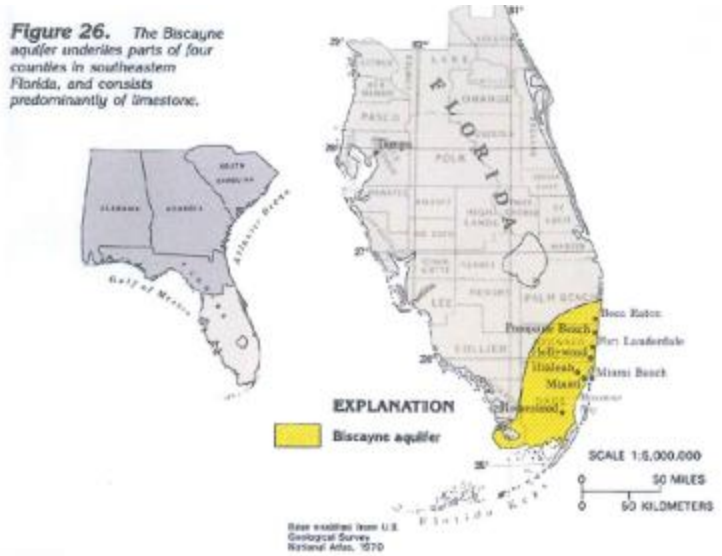

Figure 4: Map of Biscayne Aquifer (Source: U.S. Geological Survey)

(p. 5)

Agency Response: See Agencies' Summary Response in 14.1 and Compendiums for Adjacent Waters and Features and Waters Not Jurisdictional, and preamble section IV.G for a discussion.

14.141 Figure 5 is a photograph showing some of the cities of southern Broward County, Florida. All of the lakes shown in this image were excavated for the purpose of obtaining borrow material to build the buildings and roads. This area is located in converted wetlands as shown in Figure 1, the 100-year floodplain as shown in Figure 3, and on top of the Biscayne Aquifer as shown in Figure 4. Under the Proposed Rule, all of these lakes apparently now will become "navigable waters" subject to federal CWA jurisdiction.

Figure 5: Cities of Southern Broward County, Florida (Source: Google Earth).

(p. 6)

Agency Response: See Agencies' Summary Response in 14.1 and Features and Waters Not Jurisdictional. Water-filled depression created in dry land incidental to mining or construction activity are excluded from waters of the U.S. in paragraph (b) of the rule.

Minnesota County Engineers Association (Doc. #6996.2)

14.142 We understand one rule defining Waters of the United States, WOUS, which applies to such diverse areas as the upper Midwest, coastal salt marshes, Alaska, Hawaii and California needs to be very complex. We would suggest you develop, with the help of regional groups of States with similar ecosystems, regional definitions. These could be much simpler, concise and workable compared to one comprehensive definition which attempts to define WOUS in the very diverse ecosystems our nation values. For example, in our area we have a sophisticated system of constructed agricultural drainage ditches and pipes essential to agricultural use of our fine grained soils. Our rural highway system

requires adjacent ditches to drain water from the roadbed and store snow. Our region's definition would clearly define whether the constructed features are WOUS or not. (p. 3)

Agency Response: See Agencies' Summary Response 14.1 and the Compendiums for Ditches and Features and Waters Not Jurisdictional. As the preamble to the final rule explains, the agencies' conclusions in the rule, with respect to defining the physical indicators of waters and identifying waters which have a significant nexus, reflect the science as well as the practical expertise gained through case-specific determinations across the country and in diverse settings. In addition, several definitions in paragraph (c) and exclusions in paragraph (b) of the final rule have been revised to provide greater clarity about the jurisdiction of waters under the rule, in response to comments. While the rule takes regional variation into account to some extent, the agencies were guided in part by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act.

Hennepin County Public Works, Minneapolis, Hennepin County, Minnesota (Doc. #0008)

14.143 In Minnesota and Hennepin County, the narrowed federal jurisdiction should have little practical effect since we have state laws that protect wetlands regardless of federal jurisdiction and authorities. (p. 1)

Agency Response: The EPA recognizes that states maintain the authority to more broadly protect state waters and state laws are outside the scope of this rule.

Central Arizona Project (Doc. #3267)

14.144 CAP understands that the goal of the Corps and EPA with the proposed rule is to provide clarification and consistency in determining the applicability of federal jurisdiction to waters in a number of classifications, including interstate waters and tributaries. For CAP, however, this would lead to the entire CAP aquaduct system being considered a tributary of a traditional WOTUS because of CAP's interconnection with Lake Pleasant, among other connections. (p. 5)

Agency Response: See Agencies' Summary Response in 14.1. The agencies have historically regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. See also Features and Waters Not Jurisdictional for a discussion of exclusion.

Greater Lafourche Port Commission (Doc. #8411)

14.145 Finally, we are deeply concerned that this rule will undermine 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 the resources available to their water quality programs. It should be considered that in areas such as coastal Louisiana, where the state, local, industry and private landowners are working collaboratively to effect large-scale coastal and environmental restoration works that adding additional complexities, expenses and time

to the approvals process for projects is harmful to the environment the proposed rule is intended to protect. As such, assertion of federal jurisdiction over these waters should be a last resort and not the first course of action. (p. 2)

Agency Response: **The agencies also recognize the vital role that states, tribes and local governments play in the implementation and enforcement of the Clean Water Act. This rule does not affect the authority of these governments to implement their programs to more broadly and more fully protect the waters in their jurisdiction. This subject is addressed in the Executive Summary of the preamble and within the Federalism sections of the response to comments for Compendium for Topic 13: Process Concerns and Administrative Requirements.**

Menard County Underground Water District (Doc. #13885)

14.146 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. 1-2)

Agency Response: **See Agencies' Summary Response 14.1 and the Features and Waters Not Jurisdictional Compendium. The rule does not regulate groundwater and is specifically excluded in paragraph (b) of the rule, and therefore groundwater issues are outside the scope of the rulemaking. 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 shallow subsurface water and groundwater, including groundwater drained through subsurface drainage systems. This decision reflects current agencies' practice and provides greater clarity.**

Westlands Water District (Doc. #14414)

14.147 [M]any water supply conduits potentially would be reclassified as waters of the United States under the Proposed Rule. Such a construction would impair the states' ability to manage water supplies within their jurisdictions, and would exceed the limits of federal jurisdiction contained in the Clean Water Act. To provide some concrete examples:

- The federal Central Valley Project (CVP) in California, the nation's largest federal reclamation project, consists of dams, canals and other facilities that transfer water from the rivers of northern California to the central and southern parts of the State, in order to serve agricultural, municipal, industrial and other

uses. (*Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1958); *United States v. Gerlach Live Stock Co*., 339 U.S. 725, 728-736 (1950).)

- California's State Water Project, the analogue of the federal CVP, similarly transfers water from northern California rivers for agricultural, municipal and other uses in other parts of the State. (*United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 98-100 (1982).)
- The Metropolitan Water District of southern California, which provides water supplies for the people of southern California, operates a dam on the Colorado River that transfers water through the district's aqueduct to the district's service area, where it is distributed to cities, towns and water districts for urban and other uses. (*Metropolitan Water District v. Marquardt*, 59 Cal.2d 159, 171-173 (1963).)
- The Newlands Reclamation Project in Nevada—the first federal reclamation project built pursuant to authority of the Reclamation Act of 1902—transfers water from the Truckee River for irrigation uses in the project area located in central Nevada. (*Nevada v. United States*, 463 U.S. 110, 115-116 (1983).)
- The Central Arizona Project, which was built by the State of Arizona in order to provide Colorado River water for the benefit of the people of Arizona, transfers water from the Colorado River to the cities of Phoenix and Tucson, among others, to meet their domestic and other needs. (*Maricopa-Stanfield Irrig. & Drainage Dist. v. United States*, 158 F.3d 428, 430-431 (9th Cir. 1998); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495 (9th Cir. 1997).)
- The Colorado-Big Thompson Project, a federal reclamation project in Colorado, transfers water from the western slope of the Continental Divide through a tunnel to the eastern slope of the Rocky Mountains, in order to provide water supplies for people in Denver and other areas on the eastern slope. (*City of Colorado Springs v. Climax Molybdenum Co*., 587 F.3d 1071, 1074 (10th Cir. 2009).) (p. 19-20)

Agency Response: **See Agencies' Summary Response 14.1 above. The agencies have historically regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. See also Features and Waters Not Jurisdictional for a discussion of exclusions.**

Central Arizona Water Conservation District (Doc. #14585)

14.148 As part of the construction of the CAP [Central Arizona Project], the original Lake Pleasant was enlarged by the construction of New Waddell Dam, which tripled the surface of the lake using CAP water. Although Lake Pleasant is intermittently fed by the Agua Fria River following rain events, the CAP is the primary source of water for the reservoir. Given CAP's use of Lake Pleasant for winter month storage when CAP "contributes flow directly" to Lake Pleasant, and the status of the Agua Fria River and Lake Pleasant as WOTUS, a strict reading of the proposed rule would define the CAP as a WOTUS. This would occur even though Lake Pleasant itself could not exist in its current form without CAP inflows. (p. 4)

Agency Response: **See Agencies' Summary Response in 14.1. The agencies have historically regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) of the rule codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.**

EcoSynthesis Scientific & Regulatory Services (Doc. #14586)

14.149 I recently delineated a site in the Arid West Region (oak woodland in the foothills of the Sierra Nevada) where there are small bed-and-bank features in a portion of the site with steep terrain and thin soils over unweathered bedrock, typically one to three feet in width, which experience surface flow at some point during every, or nearly every, winter. Downslope, where soils are much thicker, this small amount of flow then percolates into the groundwater, with no evidence of occasional surface flow over a distance of hundreds of feet. In fact, examining the site shortly after a very substantial rainfall event (more then three inches in 24 hours, which is a lot in this environment), I observed deposits of small (<3 cm long) leaves clear across the topographic drainage, with no break, even of a few inches, where surface flow continued downhill. The only logical interpretation of these deposits of very light materials (small dried leaves) is that the surface flow that carried them – which surface flow resulted from the biggest rainfall event of that entire year – failed to continue as surface flow down to the indisputable tributary far down valley. It happens that I have studied this same site over a period of eight years, and, based on close scrutiny of the valley surface over the whole intervening distance, I conclude that there has probably been no surface flow from the steep-hill bed-and-bank feature to the tributary down valley at any time during that whole period. Indeed, periods of decades might elapse between events of connectivity. I submit that this disjunct bed-and-bank feature therefore does not have a significant nexus to downstream water quality, yet it would be regulated under the "for any distance" standard. (p. 2-3)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Tributaries and Significant Nexus.**

14.150 [R]ight outside my house in a small mountain town, the ditch alongside the paved road runs across the prevailing topographic slope; it is not even remotely aligned with the topographic fall line. It has a watershed of perhaps an acre and is a tiny feature, a few inches wide, which develops a two-inch or so incised "bank" in the road base material when hard rainfall occurs. After these events, there is sometimes also some scouring or sorting of sediment (road base) particles, so, within the language of the Proposed Rule, there is bed and bank and (in a possible interpretation) an OHWM. There are no FAC or wetter plants anywhere in the ditch, all the way to a seasonal wetland/tributary hundreds of feet away. I would suggest that this feature does not have a significant nexus to downstream water quality, any more than does the entire upland watershed, and, in my 25 years of delineation experience, features analogous to this have consistently been excluded from jurisdiction, even ones that support some fragmentary wetland vegetation. My recollection is that the original 1983 regulations alluded to exclusion of constructed roadside ditches from jurisdiction, though I cannot recall where (possibly just usual

District practice, not based on written rule). However, application of the actual language of the Proposed Rule would include them. (p. 5-6)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Ditches, and the Features and Waters Not Jurisdictional. See also Preamble Sections IV.F and IV.I.

14.151 In many areas in California (for one example I know well) where isolated pools or grassy wetlands occur, the soils are not characterized by a zone of high transmissivity overlying a clay pan or hardpan, but instead are merely low conductivity soils such as clay loams on very gently sloping topography. In many such cases, a discernible wetland or upland swale is not present, and the lateral flow is so slow that the water in the shallow pool or wetland evaporates or percolates to a depth below that of a distant tributary (often an excavated drainage ditch) long before there can be any hydrologic connectivity. Therefore, the isolated water in question cannot reasonably be represented as having subsurface adjacency or significant nexus to the water quality in the tributary or ditch, any more than all of the surrounding uplands do. Clarification of this language would be useful. In some cases, such as grassland patches dominated by Lolium (Festuca) perenne, many of which grow on slowly permeable clay or clay-loam soils and are supported by saturation only, not by inundation, there is never surface water at all except during a rain event – which is precisely the case also for the entire surrounding uplands. Absent a confined surface connection via an upland or wetland swale, the connectivity of such wetlands is definitely not enough to rise above the significant nexus threshold (either alone or in combination with other waters similarly situated). This is not just a minor exception; there are thousands of acres of such grasslands in the Central Valley of California, and probably also further north in Oregon and Washington; probably also in the prairies of the midwestern states, though I have no field experience there. (p. 6-7)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Adjacent Waters, Significant Nexus, Tributaries, and Other Waters.. The agencies have determined that western vernal pools in California are "similarly situated" for purposes of a case-specific significant nexus determination.

Tarrant Water Regional Water District (Doc. #14643)

14.152 TRWD and the City of Dallas, Texas have partnered to develop a regional water supply solution - a 150-mile, $2.3 billion water transmission system that connects nearly 4 million people to additional sources of supply. Our regional water supply systems need this additional capacity to maintain system reliability, which drives economic development, quality of life, and human health and safety. The project's 404 permit was secured in 2013 and construction began that same year. Our exhaustive environmental review found that the pipeline will cross 102 jurisdictional water bodies, including streams, wetlands and open waters, and 42 non-jurisdictional water bodies. Because we worked diligently to avoid loss of waters of the U.S., the USACE granted TRWD and Dallas a Nationwide Permit with no mitigation requirements. However, under the proposed rules, the number of jurisdictional crossings potentially increases from 102 to 144. This would occur if the 42 water bodies identified as non-jurisdictional were captured by the new proposed groundwater connectivity criterion or the new proposed provision whereby manmade ditches on uplands which flow directly into or through

another water to a jurisdictional water and thereby become jurisdictional themselves. In addition, these apparently non-jurisdictional water bodies would require rigorous testing in accordance with the Rule's proposed connectivity criteria to document whether or not they have a significant nexus to waters of the U.S. Despite our efforts to avoid losses of waters of the U.S. through thorough field studies and incorporation of results into engineering design and construction plans that require restoration of every crossing to pre construction conditions, the new rules would result in an unnecessarily burdensome and costly permitting process. (p. 2)

Agency Response: See Agencies' Summary Response in 14.1 the Ditches Compendium, the preamble to the final rule at section IV.G.2, TSD at Section VIII, and Adjacent Waters Compendium.

Nebraska Public Power District (Doc. #15126)

14.153 NPPD has more than 5000 miles of transmission lines that traverse the state of Nebraska. According to the USGS National Hydrography Dataset (NHD) intermittent streams contain water for only part of the year, while ephemeral streams flow only in response to precipitation events. Although the intermittent and ephemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the "intermittent" category. In addition, some ephemeral streams in the Southwest have been classified as washes. Of the 119,038 miles of linear streams in Nebraska, 84 percent (100,948 miles) are intermittent or ephemeral. Four percent of streams are ditches (4,462 miles), which are not classified by their flow duration in the dataset.

Thus 88 percent of the streams, which should be non-jurisdictional waters would be determined to be categorically jurisdictional as a result in the proposed definition. There is a good chance one of our transmission lines will suffer storm damage and require repair or replacement and a 404 permit will be required. The lead time for a 404 permit does not increase our ability to maintain a stable grid within our borders.

If 88 percent of the non jurisdictional waters in the State of Nebraska become jurisdictional, how can the EPA and the Corps state that the regulatory jurisdiction in the proposed rule is narrower than that under the existing regulations? (p. 6)

Agency Response: See Agencies' Summary Response in 14.1. The final rule includes revised and expanded exclusions for ditches in paragraph (b) of the rule. See the Ditches Compendium for discussion. See Tributaries Compendium, as well as the Preamble at Section III.C, the Significant Nexus Compendium, and TSD at Section VII for a more detailed discussion on the agencies support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule. Compared to the existing regulation, the definition of "waters of the United States" is narrower in the final rule in that it adds specific characteristics of "tributaries" and provides limits on adjacent waters as well as limits on which waters can be considered under case specific determinations. In addition, the rule includes provisions for a number of excluded waters in paragraph (b), some of which are excluded by rule for the first time.

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

14.154 In evaluating recent delineations of well sites in Pennsylvania, PIOOA believes the percentage increase of waters determined to be jurisdictional under the Proposed Rule will be much higher than the EPA-estimated 3%. To understand this increase, it is important to ~ remember the extent of aquatic resources throughout Appalachia, and specifically in Pennsylvania. According to the Pennsylvania Department of Natural Resources, Pennsylvania is second only to Alaska in [he number of miles of streams in one state: [37] To provide some perspective on the large proportion of surface waters in Pennsylvania, as compared to the total land surface, the Pennsylvania Department of Environmental Protection (PADEP) provided the following estimates of waters in Pennsylvania: [38]

State Surface Area (square miles)	45,333
Number of Water Basins (major basins)	6
Total Miles of Rivers and Streams	86,000
Number of Lakes/Reservoirs/Ponds** - Number of Significant, Publicly Owned Lakes (Subset)	3,956 226
Acres of Lakes/Reservoirs/Ponds** -Acres of Significant, Publicly Owned Lakes (Subset)	161,445[39] 104,024
Square Miles of Estuaries/Harbors/Bays -Delaware Estuary -Presque Isle Bay	 17 6
Miles of Great Lakes Shore	63 (Lake Erie)
Acres of Freshwater Wetlands	403,924
Acres of Tidal Wetlands	512

Based on PADEP's data; for each square mile (i.e., 640. acres) of surface area in Pennsylvania, there are an average of approximately 1.9 linear miles of streams and rivers, 8.9 acres of freshwater wetlands and at least 3.5 acres of lakes, reservoirs and ponds that are two acres or greater in size. Changes to the definition of waters of the United States will undoubtedly have a significant effect on how these waters, and waters that are not accounted for in this tally, are classified. For example, the Proposed Rule's definition of tributary is expected to extend the jurisdictional status of many waters farther upstream than previously delineated, where a bed, bank and OHWM~ may be present (regardless whether this reach of the water would be considered to be relatively permanent). As a further example, ephemeral streams that were not previously considered to be jurisdictional would be categorically presumed jurisdictional under the Proposed Rule. The Proposed Rule's definition of "adjacent waters" is also expected to increase the number of jurisdictional waters, given the inclusion of all water bodies — beyond wetlands — and the broad definitions of "adjacent" and "neighboring." (p. 6-8)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Tributaries, Adjacent Waters, and Other Waters. Compared to the existing regulation, the definition of "waters of the United States" is narrower in the final**

[37] h[tn://www.dencs[ate.pa . us/forestry/recreation/Boating/linex.htm
[38] 2014 Pennsylvania Integrated Water Quality Monitoring and Assessment Report , PADEP, April 2014.
[39] Lakes~~ and ponds greater than two acres:

rule in that it adds specific characteristics of "tributaries" and provides limits on adjacent waters as well as limits on which waters can be considered under case specific determinations. In addition, the rule includes provisions for a number of excluded waters in paragraph (b), some of which are excluded by rule for the first time.

14.155 In most cases, ditches are installed around well sites in Pennsylvania to divert water from the well site. Given the topography of Pennsylvania, and a large amount of the Appalachian Basin, a shallow groundwater table or groundwater seeps are often encountered, resulting in consistent flow in the ditches. Under the Proposed Rule, these ditches would become jurisdictional (as tributaries). These same ditches, however, would also be required to be restored when drilling is completed, under Pennsylvania law. If the Proposed Rule is adopted, operators would be required to obtain a Section 404 permit before they could comply with the site restoration requirements. Delays in receiving, or the inability to receive, the Section 404 permit could cause a violation of Pennsylvania restoration requirements. (p. 13)

Agency Response: See Agencies' Summary Response in 14.1 and the Compendiums for Ditches and Features and Waters Not Jurisdictional.

Xcel Energy (Doc. #18023)

14.156 [T]here are many agricultural ditch systems that are owned by multiple types of users. There is uncertainty about what level of industrial/other use ownership will trigger a disqualification from the agricultural exemption. PSCo currently owns portions of the water rights in over 30 separate irrigation ditch companies which have current agricultural usage. If any PSCo ownership in these companies triggers CWA jurisdiction, and by extension 404 permitting requirements, it will impose a burden on other shareholders who would have ordinarily enjoyed a 404 exemption. Because of the additional cost/regulatory/risk burden that 404 permitting imposes, imposition of an industrial ownership threshold for the 404 exemption results in substantial injury to the agricultural water users which would be contrary to Congress's intent that ordinary fanning activities be exempted from jurisdiction. Further, agricultural water users typically have significant financial limitations which may cause them to defer maintenance activities if 404 pe1mitting is required and-onerous. This deferred maintenance may have the result of negatively impacting the very Waters of the U.S. and associated wetland areas that the rules are meant to protect. (p. 6)

Agency Response: See Agencies' Summary Response in 14.1 and Adjacent Waters Compendium. The rule does not change or affect implementation of the statutory exemptions under CWA Section 404(f)(1) related to normal farming practices, which is outside the scope of the rule.

Potomac Riverkeeper, Inc. (Doc. #15013)

14.157 Through our work, we understand how important a clear definition of the "waters of the United States" is to the functioning and effectiveness of the Act. Conversely, an unclear or too narrow definition of "waters of the United States" would make our work in attempting to improve water quality in the Potomac watershed more difficult, by discouraging (already burdened and sometimes trepidatious) regulators from asserting

jurisdiction over harmful activities, increasing the burden of proof in Clean Water Act citizen suits, and taking important categories of waters out from under the Act's protection. (p. 2)

Agency Response: **As the preamble to the final rule explains, the agencies' conclusions in the rule, with respect to defining the physical indicators of waters and identifying waters which have a significant nexus, reflect the science as well as the practical expertise gained through case-specific determinations across the country and in diverse settings. In addition, several definitions in paragraph (c) and exclusions in paragraph (b) of the final rule have been revised to provide greater clarity about the jurisdiction of waters under the rule, in response to comments.**

National Parks Conservation Association (Doc. #15130)

14.158 All of the threats to the quality and availability of water in national parks could be exacerbated by climate change. Changes in long-term weather and temperature patterns will only compound existing stresses to water quality in parks (NPCA 2010b) and alter water resource quantity, quality, and location (e.g., see discussion for NPS units in the Great Lakes region in Schramm and Loehman 2010), especially in small and intermittent streams. Many smaller and intermittent waters could relocate as some areas receive more rain and others less. Glacier-fed rivers and lakes will also experience significant changes as land-ice melts and flows into the sea. Moreover, water temperature affects many chemical and ecological processes in water, such as dissolved nitrogen and oxygen levels and fish hatching cycles, respectively. These weather- and temperature-driven changes will be difficult if not impossible for our national parks to avoid important as our waters experience weather- and temperature-driven stresses that would amplify the effects of upstream pollution.

For example, a 2009 National Park Service report found that northern prairie wetlands, which provide essential habitat for many wildlife populations, are at risk of being lost due to changes in land use and patterns in rainfall and temperature (Beerie and Phillips 2007, cited in Loehman 2009). Climate change could also be causing notable changes in water chemistry in Olympic, Mt. Rainier, and North Cascades National Parks, but more research is needed to understand this relationship (Sheibley et al. 2014). Studies in Great Smoky Mountain National Park found that some storm events can cause spikes in watershed surface water pH, and this, where frequent enough, has caused extirpation of some fish species in several streams (Deyton et al. 2009). In this region and others, scientists predict storm frequency and seasonal distribution will change significantly in the future, which could bring more episodic acid and nutrient spikes that affect species that rely on these features. So in addition to protecting park units from today's threats to water quality, restoring traditional protection for "waters of the United States" will help them be resilient to future stressors.(p. 5-6)

Agency Response: **The agencies agree that protection of the "waters of the United States" is important.**

Grassroots Coalition (Doc. #2687)

14.159 We are concerned with the protection of waters of the U.S. as it pertains to--in this instance; 1. "Other Waters" needs to include waters that support the existence of

wetlands. In particular, seasonal wetlands, e.g. Southern California where rainfall both provides for seasonal ponding of rainwaters and percolation into the underlying aquifers that provide the waters of the wetlands sustenance. For example, at Ballona Wetlands Ecological Reserve, in Los Angeles, the freshwater table is at or near surface. During the rainy season, if rain occurs, the specifics of Ballona allow for its protective clay layers to both hold freshwaters below the surface and preclude saltwater intrusion from the nearby Santa Monica Bay but, also the clay layers allow for ponding to occur at the surface. (p. 1)

Agency Response: **See Agencies' Summary Response in 14.1 and Compendiums for Other Waters and Adjacent Waters. Wetlands will continue to be delineated according to the criteria in the 1987 "Corps of Engineers Wetland Delineation Manual" and/or applicable geographic regional supplements to the Manual. See Adjacent Compendium and Other Waters Compendium, Preamble sections IV.G and H, and TSD sections VIII and IX.**

Water Protection Association of Central Kansas (Doc. #10024)

14.160 Local analysis here in Kansas of the newly introduced regulatory definition in the Proposed Rule of the word "tributary" and its extension would mean an increase in classified streams to over 174,000 stream miles from the current level of just over 30,000 stream miles. (p. 1)

Agency Response: **See Agencies' Summary Response in 14.1. See Tributaries Compendium, as well as the Preamble at Section III.C, the Significant Nexus Compendium, and TSD at Section VII for a more detailed discussion of on the agencies support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule.**

Colorado Wastewater Utility Council (Doc. #13614)

14.161 The Proposed Rule Changes Will Impact Western Water Operations Disproportionally CWWUC members have raised concerns over what would now be considered waters of the U.S. under this proposed rule. The arid West is the region where there are many geographic features that would now be subject to the new rule. Such features include but are not limited to the following: dry arroyos, washes that flow only in response to infrequent storm events, isolated ponds, erosion features on land, intermittent and ephemeral streams and effluent dominated and dependent water bodies. Additionally, Colorado has over 22,800 ditches and canals as a result of early redistribution of water for irrigation, bringing mountain runoff to fields in the lowlands. It would be daunting at best for these types of features to be affected by the new rule and thus subject to permitting under the U.S. Clean Water Act. In addition, reusing water in the arid West is critical to make use of our finite resource .Often times, reuse reservoirs are in close proximity to "waters" discussed in the proposed rule. While the current regulation includes an exemption for waste treatment systems, the expanded jurisdiction discussed in the proposed rule raises new questions about the scope of this exemption. Reuse water is already heavily regulated and CWWUC requests that critical Western water operations will not be affected by this new rule. (p. 1-2)

Agency Response: **See Agencies' Summary Response in 14.1. See Preamble IV.I and the Ditches Compendium for. The rule does not change how existing the waste treatment exclusion is implemented. If the features are excluded, then water quality standards would not apply to those waters. The rule excludes wastewater recycling structures created in dry land such as detention and retention basins created in dry land, and groundwater recharge basins and percolation ponds built for wastewater recycling. Please see the Features and Waters Not Jurisdictional Compendium for a more detailed discussion.**

Friends of Nelson County, Virginia (Doc. #13893)

14.162 Between Fall 2010 and Summer 2011, a collaborative study called The Nelson County Healthy Watershed Project – involving Nelson County, Skeo Solutions, the Green Infrastructure Center, and the University of Virginia – mapped and analyzed Nelson County's natural resources and identified policies and strategies to help maintain, restore and protect local water quality and watersheds in Nelson County, Virginia.

The EPA was among The Nelson County Watershed Project's sponsors. The Nelson County Healthy Watershed Project included research, community meetings, and volunteer work by graduate students at the University of Virginia. The source for much of the information included here came from the resulting 2012 report: Healthy Watersheds, Healthy Communities: The Nelson County Stewardship Guide for Residents, Businesses, Communities and Governments. (www.gicinc.org_PDFs_Nelson_Stewardship_Guide.pdf) (p. 2)

Agency Response: **This is not a substantive comment related to the rule.**

Montana Audubon (Doc. #14755)

14.163 The types of wetlands and other waters that might be automatically included in the definition of WOUS under the proposed rule include:

[1]Wetlands located in or adjacent to Floodplains. Although the EPA/Corps proposed rule would NOT protect all the land within floodplains, it would clarify that wetlands and "other waters" that are located within floodplains are automatically WOUS. In addition, wetlands and "other waters" adjacent to floodplains could gain protection under the Clean Water Act. This provision recognizes that waters located within/next to a floodplain are more likely to affect downstream waters than those that are not. Two reasons why it is important to protect wetlands, 'other waters', and their associated vegetation located in and adjacent to floodplains is because they:

• Reduce Flooding by acting like a giant sponge during flooding, soaking up water and then allowing the flood water to reenter the main stream channel slowly so as to minimize damage from floods and reduce the amount of unnatural erosion that takes place; and

• Keep Clean Water Clean by filtering and reducing the amount of pollutants that enter streams (and drinking water) in runoff originating from sources such as roads, lawns, construction sites, and agricultural fields.

There are examples in Montana where the Corps has determined that wetlands and "other waters" located within and adjacent to floodplains are not considered WOUS. For example, the wetland marked with a yellow pin (right) is within the mapped 100-years floodplain on the West Gallatin River, Montana. It was determined to be non-jurisdictional by the Corps (permit 2006-90686). Under the proposed rule this area would become jurisdictional automatically because it is located within the 100-year mapped floodplain. Keeping pollution out of our rivers and streams by protecting wetlands located within and adjacent to floodplains is much more cost effective than treating nonpoint pollution. (p. 2-3)

Agency Response: See Agencies' Summary Response in 14.1. The definition of "neighboring" in the final rule has been revised. See Compendiums for Adjacent Waters and Other Waters, and preamble section IV.G, and TSD section VIII for a discussion.

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15123)

14.164 We are concerned about the large Dead Zone in the Gulf of Mexico created in large part by excess nitrogen and phosphorus from upstream waters. Excess nitrogen and phosphorus is exported to the Gulf of Mexico, where it triggers algal growth and eutrophication, robbing Gulf waters of dissolved oxygen and creating the second largest dead zone in the world. (p. 2)

Agency Response: The proposed and final rules are definitional rules that address the scope of the Clean Water Act nationwide. The agencies recognize cumulative downstream affects such as hypoxia in the Gulf.

Amigos Bravos, et al. (Doc. #15346)

14.165 Ephemeral and intermittent waters, waters in closed basins, wetlands, and playa lakes all serve critical functions to both wildlife and people in New Mexico. As an arid state, we rely upon all of our water resources and depend upon those resources staying clean and healthy for drinking, irrigating, wildlife habitat, cultural practices and industrial uses. Since we are a non-delegated state under the NPDES program we rely even more than other states on EPA and USACE to regulate discharges to our state's water resources, thus making it all the more critical that essential Clean Water Act Protections are applied accurately and in a manner that protects water quality across the state.[…]

Protecting ephemeral and intermittent waters in New Mexico is essential for protecting public health. EPA estimates that 280,000 people in New Mexico receive drinking water from sources that rely at least in part on ephemeral, intermittent or headwater streams (Exhibit 4). [40] These impacts are not hypothetical as there have been numerous instances of ephemeral waters being found not jurisdictional in New Mexico.[41] (p. 2-3)

[40] Note that this analysis was conducted in 2006 prior to the surface water diversions for the cities of Albuquerque and Santa Fe going online, so this number is most likely substantially greater now.

[41] See SPA-2007-636-ABQ, SPA-2007-00677-ABQ, SPA-2007-442-ABQ, SPA-2007- 3540-ABQ, SPA-2008-54-AQB (research was conducted only for 2007 and 2008 and is not comprehensive)

Agency Response: **The agencies agree with the commenter that ephemeral and intermittent headwater tributaries play an important role in providing clean drinking water and protecting the public health in New Mexico and other arid western states. The EPA's Science Report and Science Advisory Board confirm that headwater tributaries and adjacent wetlands/water are critical to the physical, chemical, and biological integrity of downstream waters. See the Tributaries Compendium.**

Everglades Law Center and Center for Biological Diversity (Doc. #15545)

14.166 [M]any other types of small, geographically isolated waters such as depression marshes, cypress domes, and ephemeral ponds should be considered "waters of the United States" where there is a sufficient nexus. In North Florida, temporary or ephemeral ponds are important for sustaining the biodiversity in upland sandhill communities[42] and longleaf pine forests. Ephemeral ponds serve as breeding sites for at least 28 amphibian species, 14 of which breed exclusively or principally in ephemeral ponds.[43] These species include the federally listed Flatwoods Salamander (Ambystoma bishop and Anbystoma cingulatum) and the state listed Florida Gopher Frog. A study by Gibbons, et. al. (2006) highlights "the key role of small, isolated wetlands in amphibian productivity and in maintaining community dynamics by coupling aquatic habitats with adjacent terrestrial habitats via transfer of biomass and energy."[44] (p. 5)

Agency Response: **See Agencies' Summary Response in 14.1 and the Tributaries, Adjacent Waters, Other Waters, and Significant Nexus Compendiums for discussion of these waters. The studies referenced would likely be useful when evaluating (a)(8) waters in case specific significant nexus analyses.**

14.167 [R]ecent studies have revealed the connectivity many of these waters have with traditionally navigable waters. For example, the physical connectivity between geographically isolated wetlands and traditionally navigable waters was revealed last month, when a group of researchers at the University of Florida (McLaughlin, Kaplan and Cohen 2014) released a study finding a significant hydraulic nexus between geographically isolated waters and more distant traditionally navigable waters via

[42] Dodd, K. 1992. Biological diversity of a temporary pond herpetofauna in north Florida sandhills. Biodiversity and Conservation 1:125-142.

[43] Means, R. 2008. Management Strategies for Florida's Ephemeral Ponds and Pond-Breeding Amphibians. Final Report, available at http://www.coastalplains.org/pdf/Final%20Report%202008.pdf (last visited November 13, 2014).

[44] Gibbons, J.W., C.T. Winne, D.E. Scott, J.D. Willson, X. Glaudas, K.M. Andrews, B.D. Todd, L.A. Fedewa, L. Wilkinson, R.N. Tsaliagos, S.J. Harper, J.L. Greene, T.D. Tuberville, B.S. Metts, M.E. Dorcas, J.P. Nestor, C.A. Young, T. Akre, R.N. Reed, K.A. Buhlmann, J. Norman, D.A. Croshaw, C. Hagen, and B.B. Rothermel. 2006. Remarkable amphibian biomass and abundance in an isolated wetland: implications for wetland conservation. Conservation Biology 20:1457-1465.Gibbons, J.W., C.T. Winne, D.E. Scott, J.D. Willson, X. Glaudas, K.M. Andrews, B.D. Todd, L.A. Fedewa, L. Wilkinson, R.N. Tsaliagos, S.J. Harper, J.L. Greene, T.D. Tuberville, B.S. Metts, M.E. Dorcas, J.P. Nestor, C.A. Young, T. Akre, R.N. Reed, K.A. Buhlmann, J. Norman, D.A. Croshaw, C. Hagen, and B.B. Rothermel. 2006. Remarkable amphibian biomass and abundance in an isolated wetland: implications for wetland conservation. Conservation Biology 20:1457-1465.

influence to the regional water table and ultimately regulation of downstream base flow.[45] (p. 7)

Agency Response: **The agencies did consider those types of studies and specifically did cite McLaughlin *et. al* study within the Technical Support Document. See previous response, 14.167 and TDS at Section IX.**

Wisconsin Wetlands Association (Doc. #15629)

14.168 Wisconsin is a water-rich state, home to -5.3 million acres of wetlands, more than 15,000 lakes, and 84,000 miles of rivers and streams. Wisconsin's borders are made up almost entirely of waters of national interest, including Lake Michigan to our east, Lake Superior to the north and the Upper St. Croix and Mississippi Rivers to the west.

For 2/3 of the state, the topography and associated hydrologic networks were largely shaped by the presence and retreat of glaciers approximately 10,000 years ago. The remaining 1/3 of the state, known as the Driftless Area, was not glaciated.

Wisconsin is a diverse landscape, encompassing portions of 6 Level III ecoregions, though dominated by four: Ecoregion 50 (Northern Lakes and Forests); 51 (North Central Hardwood Forests); 52 (Driftless Area); and 53 (Southeastern Till Plain).

The wetlands, waterways, soils, geology, and natural land cover vary greatly across the state, though surface waters, including wetlands, are abundant throughout. As described below, the dynamics of how wetlands interact with other surface waters and ground water also vary across Wisconsin's landscape.

We share brief descriptions of some of these dynamics below to illustrate the point that the vast majority of Wisconsin's wetlands exhibit strong chemical, physical, and biological connections to other waters. At the ecoregional scale, most of our wetlands are likely to meet a threshold of "similarly situated, in the region," and satisfy the presumption that there is a significant nexus between these wetlands and traditional navigable waters.

Our geologic, post-settlement, and current landscape context all support this assertion. For example:

Timber operators clear-cut the forests of the Northern Lakes and Forests ecoregion early in the 20th century, followed by a period of hardscrabble fanning on the freshly cleared land. The legacy of these activities is still evident in northern Wisconsin, particularly in the Lake Superior Basin, where steep slopes and highly erodible soils have led to channel incision, mass wasting, and miles and miles of stream that have been cut off from their floodplains and associated wetlands. In these areas, wetlands that were historically connected may no longer be recognized as part of the hydrologic system under current rule.

Unique geologic features in this ecoregion include the impermeable soils of the Lake Superior Clay Plain, and the mineral rich bedrock of the Penokee Range further east.

[45] McLaughlin, D.L., D. A. Kaplan, and M. J. Cohen. 2014. A significant nexus: geographically isolated wetlands influence landscape hydrology, Water Resour. Res., 50, doi:10.1002/2013WR15002

There, and everywhere in between, the regenerated forest landscape contains abundant, small, depressional wooded wetlands, largely in upper and middle watershed areas. Many of these wetlands discharge groundwater and contribute flow to intermittent cold-water trout streams that connect to downstream waters. "Fill and spill" dynamics during spring thaw and summer rains are also common, with the majority of the landscape saturated and little evidence of bed, banks, and OHWMs in the upper-most headwater areas.

Trout streams are also abundant in other areas of the state, but nowhere more than in the Driftless Area in the southeast. Wetlands are not nearly as abundant in this region of the state, but are commonly found at the very top portions of the tributary networks, and in small linear lines along the margins of higher order streams. As with wetlands in northern Wisconsin, many of these areas may be too small for detection with current mapping technologies and not immediately recognized as tributaries.

The Driftless Area is also one of two ecoregions in the state with large areas of karst topography, the other being the Southeastern Till Plain. These areas are characterized by fractured bedrock and an abundance of seeps, sinks, and springs, resulting in dynamic and widespread areas of surface-groundwater exchange. Discharges into wetlands in one area have a high probability of release to distant surface waters.

Groundwater influences on wetlands and other surface waters are also abundant in the Northern Central Forests, particularly in an area of the state known as the Central Sands, where the majority of surface waters are ground water fed. This is also an area of widespread production agriculture with a history of intensive drainage and a recent proliferation of high capacity wells. Wisconsin Karst Topography

Though flooding is becoming increasingly common throughout the state, it has been particularly acute in central and southeast Wisconsin in recent years, due in part to widespread agriculture drainage, and also urban development. While Wisconsin has lost nearly 50% of its pre-settlement wetlands, the rate of loss is closer to 85-90% in urban watersheds in the Southeastern Till Plain. The remaining wetlands in these highly altered landscapes provide critical functions and services. This area, above all others in the state, also provides a compelling argument for considering the effects of cumulative wetland losses when rendering determinations about the relative significance of remaining wetlands.

If available, peer reviewed science would clearly support our assertions that most of Wisconsin's wetlands are both similarly situated in their respective ecoregions and exert a significant influence on downstream waters. While the connections between our wetlands and other waters are well understood by natural resource professionals, they are not well studied. Remote sensing and landscape-level assessment tools are improving our ability to reliably map and measure these connections and should be employed to the maximum extent possible in the implementation of the new rule.

Given the obvious connections, but lack of Wisconsin-specific peer-reviewed studies, we urge the agencies to recognize that these landscapes can be described and understood through the application of generally accepted principles of watershed science. This type of generalization is both appropriate and scientifically defensible for the types of determinations that need to be made with respect to defining Waters of the U.S. We will never have the resources to publish research for every unique landscape in the continental

U.S., but this does not mean we don't understand how they function or the consequences of allowing further degradation. (p. 6-8)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendiums for Tributaries, Adjacent Waters, and Other Waters. The agencies appreciate the Wisconsin Wetland Association's explanation of the importance of waters within Wisconsin, and the Driftless Area specifically. The definition of waters of the U.S. would likely include many of the streams and wetland specified in this comment, either as tributaries, adjacent waters, or other waters that would be considered on a case specific basis.**

Wyoming Outdoor Council (Doc. #16528.1)

14.169 An additional area of "other waters" that we believe should be recognized by the agencies lies in the Great Divide Basin of west-central Wyoming, in the southern third of the State. As mentioned, this internal drainage basin is created when the Continental Divide separates into western and eastern routes near South Pass and then rejoins as a single divide to the south near Bridger Pass. The area is approximately 90 by 60 miles in extent and occupies about 3,900 square miles. While the waters in this area do not flow to the sea, it is notable for many significant water features, a surprise in this arid area of the Red Desert. There are a number of small lakes and ponds as well as reservoirs in the area, such as the Chain Lakes. And perhaps most significantly, this area is home to the Kilpecker Sand Dunes, the largest dune complex in North America, an area which contains many dunal ponds that are created by snow accumulations on the leeward side of the dunes that melts slowly during the summer, feeding the ponds.

"The dunal ponds generally are not as alkaline as other water sources in the area and are known to provide an oasis for plants and animals. The dunal ponds also provide excellent habitat for waterfowl, amphibians, songbirds, and small mammals. Waterfowl species use these ponds for nesting in the spring, raising young in the summer, and staging in the fall. Amphibians, such as the tiger salamander, can be found in many dunal ponds reproducing and rearing young."
http://publiclands.org/visitorcenter/exhibits.php?e=Lands&s=Killpecker

These important waters should be recognized as "other waters" by the EPA and the Corps. In combination these similar waters are part of a clearly recognized region that has a significant nexus to (a)(l)-(3) waters. The effect of these waters on the chemical, physical, and biological integrity of (a)(1)-(3) waters is far more than speculative or insubstantial. They perform similar functions and are located sufficiently close to each other "so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity" of (a)(l)-(3) waters. 79 Fed. Reg. at 22211.

Perhaps the most significant connection of these other waters to (a)(l)-(3) waters is the lack of flow to external waters from the waters in this internal drainage basin. This lack of connection greatly reduces the flows of floodwaters and pollutants that would otherwise flow to nearby navigable waters. In addition, these waters are home to numerous migratory bird species that utilize these waters for part of the year, but then use outside (a)(l)-(3) waters at other times of the year. Many other species also use these

waters. This lack of direct connection creates a significant nexus with (a)(l)-(3) waters. Lying just beyond the Great Divide Basin are the drainages of the Green River (ultimately the Colorado River) to the west, and the Sweetwater River (ultimately the Missouri/Mississippi River system) to the north. The Little Snake River (Green/Colorado system) lies just to the south. These are clearly (a)(1)-(3) waters and there is no doubt they are indirectly, but substantially, impacted by waters in the Great Divide Basin.

As recognized by the agencies, "[a] hydrologic connection is not necessary to establish a significant nexus." 79 Fed. Reg. at 22213. "Both connectivity and isolation have important effects on downstream waters." Id. at 22223. Moreover, "'geographic isolation' should not be confused with functional isolation." Id. at 22225. The discussion in Appendix A of the proposed rule as well as comments throughout the Federal Register notice make it very clear these isolated waters can and do have important connections to (a)(l)-(3) waters through impacts such as reducing sediment input that would otherwise occur into the Green River and Sweetwater River basins. When the Great Divide Basin water system is considered as a whole there is no doubt there is a significant, non-speculative and not-insubstantial, nexus to downstream (a)(l)-(3) waters. When the "gradient" of connection is considered, it is clear the connection of the Great Divide Basin waters is significant to the Green River, Sweetwater River, and Little Snake Rivers. See id. at 222197-98. When considered collectively, the Great Divide Basin waters are clearly geographically connected to downstream waters (the Great Divide Basin is part of the larger and greater Red Desert ecosystem, which encompasses traditional navigable waters just beyond the boundaries of the Basin), and have at least indirect hydrologic connections through their impact on either the storage or dissipation of things like sediments, pollutants, biological materials, etc. to downstream (a)(l)-(3) waters.

The Federal Register notice states that "stream networks that are not part of the tributary system (e.g., streams in closed basins without an (a)(l) through (a)(3) water or losing streams and other streams that cease to flow before reaching downstream (a)(l) through (a)(3) waters) may likewise have a significant impact on the chemical, physical, or biological integrity of downstream waters." 79 Fed. Reg. at 22250. With respect to the significant nexus evident with the Great Divide Basin waters, the following statement is significant:

> The absence of a hydro logic connection between "other waters" and traditional navigable waters, interstate waters, or the territorial seas may demonstrate the presence of a significant nexus between such waters, as Justice Kennedy recognized in his opinion [in Rapanos]. "Other waters" frequently function alone or cumulatively with similarly situated "other waters" in the region to capture runoff, rain water, or snowmelt and thereby protect the integrity of downstream waters by reducing potential flooding trapping pollutants that would otherwise reach a traditional navigable water or interstate water .... Such waters can be crucial in controlling flooding as well as in maintaining water quality by trapping or transforming pollutants such as excess nutrients or sediment, for example, or retaining precipitation or snowmelt, thereby reducing contamination or flooding of traditional navigable waters, or the territorial seas.

Id. at 22261-62. This clearly describes the function of the Great Divide Basin waters on nearby (a)(l)-(3) waters and thus the significant nexus to those waters. There are clearly

"strong" connections of the Great Divide Basin waters with (a)(l)-(3) waters, and thus the agencies should make a determination that these are "other waters." 79 Fed. Reg. at 22195-96.

The Great Divide Basin waters could also be recognized as "other waters" because they are representative of a "hydro logic landscape region." 79 Fed. Reg. at 22216. This is an alternative basis for determining that waters are similarly situated for the significant nexus analysis. A hydro logic landscape region represents "groups of watersheds that are clustered together on the basis of similarities in land surface form, geologic texture, and climate characteristics." *Id*. There is little doubt the Great Divide Basin waters meet this definition. As mentioned, the Great Divide Basin is part of the greater Red Desert, and the overall Red Dese1t, including its (a)(l)-(3) waters, is clearly geographically, geologically, climatically, ecologically, and culturally linked and related to the Great Divide Basin.

It could be argued that the Great Divide Basin waters should not be recognized as other waters because of the Supreme Court's decision in *SWANCC*. There the Court determined that isolated non-navigable intrastate ponds used by migratory birds could not be treated as jurisdictional waters. However, as discussed above, while the Great Divide Basin waters are certainly important habitat for migratory birds that then travel to (a)(l)-(3) waters for other parts of their life cycle, these waters perform far more functions than just serving just as a refuge for birds. The Great Divide Basin waters have a wide range of other impacts on downstream (a)(l)(3) waters, such as reducing and preventing the travel of sediments and pollutants to downstream waters in the Green River and Sweetwater River basins. Moreover, in *SWANCC*, the Court did not say that use of isolated wetlands by migratory birds could not be a factor in determining other waters of the United States, it only said this could not be the sole factor in this analysis. So the use of the Great Divide Basin waters by migratory birds is certainly not irrelevant when the other functional impacts of these waters are also considered.

In conclusion, in many respects the Great Divide Basin is a large trap that prevents pollutants, sediments, extreme water flows, and other undesirable elements, from flowing into the nearby (a)(l)-(3) waters (i.e. the Green River and the Sweetwater River, as well as the Snake River), and it is also a refuge for wildlife that then move to the (a)(l)-(3) waters during other parts of their life cycles. These similarly situated regional waters are clearly strongly connected to outside jurisdictional waters in a non-speculative and not-insubstantial way, even if they do not have a direct hydrologic connection to the nearby (a)(l)-(3) waters. These waters thus have a significant nexus with these nearby jurisdictional waters and should therefore be recognized as "'other waters." (p. 8-10)

Agency Response: **See Agencies' Summary Response in 14.1 and the Compendium for Other Waters. Based on the body of scientific literature regarding the subcategories of waters specified in paragraph (a)(7) and their functions, the agencies determined that waters of the specified subcategories are similarly situated because they perform similar functions and they are located sufficiently close to each other to be reasonably evaluated in combination with regard to their effects on the integrity of traditional navigable waters, interstate waters, or the territorial seas. The agencies determined that the same body of evidence did not exist for other potential subcategories, such as Great Divide Basin waters, and they were not**

selected as a subcategory of waters specified in paragraph (a)(7). As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters under state law.

Mercatus Center at George Mason University (Doc. #12754)

14.170 Provo City, Utah, has over 14,000 people living in the 100-year floodplain of Utah Lake, with more development underway. By claiming jurisdiction over floodplains, the Corps will be required to have homeowners submit CWA 404 permit applications when they dredge or fill areas of the floodplain. This means 14,000 people would be required to hire consultants and go through a costly and time-consuming permitting process to pour concrete, plant a garden, or landscape a yard. (p. 3)

Agency Response: See Agencies' Summary Response 14.1. This is a definitional rule; it does not establish regulatory requirements. The rule reference to the 100-year floodplain is in the context of the definition of "neighboring" waters and case specific waters (a)(8). Waters of the United States would not include the floodplain itself but may include waters within the 100 year floodplain as clarified in the preamble as the 1.0% chance of flooding. See Preamble IV.G as well as the Adjacent Waters and Other Waters Compendium for further discussion.

Water Environment Federation (Doc. #16584)

14.171 Many wastewater treatment processes, including man-made spreading basins, are located near or even "adjacent" to rivers and tributaries that have been (or under the proposed rule, would be) designated as waters of the United States and may be located in the riparian or floodplain areas of these rivers. Because the proposed rule defines "adjacency" and includes the incorporation of waters within the flood plain or riparian area of a designated water of the U.S. as also being a jurisdictional water (see section 328.3(c)(2)-(4), FR 22263), this could lead to an interpretation that such spreading basins and artificial storage ponds are jurisdictional.

Specifically, the proposed rule would revise the current category of an "adjacent wetland" to include all "adjacent waters." (FR 22206) As a result, numerous treatment ponds, recycled water reservoirs, and spreading grounds/basins could become jurisdictional, creating a significant problem and interference with existing wastewater treatment processes. For example, under the proposed rule, the Montebello Forebay spreading grounds in Southern California would appear to become jurisdictional. (p. 4)

Agency Response: See Agencies' Summary Response in 14.1 the Compendiums for Adjacent Waters and Features and Waters Not Jurisdictional.

California Stormwater Quality Association (Doc. #16606)

14.172 With respect to stormwater related facilities, this expanded definition of "adjacent" could result in treatment control BMPs, green infrastructure projects, and other multi-purpose benefit projects being classified as a WOTUS if such projects are installed in a floodplain or riparian zone, or are otherwise determined to be "adjacent" to a traditional navigable water. As indicated previously, such facilities are installed so that stormwater agencies can reduce pollutants to the maximum extent practicable, and many such facilities

provide for multiple benefits to the environment. For example, green infrastructure projects improve water quality, enhance recreational uses, and help to infiltrate water to groundwater basins for future municipal and domestic uses. However, under the Proposed Rule, such projects could become jurisdictional. Thus, facilities designed and implemented to comply with NPDES MS4 permit requirements would be subject to further regulation as a WOTUS. Such a result undermines the intent and purpose of such facilities, and the stormwater program in general.

In California infiltration basins or "spreading grounds" are operated to infiltrate recycled water, imported water, stormwater, and other water across basins to recharge underground drinking water aquifers. These facilities are essential to California's efforts to manage its water supplies. If included within the "adjacent" category, these spreading grounds could become a WOTUS and become subject to extensive regulation under the CWA. (p. 5)

Agency Response: **See Agencies' Summary Response 14.1 and Compendiums for Adjacent Waters, Ditches, and Features and Waters Not Jurisdictional. Many commenters expressed a similar concern about 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 as an adjacent water. In the final rule, certain stormwater control features created in dry land are not "waters of the United States". Also, excluded from the definition of waters of the U.S. are wastewater recycling structures constructed in dry land as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Excluded features would not be jurisdictional under the definition of adjacent.**

David Vitter, Ranking Member Committee on Environment and Public Works, United States Senate (Doc. #1512)

14.173 In Wyoming, it appears you can't improve your property without incurring the wrath of EPA. In 2010, the agency sued David Hamilton under the CWA after he removed discarded cars, appliances, and other debris from an irrigation ditch. Last month, however, a federal court reached the common sense conclusion that Mr. Hamilton's clean-up efforts were normal farming activities and were beyond the reach of EPA's CWA authority[46]. However, EPA is apparently undeterred—the agency is now threatening another Wyoming landowner, Andrew Johnson, with CWA fines possibly as large as $187,500 per day for building a stock pond which has attracted new wildlife to the property.[47] (p. 2)

Agency Response: **See Agencies' Summary Response 14.1 and Compendium for Features and Waters Not Jurisdictional. This is a definitional rule and enforcement matters are beyond the scope of the rulemaking.**

[46] See Williaim Perry Pendley, EPA Out of Touch, Out of Control in 1Wyoming, WASHINGTON TI1v1F.s (May 2, 2014), http;//www.washingtontimes.com/news/2014/may/2/pend ley-earth-to-epa/.
[47] See Kelly [David Burke, EPA Targets Couple's Private Pond in Wyorning, Threatens Huge Fines•, PCtxNEWS.com (May 19, 2014), http://www.foxnews.com/politics/2014/05/19/feds-target-private-pond/.

Grace F. Napolitano, Ranking Member, Subcommittee on Water and Power, United States House of Representatives (Doc. #17474)

14.174 Would the proposed rule expand CWA jurisdiction over the Bureau of Reclamation's New York Canal, which diverges from the Boise River in Idaho? How about the Sunnyside Canal, in the Yakima Project in Washington State? How does this differ from current practice authorized under the 2008 guidance? (p. 2)

Agency Response: **See Agencies' Summary Response 14.1. The agencies have consistently regulated aqueducts and canals where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) of the rule codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial. Under the final rule, such manmade features will continue to be jurisdictional where they reroute, alter, or relocate a stream and/or its flow and move that flow, directly or indirectly, to another jurisdictional water.**

14.2 INTERPRETIVE RULE

Agencies' Summary Response

Many of the comments in this section provided comments on 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)(1)(A)" (Interpretive Rule) and the 56 NRCS Conservation Practices specifically referenced therein. All comments on the Interpretive Rule, the NRCS Conservation Practice Standards themselves, and NRCS implementation are outside the scope of this rule. Additionally, the IR was withdrawn on January 29, 2015, as directed by Congress in Section 112 of the Consolidated and Further Continuing Appropriation Act, 2015, Public Law No. 113-235. The memorandum of understanding signed on March 25, 2014 by the EPA, the Army, and the U.S. Department of Agriculture, concerning the interpretive rule is also withdrawn.

While the IR and specific practice standards are outside the scope of the rule making and the IR was withdrawn, many commenters raised concerns that the proposed rule will have an overall negative effect on agriculture and limit the activities that producers can undertake under the exemptions provided in the Clean Water Act. The agencies reiterate that nothing in this rule changes the exemptions that Congress has provided for certain discharges from CWA permitting associated with farming, ranching, and forestry practices. In addition, while prior approval from the agencies has never been needed in order for a permitting exemption to apply, some people do seek technical assistance from the Agencies on whether a particular activity is exempt under Clean Water Act Section 404(f). The Agencies will address any requests for assistance on a case-by-case basis, although use of the exemption does not require approval from the Agencies. Application of the 404(f)(1) exemptions is a very fact specific question. For example, under Section 404(f)(1)(A) activities must be part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." See 40 C. F. R. §232.3(c)(1)(ii). In addition, the statute requires permits for activities that bring a water into a new use and impair the flow, or reduce the reach, of the water. See CWA § 404(f)(2). These issues can only be addressed after careful

consideration of the facts unique to each circumstance. The agencies have longstanding practices, policies, and case law which guide our staff in the review of case-specific questions, which are evaluated in light of the unique circumstances of each situation. **There were also some questions by commenters on the definition of "normal" farming, ranching and silviculture operations and the agencies have included clarification in the preamble that is within the existing regulations. Several commenters asked for a definition of what "normal" farming, ranching and silviculture. See 14.2.2 Agencies' Summary Response Ongoing Farming for additional discussion.**

In addition to the reasons stated above, the agencies do not believe this rule will have a negative effect on agriculture as the rule clarifies the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as "adjacent." See Preamble, Section IV.G (Adjacent Waters) for a discussion on the revised adjacent definition. 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 change from the proposal 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.

To address concerns of the agricultural community, the agencies also highlight that even where waters are covered by the CWA there are many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and 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.

Finally, there were some commenters that were concerned with having NRCS' involvement in regulatory roles. As with all existing CWA section 404(f) exemptions, NRCS does not function in a CWA section 404 compliance role. Only EPA and the U.S. Army Corps of Engineers determine compliance with CWA section 404. NRCS retains the primary federal role of working with landowners and land managers, state agencies, private organizations, etc., regarding the use of conservation practices. NRCS support to provide technical assistance for producers to assist with voluntary conservation activities and to help them with their natural resource management decisions on private, Tribal, and other non-Federal lands is not affected by this rule.

Specific Comments

North Dakota Department of Agriculture (Doc. #1756)

14.175 Additionally we request that the comment period on the Interpretive Rule be extended to coincide with the comment period of the proposed rule. The 45-day comment period was insufficient for a complete understanding of what weight this rule carries how it will impact our state and how it will affect the proposed rules. (p. 1)

Agency Response: See Agencies' Summary Response 14.2. The Interpretive Rule was on public notice from April 21, 2014 and was extended until July 7, 2014. Since the close of the public comment and as directed by Congress the agencies withdrew the Interpretive Rule was withdrawn on January 29, 2015 by the agencies.

New York State Department of Agriculture and Markets and the New York State Department of Environmental Conservation (Doc. #2040)

14.176 The " Interpretive Rule"' Docket ID No. EPA-HQOW-2013-0820, is intended to define activities considered to be exempt from permitting under section 404(f)(1)(A) of the Clean Water Act (CWA). The comment period for the Interpretive Rule is 45 days and all comments must be submitted by June 5. The activities to be exempted are based on Natural Resources Conservation Service (NRCS) conservation practice standards that are designed and implemented to protect and enhance water quality. Additional time is needed for DEC and DAM to conduct a comprehensive review of the list of NRCS practices that could be instituted in order to avoid being subject to regulation under section 404(f)(l)(A). Because there is a direct relationship between whether an activity is exempt from CWA permitting requirements and the definition of "Waters of the United States" (Docket ID No. EPA-HO-OW-2011-08801, it is important that the interpretive rule comment period remain open for longer than the currently scheduled 45 days to allow DEC and DAM sufficient time to better appreciate the relationship between the two proposed rules. (p. 1)

Agency Response: As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Kansas Senate Committee on Natural Resources (Doc. #4904)

14.177 Because EPA and US Army Corps of Engineers are proposing, via the WOTUS rule, participation in NRCS Conservation programs, this Committee is concerned that the Federal Nexus created by participation of private landowners in Federal Conservation programs could result in diminution of private property rights, a decrease in property values and/or erosion of the local tax base. (p. 2)

Agency Response: As stated in the summary 14.2.1, there is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule.

Johnson County and Eastern Sheridan County, Wyoming (Doc. #6191)

14.178 [T]he EPA recently promulgated a so-called "interpretive rule" that replaces the long standing exemption for "normal farming practices" with a list of 56 exemptions based on NRCS practices. A normal farming practice now has to be certified as compliant with NRCS standards in order to be exempt. This has the force of law, and as such is not an "interpretive rule" but a "legislative rule." The rule was adopted without following the requirements of the APA, including the opportunity for public input. As such, the rule is invalid. I urge the agency to withdraw this recent farming practice "interpretive rule." (p. 1)

Agency Response: As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Terry E. Branstad, Governor, State of Iowa et al. (Doc. #8377.1)

14.179 The Interpretive Rule explains that the use of the phrase "such as" in § 404(f)(1)(A) has been consistently interpreted to limit the application of the exemption "to the activities named in the statute and other activities of essentially the same character as named," and "precludes the extension of the exemption... to activities that are unlike those named." See, Interpretive Rule at 2 (citing 44 Fed. Reg. 34264). The Agencies then note that categories of activities named in the statute as constituting "normal farming activities" include "upland soil and water conservation practices." 33 U.S.C. § 1344(f)(1)(A). The Interpretive Rule acknowledges that "as the statute does not limit the exemption to only those activities explicitly listed, it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt from the section 404 permitting requirements." See, Interpretive Rule at 2. The Agencies interpretation should have ended at this point because the inclusion of the final paragraph of the Interpretive Rule moves the action into an actual substantive rulemaking rather than merely a non-legislative interpretation. (p. 1-2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

14.180 The Agencies "interpretation" continues by establishing two new substantive requirements that any conservation activity must meet in order to qualify for the § 404(f)(1)(A) exemption for "normal farming activities." First, it must be a Natural Resources Conservation Service ("NRCS") agricultural conservation practice specifically identified by EPA, the Army, and USDA. Second, the activity must be implemented in accordance with NRCS technical standards. The regulated community is then informed that the "EPA, the Army, and the USDA will enter into a Memorandum of Agreement to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that may include discharges in waters of the United States that would qualify under the exemption established by section 404(f)(1)(A)." See, Interpretive Rule at 3. (p. 2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.181 The Interpretive Rule conflicts with the plain language of the § 404(f)(1)(A) by arbitrarily narrowing the scope of the broad "normal farming activity." Accordingly, the Interpretive Rule is invalid. See, Gonzales v. Oregon, 546 U.S. 243 (2006). By limiting the exemption to only those conservation practices specifically identified, the Agencies have impermissibly narrowed the scope of "normal farming" activities that have historically been considered exempt from the CWA. Furthermore, these "normal farming" activities are now subject to performance measures issued by the NRCS, an agency without any authorization or obligation to implement the provisions of the 404 program. (p. 2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.182 [T]he Interpretive Rule is unlawful because it was not issued in compliance with the notice-and-comment procedure required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c). While the EPA claims that the Rule is merely interpretive—rendering it exempt from notice-and-comment requirement—the Rule is clearly substantive. An interpretative rule must "derive [its] proposition[s] from an existing document whose meaning compels or logically justifies" its requirements. Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010) (quotation omitted). (p. 2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.183 The unintended consequences of the interpretive rule would discourage farmers from voluntarily adopting soil and water conservation practices and would increase producer vulnerability for privately implemented practices. This rule would significantly set back Iowa's efforts to implement our nutrient reduction strategy. Our strategy seeks to increase the number of producers that are voluntarily adopting best management practices to address water quality concerns for nutrient loading to the Gulf of Mexico, especially those electing to do so without public funding assistance. This rule specifically prescribes that no NRCS assistance for ensuring compliance with NRCS standards and specifications will be provided to producers implementing practices at their own cost, and would punish them for their good efforts by adding additional regulatory procedures in order to ensure compliance on their own. This would significantly increase their vulnerability, create an uneven playing field discouraging private investment in conservation and add to the already large backlog of unmet demand for public cost-share assistance. (p. 4)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

The agencies are supportive of farmers' voluntary efforts to implement nutrient reduction strategies and nothing in this rule affects NRCS programs.

14.184 The effect of the interpretive rule on agricultural exemptions from Section 404 permitting requirements for "normal farming activities" is an issue of great concern. We request that EPA and the Corps modify this rule to clearly allow producers to self-certify that practices meet applicable NRCS standards or remove the compliance tie to NRCS standards entirely for privately implemented practices. We ask that at a minimum the rule include a rebuttable assumption that conservation practices constructed in good faith by landowners and their contractors, with or without the prior approval of the NRCS, qualify for exemptions under the interpretive rule and that reasonable modifications or restorations to their work first be given full consideration before CWA Section 404 permit applications are demanded or any enforcement actions are undertaken. There are serious concerns with linking exemptions for normal farming practices to NRCS standards and specifications for compliance. Many of these activities are implemented privately by producers with no public funding assistance, and by linking exemptions to NRCS standards for compliance it may serve to discourage these activities from occurring. NRCS will not confirm or verify practices meet their standards for producers not receiving technical or financial assistance from USDA. NRCS also will not conduct field visits for practice verification for producers not receiving technical or financial assistance from USDA. This leaves producers wishing to privately implement conservation practices few options for verifying compliance with NRCS standards under this rule. Additional clarity is needed in this rule to identify what types of landowner assurances would satisfy EPA and the Corps that private practice implementation was conducted in accordance with applicable NRCS practice standards. (p. 4-5)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.185 Changes are needed related to the exemption list for conservation practices. Pursuant to CWA section 404(f)(1), normal farming practices (including upland soil and water conservation practices) are exempt from permitting requirements. To that end, the listed exemptions should also include grade stabilization structures, terraces, wetland creation, ponds, sediment basins, cover crops, and any other conservation practices meeting the Federal agencies' inclusion means test of being designed to enhance and protect water quality and be implementable in waters of the US. The list of exempt practices may wrongly be interpreted as an exclusive list of activities exempt under CWA Section 404(f)(1). It would be helpful to add language clarifying that the list of practices "includes, but is not limited to" the named practices. Additionally, it should be clarified in the interpretive rule that many practices on the exempt list are not likely to occur in waters of the US and are not covered by CWA's jurisdiction. (p. 5)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

New Mexico Department of Agriculture (Doc. #13024)

14.186 The Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404 (f)(1)(A) of the CWA to Certain Agricultural Conservation Practices (Interpretive Rule) attempts to define what activities are normal agricultural activities by deferring to NRCS guidance. The interpretive rule is just the newest of a multitude of guidance documents for permitting under Section 404 of the CWA. It is difficult, if not impossible, for interested public parties to know of the existence of these documents. Therefore, it would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place. NRCS guide lines are subject to review, and parties with an interest in the CWA may not be aware of these changes or their potential impacts on their agricultural operations. NMDA requests the Agencies publish a Federal Register notice when NRCS guide lines are up for review. This notice should indicate that changes in NRCS guidelines will impact agricultural producers due to the applicability of permitting under the CWA, which would not have been necessary prior to changes in NRCS guidelines. We have requested the same of the NRCS when they make changes to their National Handbook of Conservation Practices.[48]

Please see our previously submitted comments on the Agricultural Interpretive Rule and the NRCS National Handbook of Conservation Practices in Appendix 8 for further concerns regarding this document. (p. 15-16)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.187 It would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rule s in one place.

NMDA requests the Agencies publish a Federal Register notice when NRCS guide lines are up for review due to the fact that changes in the NRCS guidelines will affect compliance with the Clean Water Act for certain agricultural practices. (p. 28)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

EPA does maintain a webpage at http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm. The withdrawal notice for the IR as well as other documents regarding the exemptions in section 404(f) are available through this website.

[48] Natural Resources Conservation Servic e. "Conservation Practices." http://www..nrcs.usdagov/wps/portal/nrcs/dclailfull/national/techn cal/references/?cid=nrcs143_026849

Legislative Research Commission, Commonwealth of Kentucky (Doc. #14055)

14.188 Kentucky has four different USACE districts. Each district has the right to interpret the rulemaking for purposes of implementing the §404 program. There are concerns about whether the rule will be applied uniformly across different USACE district offices. Also, USACE must rely on agricultural conservation practices as currently defined by National Resources Conservation Service (NRCS) to determine which practices are exempt under the rulemaking. This places NRCS in an inappropriate role of determining and enforcing those farming practices which NRCS considers "normal farming measures." Only those currently prescribed normal farming measures are eligible for exemption today and in the future. The Interim Joint Committee on Agriculture contends that NRCS conservation practices were never designed nor intended to be regulatory thresholds for §404 permit programs.

Kentucky USACE-Louisville has been more active in denying or pending §404 permits in Kentucky's mining sector. There is concern that past behavior could be indicative of how §404 will be applied to the agricultural sector in this state. Because the definitions of each practice are not incorporated into the proposed rule, environmental groups which seek to subject various sectors to greater regulation under the CWA will have opportunity to file suit against USACE for failing to regulate. Given USACE's and the courts' evolving interpretation of §404 as applied to Kentucky's mining sector, we believe the proposed rule and interpretive rule, as currently written, are too fragmented and vague to give farmers the needed assurance that USACE will not regulate the agricultural sector in the future. (p. 1-2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making. Further, as stated in the preamble, the goal of the rule is to increase CWA program predictability and consistency by clarifying the scope of "waters of the United States" covered by the Act. Nothing in this rule changes the permitting requirements or process and therefore comments on the permitting process are outside the scope of the rule making.**

The agencies strive to achieve consistency across the country in all Corps districts and EPA regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are regional variations that occur in geography, hydrology, climate, etc., which affect determinations of jurisdiction. The initial phase of implementing the rule will require education and training for agency staff, stakeholders and the regulated public. It is envisioned this will include regionally-based training to capture the variability associated with the natural environment and to ensure consistent and efficient implementation of the rule.

The rule does not change the exemptions under section 404(f)(1) of the Clean Water Act statute, including exemptions for normal farming activities that occur as part of an established operation. It is a definitional rule only; it does not establish any regulatory requirements.

As stated in the preamble, "Normal" farming, silviculture, and ranching is clarified in EPA's 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 does not change this and therefore "normal" farming is outside the scope of this rule.

Illinois Farm Bureau (Doc. #14070)

14.189 [A]part from the many procedural questions raised by the interpretive rule, the interpretive rule itself is unnecessary, narrows already existing farmer exemptions granted by Congress, and should be rescinded. The rule attempts to give farmers Section 404 relief by interpreting the statutory term "normal farming, ranching and silviculture." It lists dozens of NRCS conservation practices that would automatically give farmers relief under Section 404 as long as farmers implemented those practices "in conformance with NRCS technical standards." In a nutshell, the interpretative rule accomplishes nothing other than taking voluntary, incentive-based conservation practices and turning them into regulations that impose binding legal obligations on the public. (p. 3)

Agency Response: As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Governor Matthew H. Mead, State of Wyoming (Doc. #14584)

14.190 [T]he negative effects of the Agencies' Interpretive Rule (IR) for Agricultural Exemptions have not been adequately addressed in terms of economic impact. See MEMORANDUM OF UNDERSTANDING Among the U.S. Department of Agriculture, The U.S. Environmental Protection Agency, and the U.S. Department of the Army Concerning Implementation of the 404(f)(l)(A) Exemption for Certain Agricultural Conservation Practice Standards, 2014. The time and cost increases for landowners to comply with new requirements could have devastating impact with far reaching consequences, yet the Agencies do not address them. The Agencies cannot ignore impacts by mislabeling a rule as interpretive.

I have written you previously about the IR. It is substantive. It undercuts the agricultural exemption provided in the Act. It adds a third federal agency, the Natural Resources Conservation Service (NRCS), as a regulator and enforcer. Its implementation would significantly increase costs for multiple federal agencies. What has been an exemption for farming expressly set forth in the Act is no more under the IR. NRCS standards, specifications and certifications, previously inapplicable, take the place of the exemption provided by law. The IR is part of this jurisdiction-expanding rule making attempt and it too should be withdrawn. (p. 7)

Agency Response: As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

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

14.191 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: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making. The rule does not affect the citizen suit provisions within the CWA.**

Mary Fallin, Governor, State of Oklahoma (Doc. #14773)

14.192 When Congress enacted the CWA, they envisioned a cooperative program between the states and the federal government. Recognizing this partnership, the central tenet of the CWA sets states as the primary regulators of surface waters within their boundaries with limited oversight by the EPA. States best know the needs of their citizens and their resources. As proof, consider the vast improvements in water quality across the nation since implementation of the CWA. In Oklahoma, we have achieved impressive water quality improvement through voluntary programs such as our non-point source pollution control program administered by the Oklahoma Conservation Commission and local conservation districts. These efforts were implemented in addition to Farm Bill programs administered by the Natural Resources Conservation Service (NRCS). During my time as Governor, I have seen the value of working cooperatively to improve water quality with private land owners and all impacted parties.

Coupled with the release of the proposed WOTUS rule, the Agencies established an Interpretive Rule (IR) for agricultural exemptions under section 404 of the CWA limiting exemptions to farmers and ranchers only if they follow one or more of 56 NRCS approved practices. I am deeply disappointed with this decision and ask for the IR to be withdrawn. For generations Oklahoma agricultural producers have enjoyed a mutually beneficial relationship with the NRCS, largely due to the non-regulatory status of the NRCS. This relationship has resulted in the implementation of modem, more efficient farming practices that protect and improve our land and water. However, implementation of the IR effectively makes the NRCS a regulatory agency. This shift could destroy the trusted partnership currently enjoyed by the NRCS and agricultural producers, while slowing the implementation of non-point source pollution control programs that have made improvements to Oklahoma waters. I urge the Agencies to work with the U.S. Department of Agriculture, NRCS and state agriculture agencies to develop a new interpretive rule that allows for a normal, inclusive and fair evaluation of farming practices to occur. (p. 1-2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

The agencies are supportive of voluntary conservation actives to improve water quality.

Arizona Game and Fish Department (Doc. #14789)

14.193 CWA Section 404(f)(l)(A) exempts from 404 permit requirements certain discharges associated with agricultural conservation practices and upland soil and water conservation practices. Simultaneously with issuing the proposed Rule, EPA and ACOE issued an Interpretive Rule that identifies 56 agricultural conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that additionally qualify for exemption from Section 404 permit requirements, such as Wetland Restoration (657); Wetland Creation (658) and Wetland Enhancement (659) (http:/ /water.epa.gov /lawsregs/ guidance/wet! ands/agriculture.cfm).

The Interpretive Rule states that EPA, the Army and USDA intend to enter into a Memorandum of Agreement to develop and implement a process for identifying these NRCS agricultural conservation services and activities that would qualify under the 404 permit exemption in Section 404(f)(l)(A).

The Department urges EPA and ACOE to expand this Interpretive Rule to encompass conservation activities in WUS conducted by state agencies with primary jurisdiction over fish and wildlife resources. These activities, which are designed to protect and enhance water quality and benefit fish and wildlife, are "essentially the same character as named" by Congress for exemption from regulation under Section 404(f)(l)(A). No need exists under Section 404 to regulate these activities. Without this clear exemption, the Department faces unnecessary regulatory uncertainty over whether such environmentally-beneficial activities will require a 404 permit. (p. 2-3)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The rule does not change the provisions in the CWA for exemptions and the agencies are supportive of efforts to improve water quality. Further, the rule does not establish any regulatory permitting requirements for impacts on Waters of the United States as it is a definitional rule.**

Office of the Governor, State of Kansas (Doc. #14794)

14.194 The inclusion of an "interpretive rule" outlining exempt conservation practices is both redundant and limiting. Such a list invites unnecessary Federal scrutiny and requirements on any practice designed to conserve soil and water, but which may not fit neatly among the 56 practices the Federal agencies deem permissible. For example, gradient terraces are employed to reduce runoff over sloped land, thereby retaining soil and enhancing water conservation in many Kansas farm fields. In fact, EPA cites such terraces among their list of urban stormwater best management practices. Yet, this practice is not included among the 56 "exempt" practices. Is it EPA's position that installation of gradient terraces requires 404 permitting? Kansas has an estimated 290,000 miles of terraces protecting over 9 million acres, this ranks second in the nation. At today's costs this represents over $1.9 billion in conservation investment by landowners and government agencies. Requiring permits on new and even rebuilt terraces will hinder the implementation of this widely accepted best management practice. The clarification sought by the proposed rule as to its application has, in fact, introduced more questions than answers. We are concerned that the interpretive rule, in concert with the proposed

rule, will quell the desire of many agricultural producers to employ conservation practices, leading to a net increase in pollutant loading from our lands. We already have reports those voluntary conservation efforts to protect playa lakes in western Kansas are diminishing for fear of Federal interference. (p. 3-4)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The rule does not change the provisions in the CWA for exemptions and the agencies are supportive of efforts to improve water quality.**

New Jersey Department of Agriculture (Doc. #14847)

14.195 The Interpretive Rule (IR) which was meant to reduce the permitting requirements by exempting specific NRCS conservation practices, in light of the expanded definition, is not recognized in New Jersey.

Therefore, the USDA-NRCS NJ identified the conservation practices that are most commonly implemented in New Jersey from the list of practices listed as "exempt" in the EPA/ACOE/USDA Interpretive Rule. Although these practices are not exempt from the DEP CWA Section 404 permitting requirements, the DEP is looking to streamline their implementation through a permit-by-rule provision in the Freshwater Wetlands and Flood Hazard Area Control regulations. We are hopeful that the permit-by-rule approach will help remove the barriers to the successful implementation of typical conservation measures that are performed on agricultural lands.

Since the IR will be recognized in other states, it may be helpful in reducing permitting requirements under the CWA, but we believe that it will be very difficult for a farmer to implement the "exempt" practices in accordance with the practice standards prescribed in the Field Office Technical Guide without technical assistance. In other words, the complication will move from the regulations to the actual implementation of the conservation practice. (p. 1)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015, as directed by Public Law No. 113-235. Nothing in this rule preempts a state's right to regulate or to more broadly protect waters (including wetlands) within its borders. The rule is consistent with section 510 of the CWA which says: unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction on the CWA. Additionally, per the regulations at 40 CFR 233 any state or tribe implementing section 404 of the CWA may choose to regulate activities exempt under section 404(f) of the CWA, and thus may choose not to incorporate such exemptions into their approved CWA section 404 program. Approval of any potential changes to NJ's CWA 404 program is outside the scope of this rule making and should be coordinated with EPA's Region II office in New York.**

Arizona Game and Fish Department (Doc. #14197)

14.196 CWA Section 404(f)(1)(A) exempts from 404 permit requirements certain discharges associated with agricultural conservation practices and upland soil and water conservation practices. Simultaneously with issuing the proposed Rule, EPA and ACOE issued an Interpretive Rule that identifies 56 agricultural conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that additionally qualify for exemption from Section 404 permit requirements, such as Wetland Restoration (657); Wetland Creation (658) and Wetland Enhancement (659) (http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm).

The Interpretive Rule states that EPA, the Army and USDA intend to enter into a Memorandum of Agreement to develop and implement a process for identifying these NRCS agricultural conservation services and activities that would qualify under the 404 permit exemption in Section 404(0(1)(A).

The Department urges EPA and ACOE to expand this Interpretive Rule to encompass conservation activities in WUS conducted by state agencies with primary jurisdiction over fish and wildlife resources. These activities, which are designed to protect and enhance water quality and benefit fish and wildlife, are "essentially the same character as named" by Congress for exemption from regulation under Section 404(f)(1)(A). No need exists under Section 404 to regulate these activities. Without this clear exemption, the Department faces unnecessary regulatory uncertainty over whether such environmentally-beneficial activities will require a 404 permit. (p. 2-3)

Agency Response: This comment is also listed in the docket as #1479, see response above. As stated in the summary 14.2 the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Louisiana Department of Environmental Quality (Doc. #15164)

14.197 [T]he LDEQ is concerned that the proposed Waters of the U.S. rule:

May affect participation and success of conservation programs such as through the Louisiana Department of Agriculture and Forestry (LDAF) and the US Department of Agriculture (USDA) National Resource Conservation Service (NRCS). Voluntary implementation of best management practices (BMPs) of conservation practices (CPs) by parties engaged in agriculture and forestry activities maintains valuable land resources and reduces or prevents runoff from entering water bodies. Implementation of these practices results in observable water quality improvement, and Louisiana relies upon voluntary participation to aid improving environmental quality in the state. Louisiana further relies on voluntary participation in up-basin states that also benefits water quality in Louisiana. As such, voluntary participation in conservation programs is paramount to protecting and restoring environmental quality. Farmers and agricultural producers may be hesitant to participate in voluntary programs if additional requirements and regulations are imposed. Any regulatory changes that may deter producers from voluntarily participating in conservation programs would be detrimental to the water quality protection and restoration otherwise provided by these programs. (p. 2-3)

Agency Response: **This rule does not affect any of the statutory exemptions provided in the CWA. The agencies are supportive of the state's efforts to encourage voluntary efforts to improve water quality. In the final rule the agencies provided more bright lines on what is jurisdictional and what is not in an effort to provide clarity.**

14.198 May affect traditional farming methods. The LDEQ works closely with the LDAF, the lead Louisiana state agriculture and forestry agency, to protect and restore the environment with consideration of sustainability. The LDAF has communicated to the LDEQ the importance of agricultural production in feeding the world's growing population, which is currently over 7 billion and projected to exceed 9 billion in 2050. Traditional farming practices utilized to produce commodities for human welfare are necessary to feeding the existing and ever growing population. Regulations that may affect traditional farming practices whereby expansion of jurisdictional waters may encroach upon currently exempt practices could result in considerable economic and social repercussions which may not have been fully evaluated under preparation of this proposed rule. (p. 3)

Agency Response: **As stated in the summary 14.2, this rule does not affect the exemptions provided in the CWA for farming, ranching and silviculture.**

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

14.199 The Interpretive Rule attempts to clarify that 56 conservation practices are "normal farming" activities and are thus covered by the CWA's Section 404 "normal farming" exemptions. We agree that these conservation practices are "normal farming" activities and are therefore covered by the Section 404 "normal farming" exemption. These listed practices are "normal farming" activities that producers engage in every day. Whether building a fence, clearing brush, or utilizing conservation cover, producers utilize these practices as necessary tools for the management of their operations—regardless of whether those practices are implemented in conjunction with an NRCS conservation program.

However, we have significant concerns with the agencies' further "clarifications" of this exemption. The Interpretive Rule states that in order to qualify for the exemption, "The activities must also be implemented in conformance with NRCS technical standards." Rather than expanding the exemptions for producers as Administrator McCarthy wrote in a March 25, 2014 Op-Ed, the Interpretive Rule actually narrows the CWA's "normal farming" exemption by requiring—for the first time—that certain "normal farming" activities now be conducted in compliance with specific NRCS technical standards. In effect, the Interpretive Rule makes standards developed for voluntary practices, a mandatory requirement for complying with the CWA. We are concerned that the Interpretive Rule could subject producers who are found to have implemented a normal farming practice without complying with NRCS standards to exorbitant CWA penalties. Moreover, these producers would face the very real threat of defending themselves against litigation brought under the CWA's citizen suit provisions.

There is significant confusion about what specific situations require compliance with NRCS standards under the Interpretive Rule. During a number of meetings and

conference calls following the release of the Interpretive Rule, Administration officials have indicated that the intent of the Interpretive Rule was to apply only to producers participating in NRCS programs. However, this is not clear in either the Interpretive Rule or the accompanying MOU. In fact, the MOU suggests that the requirement to comply with NRCS practice standards extends beyond practices implemented with NRCS assistance:

"Landowners not relying on NRCS for technical assistance have the responsibility to ensure that implementation of the conservation practices is in accordance with the applicable NRCS conservation practice standard. It is important to emphasize that practices are exempt only where they meet conservation practice standards." (MOU, Page 3)

It is especially inappropriate and counterproductive for the agencies to require compliance with NRCS standards for conservation activities (which, as discussed above are normal farming practices) that are implemented through state programs or voluntarily by producers, as a condition for coverage under the CWA's "normal farming" exemption. We note that many state-led conservation programs often have their own associated standards or associated Best Management Practices (BMPs). By requiring that producers adhere to NRCS practice standards, producers who install conservation practices using state-based requirements or other BMPs could find themselves in legal jeopardy. We reiterate that it is inappropriate to require compliance with NRCS practice standards for these kinds of normal farming practices in order to qualify for the CWA's "normal farming" exemption. (p. 11-12)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The agencies are supportive of farmers' voluntary efforts to implement nutrient reduction strategies.**

14.200 We are concerned that the Interpretive Rule could unintentionally result in a reduction in conservation program participation and the installation of fewer water quality-enhancing conservation practices. Linking standards for voluntary NRCS conservation practices to compliance with mandatory regulatory requirements sets a dangerous precedent that could undermine the successful paradigm of utilizing voluntary, incentive-based conservation practices to improve environmental quality. Specifically, this linkage and the resulting increased legal vulnerability for producers will dissuade producers from participating in NRCS and state conservation programs and installing proven conservation practices that improve water quality. The unintended result of this would be fewer water quality improvements.

In addition, requiring compliance with NRCS standards will result in additional strains on already overburdened NRCS technical assistance resources. The increased legal vulnerability for producers to comply with NRCS standards will lead to increased demand for NRCS technical assistance as producers seek assurances that their conservation activities will not be second-guessed by federal agencies or the courts. Instead of helping producers install conservation on the landscape, NRCS technical resources will very likely be diverted to what will essentially amount to CWA compliance activities.

Moreover, the Interpretive Rule's requirement that producers comply with NRCS practice standards—and especially NRCS's role in verifying compliance with those standards—will result in a shift away from NRCS's historical technical assistance role to one of ensuring regulatory compliance. This is a dangerous shift that will reverberate far beyond the conservation practices at issue in the Interpretive Rule. The success of Farm Bill conservation programs over the past 30 years has been enhanced because producers view NRCS field staff as partners and advocates in conservation, not government regulators. Unfortunately, many of the elements of this Interpretive Rule will undermine this paradigm and dissuade producers from engaging in voluntary conservation activities. (p. 12)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The agencies are supportive of farmers' voluntary efforts to implement nutrient reduction strategies.

14.201 What if a practice is implemented for a reason other than to improve water quality? Will conservation activities that are included on the list of 56 covered practices, but that are implemented for a reason other than to improve water quality, be covered under the exemption? (p. 12-13)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.

14.202 Are the 124 NRCS conservation practices not specifically listed also exempt from Section 404 permit requirements as "normal farming activities" if they incidentally result in a discharge of dredged or fill material? (p. 13)

Agency Response: The exemptions provided in Section 404(f) are outside the scope of this rule.

14.203 Section 404 "normal farming" exemptions are limited to "established (i.e. ongoing) farming, silviculture, or ranching operation(s)." Significant confusion exists as to what operations qualify as "ongoing." For example, if a farm is sold (or has been sold), does that farm qualify as "ongoing?" If a farmer converts his land from row crops to pasture or from pasture to an orchard, is this considered "ongoing?" (p. 13)

Agency Response: The proposed rule does not affect the exemptions provided in the CWA. "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. There is no statutory definition, however, the regulations to highlight the types of activities that are considered with regard to be "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation. "To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying

fallow as part of a conventional rotational cycle are part of an established operation." Further, regulations states that activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation. If the proposed activity is not exempt under Section 404(f)(1), the work may be authorized under one or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: http://www.usace.army.mil/cw/cecwo/reg/ and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

14.204 Is the list of 56 practices an exhaustive list of practices the agencies believe encompass "normal farming" practices and are thus covered by the Section 404 "normal farming" exemption? Or is the list intended as a descriptive list of examples of conservation practices that are "normal farming"? The simultaneously-released WOTUS proposal will likely sweep significant areas under cultivation into CWA jurisdiction. Many of these areas, such as areas in flood plains, may be dry for most of the year. As a result, we believe there will likely be activities farmers do as a normal part of their farming activities that could result in discharges of dredge and fill material to a WOTUS—activities that should clearly qualify for the normal farming exemption. For example, if a farmer engages in one of the other NRCS practices that is not included as one of the 56 practices listed in the MOU, and that activity results in a discharge of dredge and fill material, would the agencies consider this not a "normal farming" activity and ineligible for coverage under the Section 404 "normal farming" exemption? Should the agencies reach this conclusion, we would strongly disagree, as we believe conservation activities clearly qualify for the Section 404 "normal farming" exemption. Further, we are concerned that by creating a list of what constitutes "normal farming" activities under the Section 404 "normal farming" exemption, courts could begin to interpret that list as an exhaustive list, rather than a descriptive list, and further narrow the Section 404 "normal farming" exemption. (p. 13)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The exemptions provided in Section 404(f) are outside the scope of this rule.**

14.205 We note that a number of the NRCS practice standards included on the list of exempt practices may involve the application of pesticides as an integral component of that standard. Following the decision of the Sixth Circuit Court of Appeals in National Cotton Council v. EPA, pesticide applications in, over, or near a WOTUS are required to be permitted under Section 402's National Pollutant Discharge Elimination System (NPDES). As the Interpretive Rule only pertains to exemptions from Section 404 permitting requirements, pesticide applications may require permitting under Section

402. We urge the agencies to ensure agency staff accurately communicate the limits of the "normal farming" exemption. Many of the statements by the agencies to date have given the false impression that the Interpretive Rule "expands" CWA exemptions and that conservation activities conducted in compliance with NRCS standards are exempt from any CWA permitting requirement. However, because some of these practices may involve the use of pest control products, producers could still be subject to CWA permitting requirements under Section 402. (p. 13-14)

Agency Response: **The exemptions provided in the CWA for agriculture are outside the scope of this rule. The agency concurs that the CWA exemptions in section 404(f) do not apply to section 402 permitting. Please see Implementation Compendium, especially the responses to comments on the application of the pesticides general permit (PGP).**

14.206 How will the Interpretive Rule be enforced? If a dispute arises that results in litigation or an agency enforcement action, which agency will determine whether a practice is implemented in accordance with NRCS practice standards? This MOU increases ambiguity with regard to jurisdictional & compliance complexities. The final two sentences in VI.B state that,

"*Even where NRCS is not providing technical assistance, the agency plans an important role in helping to respond to issues that may arise regarding project specific conformance with conservation practice standards. EPA and the Corps are responsible for responding to project specific issues that may arise associated with compliance with section 404(f), including concerns that are raised by states or federally recognized tribes*."

These two sentences do little to sort out the jurisdictional and compliance issues that farmers and ranchers will face under the MOU. According to the MOU, NRCS will play "an important role" in determining a project's conformance with NRCS standards (and thus his ability to qualify for an exemption from the statutory permitting requirements). At the same time, the EPA and the Corps are responsible for project specific issues associated with 404(f) compliance, the section under which a farmer or rancher would seek to qualify for an exemption. Thus, the two sentences only establish that all three organizations will be involved in determining whether a farmer/rancher is compliant. Further, this section fails to make clear that EPA and the Corps will not make determinations of whether a producer has conformed to NRCS standards. We believe it is inappropriate for EPA or the Corps to make determinations of whether a producer has complied with NRCS standards. (p. 14)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. In order to for an activity to be exempt it must meet the requirements set forth in the CWA and implementing regulations.**

14.207 What process will be used to add or remove practices from the list? We are disappointed the agencies did not involve state regulators and stakeholders in the development of the Interpretive Rule. Public input is crucial for an effective regulatory program. Will state regulators and the regulated community have the opportunity to provide input on changes to the list of covered practices? (p. 14)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

14.208 What if the list of practices changes? If a producer installed a conservation practice that was included on the list, but that practice is later removed from the list, is the producer left without coverage by the exemption if he continues the practice? (p. 14)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

14.209 What if an NRCS standard changes? Must the installed practice be updated to reflect the current standard in order for the "normal farming" exemption to apply? (p. 14)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

14.210 How should producers ensure compliance with the NRCS conservation standards (according to the MOU, if the farmer does not seek "technical assistance" from NRCS in identifying and implementing the conservation standards, the farmer has the responsibility to ensure that implementation of the conservation practices is in accordance with the applicable NRCS standard or the practice will not be exempt)? (p. 14-15)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

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

14.211 Why did EPA only allow an additional 20-day comment period on the interpretive rule for Agriculture exemptions? (p. 11)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

14.212 The Agency has made statements that make it sound as if the EPA is being generous in providing agricultural exceptions for 56 accepted conservation practices, but it is my understanding NRCS has over 200 accepted practices and the law actually requires EPA to include these 404 exemptions for normal farming practices. (p. 18)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

Indiana Department of Environmental Management (Doc. #16440)

14.213 The Interpretive Rule limits the applicability of Section 404(f) of the CWA. Although we recognize the Agencies' belief that the related Interpretive Rule broadens the exemptions to landowners, in reality, the Interpretive Rule only obfuscates the intent. The Interpretive

Rule would not be necessary but for the expanded federal jurisdiction under the Proposed Rule.

Congress has already established permitting exemptions for farming and conservation practices. The Interpretive Rule raises the concern that normal farming practices not listed in the rule will require a permit. Additionally, it increases the cost of practices that are listed by requiring compliance with NRCS standards. Finally, the Interpretive Rule does not provide protection, even for listed activities that do comply with NRCS standards, because under the Proposed Rule's definition of waters of the U.S., planting and plowing could be considered activities that affect "the flow and circulation of waters of the United States. Both the Proposed Rule and the Interpretive Rule guidance should be withdrawn. (p. 3)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The rule does not change the statutory exemptions provided by the CWA.**

Kentucky Department of Environment Protection (Doc. #16535.1)

14.214 The final rule must provide clarity regarding exemptions for agricultural practices. The Division recommends providing broad deference to agriculture practices, especially to the extent that the proposed "waters of the United States" rule may extend jurisdictional waters into agricultural areas that previously would not have been considered jurisdictional. Such deference was anticipated by the CWA and is provided in §404 (f)(l)(a) which provides exceptions to §404, as well as §402 and §301(a) for normal farming, silviculture, and ranching activities.

The inconsistent application of §404 (f)(l)(a) exclusions and the consequent uncertainty resulted in EPA and the Corps promulgating the "Interpretive Rule," a companion guidance to the proposed "waters of the United States" rule which is intended to clarify how §404 (f)(l)(a) is implemented. Unfortunately, the Interpretive Rule" has led to great concerns within the agriculture sector regarding the authority of EPA and the Corps to limit the exception provided under §404 (f)(l)(a) and the uncertainty regarding the language in the "Interpretive Rule" itself. The Division appreciates that EPA and the Corps are trying to provide greater certainty regarding §404 obligations to the agriculture sector, and acknowledges a number of public comments made by the EPA to provide reassurance regarding the intent of its "Interpretive Rule." However, the language of the "Interpretive Rule" itself creates lingering uncertainty regarding what activities do and do not qualify for the exemption, which may invite or require litigation and judicial review for resolution.

In addition, as guidance formal rule. it remains uncertain whether the agencies possess the authority to use the "Interpretive Rule" for implementing §404(f)(l)(a) , or whether the "Interpretive Rule" should be proposed as a If the EPA and the Corps intend the "Interpretive Rule" to be used in lieu of a formal rule, then the "Interpretive Rule" is subject to the Administrative Procedure Act 5 U.S.C. Subchapter I1 §553. If the "Interpretive Rule" is meant only as guidance, it does not appear to provide the intended certainty for the agriculture sector. (p. 2)

Agency Response: **Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

Louisiana Department of Agriculture & Forestry (Doc. #16601)

14.215 Our agricultural ditches could be potentially affected by this rule, especially under the current interpretation. Our fear is that agricultural ditches that could eventually drain into U.S. waters with "a significant nexus" to anything would be defined as waters of the U.S and under federal jurisdiction. This would limit the farmers ability to effectively manage the resource.

Several months ago, we partnered with the LSU AgCenter, to conduct two listening sessions and gather input from our agriculture and forestry producers of the possible impact that the proposed rule on their operations. Almost 250 producers attended the sessions and were informed of the 56 activities in the interpretive rule, that would be considered exempt if consistent with USDA NRCS standards. Although Congress exempted "normal" farming, ranching and silvicultural activities from the Clean Water Act, I along with other Louisiana producers expressed concerns that practices can change, and that the rule revisions could later restrict what they can do on their land, depending on the interpretation. (p. 1)

Agency Response: **See Agencies' Summary Response 14.2. and the Ditches Compendium. Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

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

14.216 While the Agencies' efforts to exempt certain water features and activities from CWA jurisdiction are noble, in many cases it has arguably led to erosion of exemptions we believe were already well established prior to this proposal. Through embodied in a separate document outside this proposed rule to define WOTUS, the Agencies' proposed Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) (Interpretive Rule") provides an excellent example of such unintended consequences. The effect of the proposed Interpretive Rule is to narrow the scope of agricultural activities exempt from CWA jurisdiction despite the Agencies' stated intent otherwise. We reiterate our request to withdraw the proposed Interpretive Rule and suggest that the exemptions for ditches and some other features proposed within the WOTUS rule suffer from the same unintended consequences without significant clarification. (p. 4)

Agency Response: **Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. The exemptions provided in the CWA remain unchanged by this rule.**

State of Oklahoma et al. (Doc. #16597)

14.217 Idaho believes the CWA's agricultural exemptions are appropriate and that the Proposed Rule should not alter or create uncertainty about such exemptions. While the agencies may intend to preserve these exemptions, the Proposed Rule and related Interpretive Rule Regarding the Applicability of Clean Water Act Section 404 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. Stated differently, the definition of "tributary" is broadened to such an extent in the Proposed Rule that the agricultural return flow exemptions may be rendered meaningless. In addition, the agricultural Interpretive Rule has created a significant amount of uncertainty concerning its possible implications for "normal farming, ranching, and silvicultural" activities. Any effort to revise the Interpretive Rule should be done in partnership with the states, particularly to determine what constitutes exempt "normal farming, ranching or silvicultural activities." (p. 4)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235. Additionally, the rule will not affect the exemptions provided for agricultural return flow in the CWA.

State of Nevada Department of Conservation et al (Doc. #16932)

14.218 The State also agrees with WSWC on agricultural exemptions. While we appreciate the intent of the Interpretive Rule to clarify exemptions, it resulted in confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions and their interactions with state water quality programs. Therefore the Proposed 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. 5-6)

Agency Response: Section 404(f) of the CWA is outside the scope of this rule and the rule does not changed it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.

Texas Department of Agriculture (Doc. #18854)

14.219 The proposed increase in jurisdiction will directly impact farming practices in Texas. Unnecessary regulations will restrict farmers from using or altering parts of their property for agricultural or even water conservation purposes, resulting in substantial economic loss. While the list of agricultural exemptions has been expanded, these exemptions are extremely narrow and only apply to the section 404 "dredge and fill" permit program. Additionally, your claims that the new rules would have little or even no effect on agriculture are not supported by the rule itself. For example, farmers and ranchers are provided no protection from enforcement over many of their standard farming practices, such as pesticide, fertilizer or soil amendment applications, as well as numerous other common farm activities. These agricultural exemptions are only warranted because they would otherwise be open to EPA scrutiny. This hostile directive threatens to eliminate traditional methods that have been successfully used on Texas farms and ranches for

decades without detriment to the quality of water available. Further, potentially innovative farming practices and conservation techniques would be stymied under the threat of increased EPA scrutiny. If there is too much unknown and fear about what is "acceptable," there is no incentive to explore and perfect new and better techniques. (p. 2)

Agency Response: **Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

Massachusetts Department of Environmental Protection (Doc. #19133)

14.220 Massachusetts seeks additional clarification of the new "Interpretive Rule .v. The "Interpretive Rule" defines a number of NRCs Conservation Practices as exempt from §404 permitting requirements. Further, it interprets the §404(f)(1) exemption for normal farming, silviculture, and ranching practices, including "upland soil and water conservation practices." A list of 56 specific NRCS Conservation Practice Standards sets out those initially approved as exempt under the new Interpretive Rule. These exempt practices have the potential to affect waters of the U.S. that extend well beyond the boundaries of the exempt agricultural practice. Additionally, these exemptions may complicate regulatory permitting and compliance at the state level and cause confusion for project proponents (e.g. a project exempt. under federal laws could be subject to oversight under state law).

Practices proposed as exempt that require further clarification, additional description or specific eligibility criteria or standards include, but are not limited to 1) Herbaceous weed-control, 2) Fence Installation, 3) Stream Habitat Improvement and Management, 4) Changes to Aquatic Organism Passage, 5) Maintenance of Grassed Waterways, and 6) Obstruction Removal. (p. 4)

Agency Response: **Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

Virginia Department of Agriculture and Consumer Services (Doc. #19590)

14.221 The EPA has stated that the proposed WOTUS rule provides greater clarity and certainty to farmers. However, by exempting 56 Natural Resource Conservation Service (NRCS) practices and a number of specific agricultural activities, the proposed rule actually creates more confusion by defining "normal farming, silviculture, or ranching" practices and listing only these 56 NRCS practices. Given that the current list of existing NRCS practices is greater than these 56 practices listed in the proposed rule, there is concern from agricultural producers and other stakeholders in Virginia that the NRCS practices not listed will be subject to federal permitting requirements. This may result in farmers installing fewer conservation measures at a time when Virginia farmers are under more scrutiny to meet nutrient and sediment reductions according to Virginia's Chesapeake Bay Total Maximum Daily Load Watershed Implementation Plan.

The proposed rule does not take into consideration the conservation practices that were installed without technical assistance or oversight from NRCS. This may inadvertently place NRCS staff in a regulatory role by having to certify if specific practices meet the current standards. It also places Virginia farmers at risk for implementing a functionally equivalent conservation measure without assistance from NRCS.

VDACS, through its oversight of Virginia's Agricultural Stewardship Act and administration of other state laws and regulations, strongly supports the stewardship of the Commonwealth's land and water resources. In fact, the agency believes that this stewardship is crucial for the longterm sustainability of agriculture in Virginia. However, it is the agency's view that voluntary conservation programs are the best avenue to achieve water quality goals. VDACS further believes that the oversight of non-navigable waters should remain the responsibility of state and local governments and that the federal government's role in this oversight should not be expanded as called for under the proposed rule. (p. 1-2)

Agency Response: **Section 404(f) of the CWA is outside the scope of this rule and is unchanged by it. Further as stated in the summary 14.2, the Interpretive Rule is outside the scope of this rule making and was withdrawn on January 29, 2015 as directed by Public Law No. 113-235.**

Lincoln County Conservation District, Washington (Doc. #4236.2)

14.222 The Lincoln County CD Board of Supervisors and many of the farmers and landowners living and working in WRIA 43 within the county do not readily agree with Crab Creek and its tributaries being included in the proposed definition of tributaries as "Waters of the United States." Because the water from Crab Creek in WRIA 43 does not flow into the Columbia River (a traditional navigable water) on any kind of a regular basis with significant flow volume and significant flow duration, it does not seem intrinsically appropriate for this stretch of Crab Creek or any of its tributaries or sub-tributaries to be categorized as "Waters of the United States." Most everybody would agree with defining Crab Creek and its tributaries as "Waters of the State", but not "Waters of the United States", which intrinsically refer more to the larger waters of more nationwide importance, including traditional navigable waterways, interstate waters, or territorial oceans. [...]

Crab Creek does NOT contribute flow that eventually makes it to the Columbia River on any type of a regular basis, flow or duration. A reasonable estimate is that Crab Creek has enough spring runoff flow to send any water all the way to Moses Lake and beyond on average only 4 out of every 10 years, which is less than 50 % of the time.

With numerous intermittent stretches and intermittent ponds/lakes around the channel of Crab Creek in the lower portions of WRIA 43 that are typically dry for more than half a year now days, it takes a lot of stream flow to rehydrate the stream channel and the adjacent ponds/lakes before runoff water even makes it all the way down through Brook Lake and under the bridge at Hwy 28 at Stratford. Runoff water from WRIA 43 needs to exit out of the watershed at Stratford before it has any reasonable chance of making it to Moses Lake and eventually to the Columbia River, a traditional navigable waterway.

The only time now days that water from Crab Creek in WRIA 43 ever makes it down to Moses Lake and beyond is during significant rainfall on snow on frozen ground or just rainfall on bare frozen ground events. It takes the runoff water from much of the upland cropland fields to provide the extra-ordinary high flow well above and beyond the OHWM level to send water down Crab Creek to make it all the way to Moses Lake and beyond. That high level of runoff flow rarely lasts more than a day or two at most locations, and thus is too brief to meet the regular OHWM duration requirements. In addition, the farthest downstream intermittent stretches of Crab Creek in WRIA 43 rarely ever flow for more than any 3 continuous months in of WRIA 43 for 3 to 5 years at a time.

During those limited and sporadic years when high flow runoff water does flow out of the bottom of the WRIA 43 watershed, it typically contains sediment and excess nutrients washed out from the upland cropland fields in the watershed, and it does create water quality issues for Crab Creek and its tributaries in WRIA 43 and in Moses Lake for that given year. But those runoff events do not occur on any kind of a regular basis, and much of the runoff sediment and nutrients has an ample opportunity to settle out along the 180 mile stretch of Crab Creek between the top of the WRIA 43 watershed and its confluence with the Columbia River at Schwana. One question that comes to mind is: What affect would any spring runoff flow from Crab Creek in WRIA 43 that might actually make it all the way to the confluence of the Columbia River at Schwana on a sporadic and irregular basis have on the very much larger Columbia River? The typical stream flows at Priest Rapids Dam downstream of Schwana range from 100,000 to 200,000 cfs. Many of landowners and farmers who live and work in WRIA 43 within Lincoln County do not readily believe that any relatively tiny amount of spring runoff water from Crab Creek in WRIA 43 that ever makes it to the confluence with the Columbia River would have a significant effect on the chemical, physical, and biological integrity of the water in the Columbia River at Schwana.

In summary, Crab Creek in WRIA 43 (with the usually dry stream reaches at the bottom of the watershed) currently acts like one of the non-navigable, non-relatively permanent tributaries described by Justice Scalia, whose flow is coming and going in intervals, is broken and fitful, does not flow continuously for at least 3 consecutive months every year into a traditional navigable water such as the Columbia River, and therefore is not intended to be categorically included under the definition of a tributary as "Waters of the United States."

If the proposed Lincoln County Passive Rehydration Project was ever fully funded and implemented, and water from Lake Roosevelt was pumped over the top of the WRIA 43 divide and into the upper reaches of one or more tributaries of Crab Creek, so that more stream reaches of Crab Creek had flowing water every year, especially the lower stream reaches of Crab Creek in WRIA 43, then the Lincoln County Conservation District and the local farmers and landowners would be more willing to accept Crab Creek in WRIA 43 as a "tributary" and "Waters of the United States," as the creek would be much more likely to be contributing flow to the Columbia River on a regular basis, with significant flow volume and significant flow duration. (p. 1-4)

Agency Response: **See Summary Agencies' Responses 14.1 and 14.3 and the Compendiums for Tributaries, Other Waters and Significant Nexus.**

14.223 Brook Lake just above Stratford at the bottom of WRIA 43 is scheduled to carry more Columbia Basin Irrigation Project (CBIP) water from Billy Clapp Reservoir down middle Crab Creek towards Moses Lake during the summer irrigation season sometime in the future. When this occurs, Brook Lake will have a somewhat higher lake level in late winter/early spring than it has now, and it will take less spring runoff water from Crab Creek in WRIA 43 to flow out of the bottom of the watershed. But any spring runoff water from the upper portions of WRIA 43 still needs to make it all the way down to Brook Lake, and this will still require extra ordinary high runoff to make it this far. For the last several years, the water level in Brook Lake has been down 5 to 10 ft. or more, and with the current water levels in the lake, it would take an exceptionally large runoff event for any water from Crab Creek in WRIA 43 to flow out from the bottom of the watershed. (p. 4-5)

Agency Response: See Summary Agencies' Responses 14.1 and the Compendiums for Other Waters and Significant Nexus.

Little Kanawha Conservation District (Doc. #4770)

14.224 Because of the proposed rule, farmers and other land owners will face extreme difficulties to ordinary land use activities such as fencing, spraying for weeds, plowing or even pulling weeds. The need to establish buffer zones around grass waterways, ephemeral washes and farm ditches could make farmlands a maze of intersecting "no farm zones" that could make farming impractical. (p. 1)

Agency Response: This rule does not affect any of the exemptions provided in the Clean Water Act for farming.

14.225 The farming exemptions in current law are important, but they have been very narrowly applied by the agencies and they will not protect farmers from the proposed "water" rule. It is the Board of Supervisors opinion that if farmlands are regulated as "waters," farming will be difficult, if not impossible. (p. 1)

Agency Response: This rule does not affect any of the exemptions provided in the Clean Water Act for farming.

County of El Dorado, California (Doc. #5483)

14.226 We support the continued exclusions for specified farming, silviculture, and ranching activities.

The County of El Dorado has robust farming and ranching sectors that would be negatively impacted by the additional regulatory burden of new federal Clean Water Act regulations. We are encouraged that the proposed rulemaking does not extend federal jurisdiction to previously excluded activities in this realm. (p. 2)

Agency Response: The rule does not have any effect on the exemptions provided in the CWA.

Sweetwater County Board of County Commissioners, Sweetwater County, Wyoming (Doc. #6863)

14.227 Even though the comment period regarding the interpretive rule related to agricultural practices has closed, Sweetwater County recommends that the EPA maintain its existing permit exemptions for farming and ranching practices, and recommends that the EPA remove the Interpretive Rule (IR) requirement that agricultural activities be in compliance with the National Resources Conservation Service (NRCS) conservation practice standards to qualify for exemptions under CWA Section 404(f)(I)(A).

Sweetwater County believes that requiring compliance with NRCS standards in order to qualify for Section 404(f)(I)(A) permitting exemptions is placing unnecessary new requirements upon fanners and ranchers. The county believes this is beyond the scope of authority of the EPA Interpretive Rule. Sweetwater County recommends that the Interpretive Rule should be withdrawn and that any new CWA rule should clearly exempt farm ponds, stock ponds, irrigation ditches and the maintenance of drainage ditches. (p. 2)

Agency Response: The rule does not have any effect on the exemptions provided in the CWA. As stated in the summary 14.2 of this section the Interpretive Rule was withdrawn.

White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936.1)

14.228 Requires NRCS Prescribed Grazing Plan to get "normal farming and ranching" exemption.

More time and expense for farmers and ranchers with little or no gain.

Costly federal intrusion into farming and ranching practices that necessarily vary a great deal.

Makes NRCS a regulatory compliance agency, therefore chilling landowner participation in conservation activities. (p. 2-3)

Agency Response: As stated in the summary 14.2 of this section the Interpretive Rule was withdrawn. The rule has no effect on the agricultural permitting exemptions provided in the CWA.

14.229 Experience clearly proves that stated intentions are irrelevant. Local governments, businesses, farmers, and ranchers must be able to operate without excessive federal burdens or uncertainty.

Normal farming activities that does not result in a point source discharge of pollutants Into waters of the U.S. should be exempt from having to obtain a permit.

The newly identified (56) established NRCS conservation practices implemented i n accordance with published standards are complimentary to all previous exemptions and all exemptions are not limited to just these (56) conditions .

It must be noted that grazing cattle on public or private lands that do not require an issued NR CS permit is considered normal ranching and farming practices. (p. 3)

Agency Response: **As stated in the summary 14.2 of this section the Interpretive Rule was withdrawn. The rule has no effect on the agricultural permitting exemptions provided in the CWA.**

Aurora Water (Doc. #8409)

14.230 Aurora Water adopts a best management practices approach in the protection of its watersheds, headwaters, stormwater retention areas and ditches. These maintenance activities can often be accomplished under an existing nationwide permit. Under the proposed rule, some of these conservation practices may require a full Section 404 permit, increasing costs and delaying or eliminating some maintenance and operations activities. In addition, Aurora Water works closely with federal, state and local agencies to improve the conditions of our watersheds.

Recommendation: New exemptions for activities related to stream and habitat improvements should be included in the rule, allowing a more immediate response to wildfires, floods and other natural disasters as an "urban corollary" to the similar agricultural best conservation practices exemptions. (p. 3)

Agency Response: **This is a definitional rule that does not establish regulatory requirements for stream and habitat improvement. 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.**

Scott County Soil and Water Conservation District (Doc. #8410)

14.231 Normal farming, silviculture, and ranching practices exempt in the Clean Water Act including plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products must be exempt in the definition of Waters of the U.S. Additionally, these exemptions must include upland soil and water conservation practices; agricultural stormwater discharges; return flows from irrigated agriculture; construction and maintenance of farm or stock ponds or irrigation ditches on dry land; maintenance of drainage ditches; and construction or maintenance of farm, forest, and temporary mining roads. (p. 1)

Agency Response: **Nothing in this rule changes the permitting exemptions provided in the CWA for agriculture or any of the other permit exemptions provided in section 404(f) and is outside the scope of this rule.**

14.232 It is important that the proposed rule provide greater clarity and certainty to farmers. It should avoid any economic burden on agriculture, encourage the use of voluntary conservation practices, and be consistent with and support existing USDA programs.

It should not hamper voluntary conservation practices especially those not tied to government cost share or NRCS approval. Producers should not need to notify regulatory agencies when they self-implement conservation practices. Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application. (p. 1)

Agency Response: **See Agencies' Summary Response 14.2. The Interpretive Rule was withdrawn and is outside the scope of this rule.**

14.233 We are concerned by provisions in the Interim Rule published and immediately effective in April that exempts a limited number of NRCS defined normal farming practices definition. The Clean Water Act recognizes that normal farming practices are not confined to specific items. Soil and Water Conservation Districts working with NRCS recognizes that normal farming practices must be flexible and based on changing farming methods and technology and on local conditions and traditions.

Conservation efforts will be hurt if an already stretched agency takes on additional paperwork and spot checking because of this rule, and producers will be skeptical of working with NRCS in the future if they view them as overseers rather than implementers of conservation program delivery. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

Northeastern Soil & Water Conservation District (Doc. #8539.1)

14.234 The interpretative rule states that a farmer enacting on of the conservation practices approved under the interpretive rule does not have to have prior approval from the Corps nor the EPA, but the farmer must comply with National Resources Conservation Services (NRCS) technical standards. The rule does not make it clear which agency will ensure that farming practices are in compliance nor what would happen if a farmer is unknowingly not in compliance. If they are unknowingly not in compliance with NRCS standards, we believe that agricultural producers would be open to citizen lawsuits under the Clean Water Act. The interpretative rule leaves the agricultural producers of our great country in more regulatory uncertainty. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

14.235 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: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

14.236 Northeastern SWCD works hand -in-hand with the NRCS here in our district. We fear that our NRCS friends will no longer be in control of the conservation practices they develop. The last paragraph of the interpretative rule seems to indicate that the EPA and

the Army Corps of Engineers will have significant input, and perhaps veto power, over the conservation practices. The NSWCD and the NRCS have a long history of on-the-ground work with our local farmers and ranchers. We understand the challenges they face and the practices of farming and ranching. Our sister agency, the NRCS, is in the business of helping agricultural producers with the implementation of on-the-ground conservation practices. The EPA and Corps do not have agronomists, horticulturalists, or range scientists on staff like the NRCS; therefore we are concerned that the two agencies mentioned will be directing how farming and ranching activities are done. How are they to make educated decisions regarding conservation practices that are unique to certain areas of the country? Many of at the NSWCD are farmers and ranchers ourselves and are passionate about conserving our district for future generations. We believe the development and modification of conservation practices should remain within the prevue of the experts at the NRCS. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

14.237 The interpretive rule states that exempted conservation practices will be reviewed on an annual basis. This is unnecessary as the implementation of conservation practices involves multi-year projects; and we are concerned that a farmer or rancher who has enacted or is in the process of enacting a practice will suddenly be left in a state of limbo if that practice is removed from the approved list. A process for dealing with this situation should be developed and added to the rule. Our last concern is the interpretive rule states that only practices performed on an "established (i.e. ongoing) farming, silviculture, or ranching operation" are eligible for exemption. This is contrary to many policies of the USDA, which aim to provide incentives to the young people to get involved in agriculture, and could jeopardize the future of farming. The increasing average age of farmers and ranchers not only in the Northeastern SWCD but in the country in general and the lack of recruitment of younger individuals into fields of Agriculture is a major concern of the USDA and the NSWCD. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

Dayton Valley Conservation District (Doc. #10198)

14.238 We are also concerned that the proposed rule could have a huge impact on agricultural users in the watershed. Most of the agricultural land in the watershed is located near "water of the U.S." Although normal farming practices are exempt from permitting under the proposed rule, this would not stop third parties from raising the jurisdictional question in litigation, creating uncertainty and instability for the farming community. (p. 2)

Agency Response: **See Agencies' Summary Responses 14.2 and 14.2.2. For the reasons stated in this subsection summary, the agencies do not feel that this rule will have a negative effect on agriculture.**

Harrison County Board of Supervisors, Logan, IA (Doc. #10969)

14.239 The cumbersome permit process will discourage conservation practices due to the cost of paperwork and loss of time. It takes control of local land use decisions out of the hands of the landowners (p. 1)

Agency Response: This rule does not change the process for permitting as provided in the regulations and is outside the scope of the rule.

Pike County Soil and Water Conservation District, Pittsfield, Illinois (Doc. #12748)

14.240 It is important that the proposed rule provide greater clarity and certainty to farmers. It should avoid any economic burden on agriculture, encourage the use of voluntary conservation practices, and be consistent with and support existing USDA programs. It should not hamper voluntary conservation practices especially those not tied to government cost share or NRCS approval. Producers should not need to notify regulatory agencies when they self-implement conservation practices. Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application (p. 1)

Agency Response: See Agencies' Summary Responses 14.2. and 14.2.2.

14.241 We are concerned by provisions in the Interim Rule published and immediately effective in April that exempts a limited number of NRCS defined normal farming practices definition. The Clean Water Act recognizes that normal farming practices are not confined to specific items. Soil and Water Conservation Districts working with NRCS recognizes that normal farming practices must be flexible and based on changing farming methods and technology and on local conditions and traditions. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.

Palm Beach County MS4 NPDES (Doc. #13218)

14.242 An example of the reduction in the MS4 area is provided for two of our permittees, the lead permittee, Northern Palm Beach County Improvement District, and one of the largest municipalities in Palm Beach County, Village of Wellington. As shown in the attachments, Northern Palm Beach County Improvements District's MS4 area is reduced from 36,000 acres to less than 1,000 acres (a 97% reduction) and Village of Wellington is reduced from 20,000 acres to 6,000 acres (a 70% reduction). This reduction severely restricts the MS4s ability to implement additional stormwater management programs to meet water quality requirements, particularly any implementation of TMDLs. Surely, it is not the intent of EPA to reduce the MS4 area and Clean Water Act requirement to control the discharge of pollutants to the maximum extent practical. (p. 2)

Agency Response: See Agencies' Summary Response 14.1. Certain stormwater control features are excluded from the definition of "waters of the United States". See the Features and Waters Not Jurisdictional Compendium for additional discussion on this exclusion.

Carson Water Subconservancy District, Carson City, NV (Doc. #13573)

14.243 We are also concerned that the proposed rule could have a huge impact on agricultural users in the watershed. Most of the agricultural land in the watershed is located near "Waters of the US." Although normal farming practices are exempted from permitting under the proposed rule, this would not stop third parties from raising the jurisdictional question in litigation, creating uncertainty and instability for the farming community. (p. 3)

Agency Response: See Summary Agencies' Response 14.2. As stated in the summary, the agencies do not think that there will be a negative effect on agriculture. The rule does not change any of the enforcement processes or rights for citizen suits provided in the CWA and are outside the scope the rule.

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

14.244 Northeastern SWCD works hand —in-hand with the NRCS here in our district. We fear that our NRCS friends will no longer be in control of the conservation practices they develop. The last paragraph of the interpretative rule seems to indicate that the EPA and the Army Corps of Engineers will have significant input, and perhaps veto power, over the conservation practices. The NSWCD and the NRCS have a long history of on-the-ground work with our local farmers and ranchers. We understand the challenges they face and the practices of farming and ranching. Our sister agency, the NRCS, is in the business of helping agricultural producers with the implementation of on-the-ground conservation practices. The EPA and Corps do not have agronomists, horticulturalists, or range scientists on staff like the NRCS; therefore we are concerned that the two agencies mentioned will be directing how farming and ranching activities are done. How are they to make educated decisions regarding conservation practices that are unique to certain areas of the country? Many of at the NSWCD are farmers and ranchers ourselves and are passionate about conserving our district for future generations. We believe the development and modification of conservation practices should remain within tne prevue of the experts at the NRCS. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule. Further, because nothing in the rule effects any NRCS program, it is outside the scope of this rule.

Pocahontas County, IA (Doc. #13666)

14.245 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. However, 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 on how the rule may adversely impact owners of wetlands hydro-logically altered to allow conversion to crop production and other beneficial uses. (p. 2)

Agency Response: **The agencies made no changes to the treatment of Prior Converted Crop land and the exclusion was maintained in the final rule. See Features and Waters Not Jurisdictional Compendium. Where a wetland or aquatic resource subject to normal ongoing farming was not exempt and is found to have a significant nexus through a case-specific analysis, the permitting requirements of activities to repair or enhance subsurface drainage are unchanged by this rule and are outside the scope of the rule making.**

14.246 Concern about lack of coordination with the USDA/NRCS: We are dismayed that the USEPA has not stated in the proposed rule that the certified wetland determinations of the NRCS under the farm program will be the same upon which the USEPA will assert jurisdiction in regularly cropped fields. How then will the USEPA determine and publish the jurisdictional reach. It is baffling that in this rulemaking process the USEPA has gone to great lengths to declare that a farmer may place an NRCS-approved fence post in a wetland without first securing a Clean Water Act permit, but it will not reveal in the proposed rule if the NRCS-certified wetland determinations will be accepted. (p. 2-3)

Agency Response: **The rule has not changed the Corps and NCRS 2005 guidance memorandum on conducting wetland determinations for the Food Security Act and the Clean Water Act. http://www.usace.army.mil/Portals/2/docs/civilworks/mous/foodsecurity_cleanwateract.pdf. Nothing in the rule changes the process or requirements for obtaining a permit for a discharge of dredged or fill material and therefore they are outside the scope of this rule.**

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

14.247 Concern about lack of coordination with the USDA/NRCS. We are dismayed that the USEPA has not stated in the proposed rule that the certified wetland determinations of the NRCS under the farm program will be the same upon which the USEPA will assert jurisdiction in regularly cropped fields. How then will the USEPA determine and publish the jurisdictional reach. It is baffling that in this rulemaking process the USEPA has gone to great lengths to declare that a farmer may place an NRCS-approved fence post in a wetland without first securing a Clean Water Act permit, but it will not reveal in the proposed rule if the NRCS-certified wetland determinations will be accepted. (p. 2)

Agency Response: **See response immediately above.**

Mesa Underground Water Conservation District (Doc. #14310)

14.248 NRCS has always been a friend of agriculture and we are afraid that the Interpretive Rules will cause that relation to change as it possibly infringes upon private property rights, impairing land management activities and agriculture production. We urge the withdrawal of the Interpretive Rules and the Memorandum of Understanding with the NRCS. We are most fearful of the Interpretive Rules that will redefine "significant nexus". It seems apparent that the gullies, washes, and playa lakes will be considered, even though Dawson County is over 500 miles from the Gulf Coast. Please reconsider issuing these Interpretive Rules. (p. 1-2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule has been withdrawn. See also Agencies' Summary Response 14.1 and Other Waters and Significant Nexus Compendiums.**

Delta Board of County Commissioners (Doc. #14405)

14.249 Exclusions and Exemptions for Agriculture are also a grave concern for Delta BoCC. Nor -mal farming, ranching, and silviculture activities do not need a permit as long as they follow the Best Management Practices (BMPs) allowed for by the Natural Resource Conservation Service (NRCS). This creates a federal government agency that was never intended to be regulatory to be become the agriculture police to determine compliance. The NRCS continues to see reductions in work force and funding. To add this responsibility to their workload delays all projects even more. In many Delta County projects, delays are noted to be two years or more. Irrigation and food production in the arid west cannot wait a determination of BMPs. Again, this is an overreach of the Proposed Rule. (p. 5-6)

Agency Response: **See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule. Also as stated in the summary, the agencies do not believe that there will be a negative effect on agriculture.**

Maryland Association of Soil Conservation Districts (Doc. #14932)

14.250 MASCD appreciates EPA's efforts to exempt "normal farming practices" but we do not feel as though the 56 NRCS standard practice codes in the interpretive rule are exhaustive. Also, using NRCS practice codes in problematic as Maryland has many farmers voluntarily installing conservation practices which may not meet specifications, but still provide a water quality benefit. These practices are being called "Resource Improvements" and have recently been approved by the Chesapeake Bay Program for counting and inclusion in the Chesapeake Bay Model. (p. 2)

Agency Response: **See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.**

Klamath Drainage District (Doc. #15139)

14.251 Further, and despite the assurances that the proposed Rule does not alter existing regulatory exemptions and exclusions, including those that apply to agricultural activities, the proposed Rule when coupled with the Interpretive Rule tends to threaten normal on-going and established farming practices that have previously been exempt and to force compliance with the farming and conservation technical standards of the NRCS, which have previously been voluntary. The Interpretive Rule as it may be applied in concert with the proposed revisions of the regulatory definition of "waters of the United States" and the draft technical report on connectivity, appears to narrow rather than retain the current exemption from regulation by limiting it to only those enumerated NRCS-compliant practices. In effect, it will require farmers and ranchers to conduct their routine practices in conformance with otherwise voluntary NRCS standards or forego such

practices or seek permits for otherwise normal, lawful and presently excluded agricultural activities.

The NRCS standards are very detailed, specific, and often substantially more expensive to implement than methods currently employed by farmers, which are no less effective. With the Interpretive Rule, those relying on a section 404 exemption are not provided any flexibility in how they choose to conduct normal farming operations. Additionally, the 56 practices listed in the Interpretive Rule are already normal farming activities, and would therefore already be exempted without any detailed conservation standards. The potential overreach is alarming. (p. 3)

Agency Response: See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.

Central Platte Natural Resources District (Doc. #15477)

14.252 Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly or through another water to an interstate water, interstate wetlands, or territorial sea. No meaningful exemption from this definition is provided, and no case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means any hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a "tributary."

In Nebraska's large river valleys, it is impossible to develop commercially-viable land, or implement flood control, irrigation, or drainage projects without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.

For all practical purposes, the CPNRDs flood control, drainage, and irrigation projects would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant. Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the CWA. The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means. (p. 4)

Agency Response: See Agencies' Summary Response 14.1 and Compendiums for Tributaries, Ditches, Other Waters, and Legal Analysis.

Idaho Association of Counties (Doc. #15525)

14.253 [T]he proposed regulations regarding "tributaries" need clear limitations. The word "tributaries" appears in the definition of WOTUS in proposed 40 C.F.R. 230.3(s)(5), and then "tributaries" itself is defined in proposed 40 C.F.R. 230.3(u)(5). Although the Counties sincerely appreciate the attempt to define a "tributary," the proposed definition in 40 C.F.R. 230.3(u)(5) could justify the federal regulation of most if not all irrigation

ditches in Idaho, as well as any water leading into those ditches. The potential far-reaching effect of the definition of "tributaries" is further exacerbated by the proposed definition in 40 C.F.R. 230.3(s)(5), which includes all waters and wetlands adjacent to tributaries. The proposed language here could easily create uncertainty regarding the Clean Water Act's ("CWA") agricultural exemption, which could in turn have very costly implications. As such, if the proposed definition is not withdrawn as requested by Governor Otter, then the Counties suggest inclusion of agricultural exemptions in 40 C.F.R. 230.3(t). (p. 3)

Agency Response: **See Compendiums for Tributaries, Adjacent Waters, and Features and Waters Not Jurisdictional. The final rule does provide additional limits on which waters can be determined to be adjacent water. Specifically, "adjacent" waters do not include waters that are subject to established, normal farming, silviculture, and ranching activities (33 U.S.C. § 1344(f)(1)). The rule also does not change any of the exemptions provided in the Clean Water Act for agriculture and those exemptions are outside the scope of this rule.**

Ouray County Board of County Commissioners (Doc. #15622)

14.254 A third common issue in Colorado is when are ephemeral washes considered to be tributaries? How is that proven? In the case of the Colorado Plateau country that lies in Eastern Utah and Western Colorado, County and public lands agency roads may cross small swales (4-6" deep) that may carry water short distances a few times a year, so sparse, there is no vegetative margins or contrast with the adjacent upland. These are remote areas, often rocky and barren. The final Definition needs to be able to accommodate that these features are not Waters of the U.S. without the burden of proof of paying an observer to document with direct observation how far the water might flow in a rare precipitation event before completely disappearing underground. The West is famous for flash floods, some may once in a great while make it to a perennial tributary and many will not. But the burden of proof in the past was such that it was cheaper for a county road and bridge department to treat them as ephemeral tributaries than to try to accumulate empirical scientific proof that they were not. If there is no contrast in soil/vegetation/persistent hydrological conditions -- can they be considered non-Waters of the U.S. under the proposed new Definition?

These types of situations are not uncommon in Western Colorado. Which is why it seems very difficult, even though there may be regional guidance, to create a nationwide definition for Waters of the U.S. that fits all conditions, and does not over-regulate or under-protect. Will that single definition, as proposed, result in better outcomes for both the regulated community and functional natural ecosystems being protected? (p. 2)

Agency Response: **See Agency Summary response 14.1 and the Compendiums for Tributaries, Other Waters, and Features and Waters Not Jurisdictional. The rule excludes erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of "tributary". The agencies believe that, given the wide geologic, hydrologic, and biologic variability across the country, any attempt to introduce regional approaches in the final rule would cause confusion and detract from the agencies' goal of providing clarity. Nevertheless, the final rule takes into account regional variation in a number of ways.**

14.255 Will discharges from natural mineralized hot springs put to beneficial use become regulated as Waters of the U.S. or subject to water quality standards? From my County Commissioner perspective, Ouray County is blessed with several natural and mineral laden hot springs. These are related to 20-30 million year-old volcanism and bodies of magma that circulated hydrothermal fluids through zones of weakness. The heat source is still cooling and some of the hot springs are developed into hotel soaking pools, vapor caves, and facilities open to the public for recreation. The largest is the City of Ouray municipal hot springs pool and next is the privately-owned, open-to-the-public Orvis Hot Springs. The proposed definition should not burden these natural hot springs, which have flowed naturally toward the Uncompahgre River and its tributaries, with additional regulations or burdens because of their naturally mineral-rich thermal waters. These hot springs and vapor caves (which have a small flow) are vital to the recreation-tourism economy and to the quality of life of the permanent residents of Ouray County. I cannot over-state how important this issue is for Ouray County and other areas having natural hot springs. It would seem that this issue could also have significant effects on places like Yellowstone National Park and its nearby lodges which use natural thermal waters in their pools or spas. (p. 3)

Agency Response: **See Agencies' Summary Response 14.1. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. There is not enough information in the comment to determine whether the springs would be covered waters. See Compendiums for Adjacent Waters and Other Waters for additional information. Springs could be either adjacent waters or waters subject to a case specific evaluation under (a)(8) if they meet the provisions set forth in the rule.**

Redwood-Cottonwood Rivers Control Area (Doc. #4232)

14.256 The primary concern of RCRCA with the Interpretive Rule is that the list of NRCS conservation practices is not inclusive of all practices which should be exempt from Section 404(f)(1)(A) permitting. More specifically, NRCS practices of 378-pond, 410-grade stabilization structure, 600-terrace, and 638-water and sediment control basin (WSCB) must be included on this list. Given the unique topography of southwestern Minnesota, these additional practices are not only considered "normal farming..." but a very necessary part to farming operations. The majority of projects undertaken by RCRCA and the member soil and water conservation districts involve the installation of 410-grade stabilization structures and 638-water and sediment control basins. Without these projects, soil losses are tremendous.

The justification of need for ponds, grade stabilizations, terraces and WSCBs, stems from the Minnesota Pollution Control Agency's (MPCA) Sediment Reduction Strategy for the Minnesota River watershed, as the Redwood and Cottonwood Rivers drain directly to it. The Sediment Reduction Strategy sets reduction goals of 25% by the year 2020, 50% by year 2030, with an 80-90% overall reduction needed to meet the Minnesota River TMDL. Best Management Practices to retain waters, like ponds, grade stabilizations, terraces and WSCBs, are being promoted by the MPCA to help achieve these goals. If these common standard practices fall under the jurisdiction of the US Army Corps of Engineers,

progress will not be made within the timeframes needed. The St. Paul District recently 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, two to eight months for permit review by the Corps of Engineer is not only unacceptable, but not necessary for these standard, historically implemented NRCS practices that are vital to our landscape. (p. 2)

Agency Response: See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.

Conservation Districts of Iowa (Doc. #6919.1)

14.257 Comments on the Interpretive Rule [...]. We are engaged in the conversation about the rule with our constituents and partners. We feel an extension of the comment period is necessary to allow for continued dialogue. (p. 1)

Agency Response: See summary response 14.2 that the Interpretive Rule has been withdrawn.

National Association of Conservation Districts (Doc. #12349)

14.258 As you are aware, NACD submitted comments on June 13, 2014[49] on the IR Regarding Applicability of the Exemption from Permitting under section 404(f)(l)(A).[50] We'd like to reiterate several facts stated in those comments: 1) the IR is not meant to put the USDA Natural Resources Conservation Service (NRCS) in a compliance or regulatory role; 2) the list of exempted NRCS conservation practice standards is not exhaustive of conservation practices that are exempt from Section 404(f)(1)(A) permitting; 3) this list is not defining "normal farming, silviculture, or ranching" activities but falls under the definition of a category of practices now clearly exempted; and, 4) producers will not need to notify regulatory agencies when they self-implement conservation practices in "Waters of the United States" (WOTUS). Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application.

Although EPA intended for the IR to offer guidance to farmers with additional protections for implementing conservation practices, we still have concerns. The requirement for practices to conform to NRCS standards does not protect functionally equivalent practices that serve the same purpose without meeting NRCS standards. While the guidance imposes no new legal requirements on producers, the creation of a bright-line test could potentially increase their exposure to litigious groups and individuals. Based on your MOU and IR, the term "based on NRCS standards" should be taken in the

[49] NACD comments on the Interpretive Rule (June 13, 2014) http://www.nacdnet.org/dmdocuments/NACD-Comment-Letter-IR-6-13-14.pdf.
[50] EPA and USACE Interpretive Rule Regarding the Applicability of CWA Section 404(f)1(A)" (March 25, 2014) http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf.

spirit of the intent of NRCS engagement in the CWA where there is no statutory obligation to do so, in line with the flexibility highlighted in the IR. This will also provide for functionally equivalent conservation structures and practices, and for generally accepted local conservation standards, in addition to the practices that readily fall under the statutory exemption in Section 404(f)(1)(A). NACD promotes a variety of successful locally-led conservation practices— taking into account that not all were developed with direct NRCS supervision— based upon their impact on sustainable and economical food, fuel and fiber production, flooding and commerce, and landscape protection.

While suggested changes are being accepted for CWA definitions, NACD's policy urges EPA and USACE to consider several revisions to section 404(f)(2). The value of food production in non-tidal aquatic environments should be recognized, while establishing criteria and BMPs that provide reasonable protection of the waters of the U.S. We also want to ensure that the definition of agriculture, used by USACE and EPA, encompasses aquaculture, horticulture and all livestock-related operations in addition to food, fuel and fiber-producing operations. We support action by USACE to issue a regulatory guidance letter or nationwide permit (NWP) so that 404(f)(2) becomes less burdensome for agricultural activities. We also ask that USACE establish criteria for an NWP for farm ponds in, and associated with, perennial streams, as well as an NWP for construction and maintenance of ponds and related structures and facilities for aquaculture in non-tidal waters. A follow-up letter will be sent after the close of the comment period to re-state our policy-backed requests related to 404(f)(2) permitting.

NACD appreciates that EPA recognizes the importance of NRCS practices that improve water quality by including the list of exempt practices in the IR. We believe there is a simple solution to make it more inclusive and less confusing, while serving to increase the adoption of practices that improve water quality. As stated earlier, the IR's list of 56 NRCS practices exempt from permitting is not exhaustive of NRCS practices that improve water quality. The fact that some are not listed creates concerns that the use of innovative practices and new technologies could be stymied by the potential of an additional permitting process. Producers and landowners will be much more likely to engage in the use of new and innovative conservation practices—thus getting more conservation on the ground-- if the disincentive of a potential permitting process is eliminated. NACD suggests that the IR be changed so that all NRCS upland conservation practices are approved by EPA and USACE. A new list should then be developed containing only those NRCS conservation practices requiring a 404(f)(1)(A) permit. This would substantially reduce confusion amongst cooperators, and promote greater implementation of water related conservation practices on the land. (p. 2-3)

Agency Response: **See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.**

14.259 In addition to exposure of private landowners to the full force of CWA enforcement, expanded CWA jurisdiction could potentially lead to a reduction in the implementation of conservation practices on the ground; landowners and users may avoid the use of current, voluntary, incentive-based practices on their land, out of fear of burdensome regulation. (p. 8)

Agency Response: **See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.**

14.260 Conservation districts and their customers use the §319 NPS Program to increase the utilization of agricultural best management practices ("BMPs") 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. The impacts of this rule and its costs along with the three percent expansion of jurisdiction that the Congressional Research Service[51] acknowledges but that is highly disputed by professionals,[52] will be best understood in light of less costly alternatives to achieving water quality, such as voluntary efforts and ecosystem service trading schemes. (p. 8)

Agency Response: **See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.**

Coalition of Local Governments (Doc. #15516)

14.261 [T]his interpretative rule omits over 100 conservation practices standards from inclusion into the Section 404 exemption and provides little relief to livestock operators because these standards do not apply to many of the necessary activities of a ranching operation. For example, it would not apply to the building of livestock shelter structures to protect livestock from the excessive weather conditions in the arid west, to the development of ponds and other water structures that provide water to livestock and wildlife when no other sources are available, or to the establishment of trails to facilitate livestock movements. It appears that these practices will therefore require a section 404 permit if there is any possibility of discharge into "waters of the United States."

The conservation practices are also not self-implementing because before being qualified for the exemption, a farmer or rancher must show that it is in compliance with the NRCS standards that were once fully voluntary. The rule currently exempts those discharges that relate to "normal farming, silviculture and ranching activities" that are part of an established or ongoing operation. 33 U.S.C. §1344(f)(1)(A); 40 C.F.R. §232.2(c)(1); 33 C.F.R. §323.4(a)(1). No other obligations are required pursuant to the statute. Imposing new standards before an activity qualifies for the exemption places new obligations on farmers and ranchers.

Section 404 exemptions don't apply to other permitted requirements such as Section 402 permits. Expanding the definition of "waters of the United States" will also expand those waters subject to the Section 402 permit. They also do not apply to new farms, farms where farming had ceased and later resumed, or farms that have switched from one crop to another. 40 C.F.R. §232.3(c)(1)(ii)(A), (B); United States v. Akers, 785 F.2d 814, 819-

[51] Claudia Copland, CRS Report, "EPA and the Army Corps' Proposed Rule to Define 'Waters of the United States'" (March 27, 2014).
[52] David Sunding, "Review of the 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States"(May 15, 2014) http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule/.

20 (9 Cir. 1986). Expanding the definition of "waters of the United States" will therefore impact new and modified farming operations by subjecting more activities to Section 404 permitting. (p. 16-17)

Agency Response: See summary response 14.2 that the Interpretive Rule has been withdrawn and the permit exemptions provided in the CWA are unchanged and outside the scope of the rule.

Washington State Water Resources Association (Doc. #16543)

14.262 Concern from NWRA's agricultural members is not solely limited to water transportation infrastructure. There is also great concern about the proposed rule's impact on general agricultural and conservation practices. As an example, gradient terraces are utilized in many NWRA member states to help reduce runoff over sloped land. This helps reduce erosion, retain soil and aid in water conservation efforts. It is also a practice that the EPA cites as a best practice for stormwater management. However, activities associated with the use of this practice have not received a specific exemption to the CWA. This creates ambiguity over whether this "best practice" is now subject to the Agencies' jurisdiction.

If the installation and maintenance of gradient terraces becomes subject to the CWA, it will have an adverse impact on many water users and could actually hinder voluntary efforts to improve water quality. In Kansas, for example, there are some 290,000 miles of terraces that protect over 9 million acres of land. According to the Kansas Governor's office this effort represents over $1.9 billion dollars invested by landowners and government agencies in this conservation effort. If this practice now falls under the jurisdiction of the CWA it could inadvertently reduce the number of agricultural producers that engage in this and similar conservation practices. (p. 11)

Agency Response: The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.263 To address the concerns of water users outlined in this section the Agencies should: [...] Further clarify and expand various agricultural conservation practices that are exempt from CWA jurisdiction. (p. 14)

Agency Response: The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

South Kansas Groundwater Management District No. 3 (Doc. #16465)

14.264 To address the issues identified in this letter the Federal Agencies should: [...] Further clarify and expand various agricultural conservation practices that are exempt from CWA jurisdiction. (p. 2)

Agency Response: The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Brady Township Supervisors, Clearfield County, Pennsylvania (Doc. #16480)

14.265 The CWA itself contains broad exemptions from regulation for the agricultural sector. Farmers 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 that these exemptions would be carried forward under the proposed rule and issued an "interpretive rule" to explain dredge-and-fill exemptions for normal farming 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 USDANRCS 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 practices important to the balance of productive farms and clean water.

We believe the EPA should withdraw the interpretive rule and collaborate with the agricultural sector to ensure that all normal farming practices, including USDA-NRCS practices continue, to be exempt from CWA regulation. (p. 4)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Washington State Water Resources Association (Doc. #16583)

14.266 A specific concern on the Interpretive Rule that we would like to make special note within this letter, pertains to the Exemption from Permitting under section 404(f}(l)(A). The listing of 56 Natural Resource Conservation Service (NRCS) conservation practices exempt from permitting is not a complete list of NRCS practices that improve water quality. This list has created the assumption that other conservation practices outside of the list and new innovative technologies would potentially have to go through the permitting process. Conservation practices have a much better chance of being implemented by producers and landowners if the disincentive of a potential permitting process is eliminated. We stand with NACD's suggested approach to change the interpretive rule to state that all NRCS upland conservation practices are approved by EPA and USAGE, with a new list developed for only those NRCS conservation practices requiring a permit. Regulations define what cannot be done, rather than what can be done and we believe including a list of conservation practices requiring a permit would reduce confusion amongst cooperators and promote more water quality-friendly conservation practices being implemented on the land. (p. 1-2)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

KS Conservation District (Doc. #16858)

14.267 The District Board is opposed to the rule as currently written, and requests that all conservation practices be exempt from additional permitting requirements. (p. 1)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Cascade County Commissioner (Doc. #16904)

14.268 It would be helpful to clarify whether conservation practices of the Natural Resources Conservation Service (NRCS) are considered "normal farming practices" and exempt from CWA permitting requirements. It would also be helpful to identify how newly identified NRCS practices will be handled. Will specific NRCS practices considered exempt be listed within the rule or noted on a website for future reference? The rulemaking should consider a methodology for updating a list of exempt NRCS practices as new farming techniques are identified and implemented under NRCS recommendation. (p. 2)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Central Utah Water Conservancy District (Doc. #17024)

14.269 [D]espite the assurances that proposed rule does not alter existing regulatory exemptions and exclusions, including those that apply to agricultural activities, the proposed rule when coupled with the Interpretive Rule tends to threaten normal on-going and established farming practices that have previously been exempt and force compliance with the farming and conservation technical standards of the NRCS, that have previously been voluntary. The Interpretive Rule as it may be applied in concert with the proposed revisions of the regulatory definition of "waters of the United States" and the draft technical report on connectivity, appears to narrow rather than retain the current exemption from regulation by limiting it to only those enumerated NRCS-compliant practices. In effect, it will require farmers and ranchers to conduct their routine practices in conformance with otherwise voluntary NRCS standards or forego such practices or seek permits for otherwise normal, lawful and presently excluded agricultural activities.

The NRCS standards are very detailed, specific, and often substantially more expensive to implement than methods currently employed by farmers, which are no less effective. With the Interpretive Rule, those relying on a section 404 exemption are not provided any flexibility in how they choose to conduct normal farming operations. Additionally, the 56 practices listed in the Interpretive Rule are already normal farming activities, and would therefore already be exempted without any detailed conservation standards. The potential overreach is alarming. (p. 3)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Montana Association of Conservation Districts (Doc. #18628)

14.270 (Public input into NRCS standards changes)-NRCS practices can change without public input. Should an administration or science review change these, we encourage opening

this process up to public comment and input. Otherwise, this broadens the requirements placed on individual landowners without providing the opportunity for addressing their concerns. This could result in greater costs to landowners if NRCS practice specifications drastically change in the future. In addition, we request that there be an easy entry lane for additional NRCS practices that come on line through continued BMP daylighting. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.271 (Does including 56 specific practices limit what is considered NPS?) Currently conservation districts in Montana are working hard to limit non-point source pollution. Does including 56 specific NRCS practices in addition to a blanket statement that silviculture and farming practices are included in exemptions from the "Waters of the United States" alter the nature of voluntary implementation of BMPs for non-point source pollution under the Clean Water Act? (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Nevada County Board of Supervisors, State of California (Doc. #18894)

14.272 Under an interpretive guidance rule, farmers and ranchers would be exempt from Section 404 permits so long as any of 56 listed practices comply with Natural Resource Conservation Service (NCRS) standards, despite the fact that those practices have qualified as "normal" fanning, ranching and silviculture activities for 37 years. This interpretive rule narrows how the exemption is applied and increases farmers' liability by requiring that farmers comply with NRCS conservation standards, which were previously voluntary, in order to be exempt from Section 404 permitting. While we recognize the agencies' attempt to address farmers' concerns through the guidance document and Memorandum of Understanding with NRCS, this still requires farmers to spend more time on seeking exemptions than on the core practice of farming. (p. 2-3)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.273 The newly proposed interpretation of "normal farming and ranching" would apply only to farms and ranches that EPA determines to be "established" and "ongoing"-not newer or expanded farms and ranches. This new layer of bureaucracy adds to the list of reasons why small family farms are disappearing from the landscape, and not enough young people are choosing careers in farming and ranching. (p. 3)

Agency Response: The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making See summary response below for section 14.2.2 Ongoing Operations for a discussion.

Pitkin County Colorado Board of County Commissioners (Doc. #18921)

14.274 Pitkin County agrees with the continuation of the agricultural use exclusion. Exemptions have historically been applied by the Agencies for the agricultural drainage ditches and irrigation canals and the continuation of this interpretation needs to be made overtly clear in the rule. The use of the term "normal farming" is not self-explanatory. Farming, ranching, and silviculture are terms that even of themselves require specific definition. Most states deal with these terms in the area of property taxation. The addition of the modifier normal does not assist but only confuses what this activity might be construed to include. It should be made clear that all activities associated with any agricultural operation are exempt from the application of the Clean Water Act. These activities should specifically include return flows from agricultural irrigation activities. The exclusion should be premised upon an exclusive purpose of the infrastructure to service agricultural activities. The agricultural activities should not be a minor or merely contributing use of water supply infrastructure, but the defining application. (p. 3)

Agencies' Response: See summary response 14.2 Interpretive Rule.

Waters Advocacy Coalition (Doc. #0851)

14.275 At the same time that members of the public are asked to comment on the proposed rule to define "waters of the United States," the agencies are also seeking comment on their Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404(f)(1)(A) to Certain Agricultural Conservation Practices. Many of the undersigned organizations are part of the agricultural community and are confused by the potential implications of the Interpretive Rule. It is unduly burdensome for these organizations to have to respond to two such complex and interdependent proposals within such a short time frame. Additional time is warranted to allow for the public to meaningfully respond to both rules. (p. 4)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.

New Mexico Association of Commerce and Industry (Doc. #5610)

14.276 After review of the Interpretive Rule by ACI's Agriculture & Food Policy Committee and Water & Land Use Policy Committee, we are extremely concerned that the interpretive rule, which has already been put into effect, is an attempt to obtain de facto expansion of the EPA's and the Corps' regulatory land use authority over the property of farmers, ranchers, developers, and other industry sectors throughout New Mexico. The attempt at a de facto expansion of the agencies' regulatory authority through the proposed rule is in direct conflict to the meaningful limits Congress has placed on the agencies' authority under the CWA, which have been repeatedly recognized by the U.S. Supreme Court. (p. 1)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.

14.277 ACI believes that many industries will be negatively impacted by the rule. As it pertains to agriculture, ACI believes that the practical effect of the rule is to require compliance with National Resource Conservation Service standards when undertaking any normal

farming, silviculture, or ranching activity that federal officials might deem to be located in a water of the U.S. The said interpretive rule binds farmers and ranchers with new, costly legal obligations under the CWA. Other industries may experience increased costs and restrictions under the rule, such as those for permitting, water delivery, facility siting, mitigation, financing, and any sector dependent on developable land. The interpretive rule will complicate state water quality standards, such as those related to stormwater discharges, and lead to economically damaging project delays and unnecessary costs. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.

Delta Council (Doc. #5611.1)

14.278 With regards to the interpretative rule Memorandum of Understanding, the document states that the exemptions extended to agriculture apply to "established" farming operations. Any clarification of the word "established" would necessarily carry the message that new farming operations are not exempt. These types of references throughout the proposed rule make organizations which represent landowners and farm operators very nervous and it would be helpful if you could clarify your purpose in the use of this language. For instance, will the interpretative rule apply to farming operations, or portions of farming operations that have been fallow for several years, but now are suitable to be re-established as part of the total farming operation? Further, if these expanded properties which have been fallow are not considered "established", according to your rule, will the ditches, field depressions, ephemeral streams, and other waters of the U.S. be subject to the jurisdiction of CWA as a part of your proposed rule? (p. 3)

Agency Response: See Agencies' Summary Response 14.2.2. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.279 As another example, we are extremely unclear about the goals which the agency expects to achieve with the interpretative rule. Although you have identified 56 exemptions from the 404 permitting process, it is extremely difficult for us to identify those specific practices which were previously not within this jurisdiction of the CWA, that would be jurisdictional under the proposed rule. Please advise us on these specific practices which would no longer be exempt under your "clarifications" of the existing rule which have now become your proposed rule. (p. 3)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.

14.280 In a final note, farmers have previously been able to undertake voluntary NRCSUSDA practices as part of their normal farming activities. It appears that the proposed rule suggests that rather than remaining voluntary, the farmer risks CWA enforcement actions unless he complies with these NRCS standards. It would be helpful if you would clarify the linkage between compliance with USDA standards for normal farming practices and any consequential CWA enforcement if the operator is not in compliance with these standards. (p. 3)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of the rule.**

Ann Arbor Brewing Company, et al. (Doc. #14526)

14.281 [W]e understand that some agri-business interests have expressed concerns about the potential impacts of this rule on normal farming operations. We understand that EPA and the Army Corps of Engineers, along with the U.S. Department of Agriculture, have assured farmers that nothing in this rule will change the exemptions that apply to discharges by agricultural producers. We urge the agencies to continue these outreach efforts to the agricultural community and to partner with them as you work to finalize clear rules. (p. 1)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

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

14.282 Best management practices should be recognized as exemptions. The best management practices for agriculture and others needs to be flexible. The adoption and the use of BMPs should be flexible and not mandated. The Agencies needs to also allow for targeted conservation.

The golf industry wants and should be considered for its work on science based best management practices. As stated previously, the golf industry asks the Agencies to withdraw the proposed rule, revise the rule in light of the important concerns expressed in these and other comments and coordinate with stakeholders to reissue a revised proposed rule. As part of this effort, the EPA and the Corps should work with the golf industry to identify best management practices on golf courses that would be exempt from any 402 or 404 Clean Water Act permitting if those practices like the ones listed above are performed in, over or near "waters of the U.S." (p. 19)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Salinas Valley Water Coalition (Doc. #15625)

14.283 The Proposed Rule should not muddle the 404 exemptions afforded under 33 U.S.C. § 1344(f)(1)(A) (i.e., normal farming, silviculture, ranching activities, emergency reconstruction of structures such as dikes and dams, the construction of farm ponds, the construction of irrigation ditches, and the construction of logging roads.) The Supplementary Information of the Proposed Rule states, "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." (79 Fed. Reg. 22189, proposed April 21, 2014.) Later on in the Supplementary Information of the Proposed Rule, that position is muddled by referencing the NRCS conservation practice standards as follows:

> To provide additional clarity to farmers, the agencies are today also issuing an interpretive rule clarifying the applicability of the permitting exemption provided under section 404(f)(1)(A) of the CWA to discharge of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service conservation practice standards and that are designed and implemented to protect and enhance water quality. This interpretive rule was developed in coordination with the U.S. Department of Agriculture, was signed by EPA and the Army, and became effective immediately. (79 Fed. Reg. 22194, proposed Apri121, 2014.)

The Interpretative Rule is not in fact an interpretation of the exemptions -- it is a rewrite of them. The USEPA and USACE do not have the authority to rewrite statutory provisions. The USEPA and USACE's interpretative rule impermissibly rewrites the 404 exemptions so that they only apply if the NRCS conservation practice standards are followed, creating another layer of arbitrary and discretionary authority for the USEPA and USACE, with the NRCS playing the role of a gate keeper. The MOU states, in relevant part,

> Discharges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards.... [T]he landowner has the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard.

The statutory language for the exemptions contains no such obligations. Because the Interpretative Rule now binds farmers, ranchers and others with new legal obligations under the Clean Water Act, the Interpretative Rule is a regulation subject to the Administrative Procedure Act, and the federal agencies violated that Act by attempting to hide the regulation under the guise of an interpretative rule.

Moreover, through the "Interpretative Rule", the agencies are attempting to expand their authority beyond waters of the United States to land uses -- such action was specifically admonished by the U. S. Supreme Court in *Rapanos*. The plurality decision made clear, "The plain language of the statute simply does not authorize this `Land is Waters' approach to federal jurisdiction." (*Rapanos v. United States*, supra, 547 U.S. at p. 734.) The fifty six (56) NRCS conservation practices, which include "fence," "brush management," "fuel break", "conservation cover", "prescribed grazing", etc., are land uses outside of the federal jurisdiction. Simply put, land is not water.

Finally, the language of exemptions is clear and unambiguous and thus, is not subject to the *Chevron* deference. (*Chevron U.SA. v. Natural Res. Def. Council* (1984) 467 U.S. 837 at p. 842.) Congress created these exemptions that apply to everyday farming activities, such as plowing, harvesting and minor draining of occasionally inundated farmland, largely in response to concerns that enlarging the USACE's territorial jurisdiction for the §404 program would result in obstructing or prohibiting routine farming activities by requiring time consuming application for unnecessary permits. (3 Senate Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, 95th Cong, 2d Sess at 494.) The USEPA and USACE do not have the legal authority to create new obligations by rewriting the clear and unambiguous exemptions.

Accordingly, the Interpretative Rule must be withdrawn. (p. 4-6)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Interstate Mining Compact Commission (Doc. #1435.1)

14.284 State review of this long anticipated rule has been partially diverted by issuance of an "Interpretive Rule," Notice of Availability Regarding the Exemption from Permitting Under Section 404(j)(l)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (79 Fed. Reg. 22276 (April 2 1, 2014)), concurrent with the proposed rule on Definition of "Waters of the United States." The Interpretive Rule took immediate effect, and also has significant implications for the states. As the Interpretive Rule was unanticipated, is already in effect, and is being reviewed under a 45 day time period, states are focusing attention on the Interpretive Rule and those comments. Initial information from the states indicates that some of the newly exempt practices may trigger additional state or federal regulations, create the potential for exempt activities to result in state water quality violations or lead to other unforeseen consequences. (p. 2)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Pennington/Jackson County Farm Bureau (Doc. #0959)

14.285 Some claim that farmers and ranchers should have no concerns because they are exempted. Those who claim this are wrong. Normal farming and ranching exemption only applies to a specific type of Clean Water Act permit for dredge and fill materials. There is no farm or ranch exemption from Clean Water Act permit requirements for pollutants like fertilizer, herbicide or pest control products. Under the proposed rule, many common and necessary practices like weed control and fertilizer spreading will be prohibited in or near so-called waters unless you have a Clean Water Act permit. Second, EPAs new guidance on the dredge and fill exemption actually narrows an exemption that already existed, by tying it to mandatory compliance with what used to be voluntary NRCS standards. Third, EPA and the Corps of Engineers have interpreted the normal to mean only long-standing operations in place since the 1970s not newer or expanded farming or ranching. This rule creates uncertainty for my family farm and ranch as we are in the process of transferring our farm and ranch to the next generation. This is one more hurdle that up and coming farmers and ranchers will have to face as they get started farming and ranching. We all know it is already hard enough for young farmers and ranchers to acquire the necessary land and equipment to get started in the first place. We definitely don't need to be adding more hurdles keeping young farmers and ranchers from getting started. (p. 2)

Agency Response: **The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. This is a definitional rule and it does not establish any regulatory requirements and voluntary incentives and cost-share programs are outside the scope of this rule making. See also summary response 14.2.2 Ongoing Farming.**

D. Warnock (Doc. #0984)

14.286 Regulations, like your proposal, make it hard to keep our small businesses financially viable. More red tape is the last thing my ranch needs, because it gets in the way of me putting environmentally friendly practices on the ground, many of which are not included in your list of 56. This proposal will have a negative impact on my small business and hundreds of thousands like it across the country. (p. 2)

Agency Response: This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Family Farm Alliance (Doc. #1431)

14.287 At the same time that members of the public are asked to comment on the proposed rule to define "waters of the United States," the agencies are also seeking comment on their Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404(f)(1)(A) to Certain Agricultural Conservation Practices. Our members are part of the agricultural community and are confused by the potential implications of the Interpretive Rule. It is unduly burdensome for these farmers and ranchers to have to respond to two such complex and interdependent proposals within such a short time frame. Additional time is warranted to allow for the public to meaningfully respond to both rules. (p. 4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

National Pork Producers Council (Doc. #1433)

14.288 [W]e are also requesting that the 45-day period to comment on the 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 (April 21, 2014) ("Interpretive Rule") be extended beyond the June 5, 2014, comment deadline by at least an additional 45 days but preferably to coincide with the closing of the comment period on the underlying WOTUS proposal. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.289 It has become glaringly apparent in stakeholder outreach sessions and in its public pronouncements that while EPA contends the rule exempts farms (largely based on the findings of the "Interpretative Rule"), that decision is extraordinarily limited in its application for farmers and ranchers when compared with the general broad changes EPA is proposing in how farmers and ranchers view the jurisdictional boundaries of the Clean Water Act. On numerous occasions, including in EPA's initial outreach to Agriculture stakeholders on April 2, 2014, agency staff admitted that agriculture was affected in ways not communicated in EPA's general public statements regarding the rule and in particular

the purported impacts of the Interpretive Rule. Indeed, at both that April 2, 2014, meeting and in a follow-up Agricultural Stakeholder meeting on April 18, 2014, to explore the concept of "substantial nexus," senior EPA officials were incapable of explaining whether, in light of the proposed rule, common features of many agricultural fields would fall under CWA jurisdiction. This situation has been made more complicated by recent actions of the Army Corps of Engineers, which has issued individualized jurisdictional determinations in Iowa that seemingly take a different approach to the impact on agricultural fields than the public pronouncements of EPA or USDA. In particular, these positions indicate something very much different from the view expressed by EPA Administrator Gina McCarthy in her March 25, 2014, Farm Journal op-ed, where she wrote that the rule will not increase regulation of drainage. (p. 4)

Agency Response: See Summary Responses 14.1 and 14.2.2 The Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

North Carolina Farm Bureau Federation, Inc. (Doc. #1748)

14.290 The Interpretive Rule went into effect immediately upon publication, prior to any input from the agricultural community or from those having to implement the rule on the ground. Based on the numerous complex questions the Interpretive Rule raises among farmers, state regulatory agencies, and even employees within your three agencies (USDA, EPA, and the Corps) that must implement and enforce the rule, the comment period on the Interpretive Rule should be extended. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn.

14.291 Furthermore, we are also requesting that the 45-day period to comment on the Interpretive Rule be extended beyond the June 5, 2014, comment deadline by at least an additional 45 days, but preferably to coincide with the closing of the comment period on the underlying WOTUS proposal, that itself will hopefully be extended. (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn.

Agribusiness Association of Iowa (Doc. #1765)

14.292 Due to the comment period for the interpretive rule landing directly on top of Iowa's late spring planting season, our members and their customers are extremely busy and have not had the opportunity to give these rules the required attention needed, and this is of great concern to us. Therefore, we are requesting that the 45 day comment period for the interpretive rule be extended to 180 days. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn.

F. W. Henderson (Doc. #1981)

14.293 The NRCS was established to help the agricultural producer, not to control private property. What used to be voluntary NRCS standards regarding "dredge and fill" will

become mandatory under this rule. It is critical that we are able to store pond water without any federal regulation beyond the state (Wyoming) rules. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Washington Farm Bureau (Doc. #3254.2)

14.294 WFB is concerned that the confused drafting of the proposed rule and interpretive policy, read together, will also discourage the implementation of good conservation practices. It is not clear, for instance, how a producer "qualifies" for an exemption. There is no qualification test today. There is simply an exemption from permit requirements. (p. 3-4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.295 It is also unclear what happens to conservation practices that are not clearly covered by the 56 listed conservation activities listed, or what the regulatory impact might be on producers. WFB is concerned that NRCS conservation standards and practices, which are truly voluntary today, will effectively become mandatory "Ag Practices Act" standards used to determine if a producer qualifies for the protections provided by the CWA's express exemptions. (p. 1-2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.296 This distinction is critically important right now here in Washington, as we are moving into implementation of the state's Voluntary Stewardship Program (VSP). VSP legislation passed our state legislature with strong bipartisan support due a very broad coalition of agricultural, environmental and local government supporters. VSP is about agricultural producers working with a diversity of interests to protect critical areas and improve water quality while maintaining and enhancing the economic viability of agriculture. VSP focuses on finding shared solutions that work for agricultural, tribal, environmental and local government interests, and the VSP mission of improved environmental and agricultural outcomes is to be programmatically pursued as complementary, and not mutually exclusive, efforts. (p. 4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

North Carolina State Grange (Doc. #3606.2)

14.297 The proposed Interpretive Rule is of great concern with the possibility of disrupting the relationship between conservation agencies and the private sector. It is our understanding that the Interpretive Rule is being promoted as a clarification of current guidelines. However, this proposal is an expansion of federal jurisdiction by limiting "normal

farming practices" which are exempted by the Clean Water Act. The creation of a list identifying such practices will succeed in limiting the needs of modern agriculture. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Washington Cattlemen's Association (Doc. #3723.2)

14.298 The WCA opposes the redefinition of WOTUS and of the prescriptive list of fifty-six Practices. The EPA's list of 56 NRCS practices will take NRCS out of its historically recognized voluntary incentive based presence and place NRCS into a regulatory position via EPA's requirement that ranching activities that occur within a "water of the U.S." must be implemented to NRCS standards. This type of an approach accelerates landowners' distrust of the EPA and weakens its credibility as an honest and transparent partner working towards improving water quality. This new role for NRCS will negatively impact the ability of landowners to voluntarily come forward and partner with NRCS to implement conservation practices on private lands throughout the United States. The WCA would like to know why the EPA believes that a sec. 404 permit is necessary for any activity that doesn't fit inside the EPA's predetermined list of best management practices (BMPs). This aspect of the EPAs proposal is a backdoor Ag Practices Act and WCA adamantly opposes it. (p. 1-2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. Further, nothing in the rule effects any NRCS program and is outside the scope of this rule.

14.299 All agricultural drainage ditches should be completely exempt from the jurisdiction of the CWA. The EPA/NRCS/Army Corps Interpretive Rule (IR) circumvented the 42 year standing exemption that clearly exempted all "normal" agricultural, ranching and sivicultural activities from the permitting requirements of section 404 of the CWA. Landowners would be better off if the EPA withdrew the IR completely. The IR only muddies the water. The IR if adopted will dramatically narrow the 404 exemption and create a 56 standard Agricultural Practices Act. Landowners must have maximum flexibility and not be required to meet NRCS standards for everyday activities like fencing and grazing to qualify for the exemption from the sec 404 permit. The WCA is concerned that the IR would not allow state approved conservation standards to qualify for a 404 exemption unless the standards are the same as NRCS standards; this requirement will act as deterrent to private landowners that are considering implementation of voluntary conservation practices. (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. See also the Ditch Compendium for a more detailed discussion.

New Mexico Farm and Livestock Bureau (Doc. #3969)

14.300 NMFLB has significant concerns with the both the substance and process by which EPA, the Corps and the Natural Resources Conservation Service (NRCS) (together, the agencies) developed this IR. NMFLB recommends that the agencies withdraw the IR immediately and ensure that any future changes to the Clean Water Act's (CWA) normal farming exemptions comply with the Administrative Procedure Act (APA). As well, any proposed rule changes should be given an ample amount of time for scientific peer review and public input from those most impacted.

The new IR provides amendments to the CWA, with those provisions comes legally binding new language for agricultural producers. These rule changes have been purported as an interpretive rule however, by definition if a rule change establishes new policies with binding effects it should be considered as a legislative rule. Under the APA legislative rules strictly require notice and a public comment period. The IR can simply not be adopted as is, without compliance with the APA requirements. The fact that the IR has been adopted and implemented clearly circumvents the APA process.

Contrary to the EPA statements Congress amended the CWA to exempt normal farming and ranching practices in 1977 from section 404 permitting requirements. However, the IR does not provide farmers and ranchers with additional CWA Section 404 permit exemptions beyond those already authorized by Congress. The new IR mandates that the formerly voluntary conservation practices set forth by the NRCS, now be permit required practices; such as constructing fence through jurisdictional areas. There is much confusion surrounding this interpretive rule concerning is validity and lack of substantial outreach to the agricultural community. (p. 1)

Agency Response: See the summary response, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. See also the Ditch Compendium.

Sacramento County Farm Bureau (Doc. #4868)

14.301 Under the Interpretive Rule, EPA and the Corps would now require farmers and ranchers to meet otherwise voluntary NRCS standards for everyday normal farming activities or else face CWA liability and enforcement. By linking the normal farming practices exemption to NRCS standards, the rule would make voluntary conservation standards mandatory and subject to EPA enforcement.

The rule will impact most farm and stock ponds through its expanded jurisdiction to include common ephemeral drains and isolated wetlands. These ponds are typically constructed at natural low spots on a property to best capture storm water. This will result in the proposed farm pond exclusion being illusive and meaningless for most farmers.

As a result of the Interpretive Rule, we will now be subject to burdensome requirements which dictate the manner in which we must conduct normal farming activities. Additionally, under the Interpretive Rule, normal farming activities will now trigger federal land use restrictions, consultations with state and federal wildlife agencies, and will require a substantial expenditure of time and money and even potential liability. Permits are far from guaranteed, may take months to obtain, and often include onerous

paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

National Farmers Union (Doc. #6249)

14.302 The preamble indicates that the proposed rule does not affect existing regulatory exemptions for agricultural activities.[53]There is nothing in the proposed rule that calls this assertion into question. Some of these exemptions are referenced in the interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(l)(A) of the Clean Water Act to Certain Agricultural Conservation Practices" (Interpretive Rule), which was published on the same day as the proposed rule.[54] The interpretive Rule states the list of exempted practices is illustrative rather than exhaustive and the CWA exempts those, like other activities conducted in the normal course of agriculture production, including conservation activities, are also exempted from CWA permitting requirements. In order to provide the regulated community with increased certainty, the agencies should consider codifying the Interpretive Rule and adding language explicitly stating that engaging in these exempted activities does not invoke any reporting requirement or other obligation to the agencies, including when these activities take place on land newly brought into farming. The agencies should also explicitly note that conservation activities do not need to follow specific National Resource Conservation Service guidelines for cost-share or technical assistance eligibility when engaging in these activities in order for their actions to remain exempt from permitting requirements. (p. 9-10)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn and is outside the scope of this rule.

Washington State Grange (Doc. #6249.2)

14.303 WSG is concerned that the drafting of the proposed rule and interpretive policy, read together, will also discourage the implementation of good conservation practices. It is not clear how a producer "qualifies" for an exemption. There is no qualification test today. There is simply an exemption from permit requirements.

It is also unclear what happens to conservation practices that are not clearly covered by the 56 listed conservation activities listed, or what the regulatory impact might be on producers. WSG is concerned that NRCS conservation standards and practices, which are truly voluntary today, will effectively become mandatory "Ag Practices Act" standards used to determine if a producer qualifies for the protections provided by the CWA express exemptions. (p. 2)

[53] 22218

[54] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Colorado Livestock Association (Doc. #7930)

14.304 The Interpretive Rule provides exemptions for agricultural operations although the exemptions are tied to NRCS Practice Standards. These exemptions were not a part of the Clean Water Act, and can be considered no more than agency guidance. The Proposed Rule suggests a Memorandum of Agreement between the EPA and the NRCS, although no MOA currently exists. In practice, this effort could have the effect of putting the NRCS in the position of regulator, whereas their traditional role has been to provide technical assistance.

Point: The Interpretive Rule ties agricultural exemptions to NRCS Practice Standards which are not part of the Clean Water Act. It also presumes a relationship between the EPA and NRCS which does not exist. Even if that relationship was formalized by an MOA, NRCS Practice Standards were never intended to be used as regulatory requirements and as such have no requirement to adhere to formal rule making procedures and the public notice process. This fact would only further add to uncertainty for regulators, business operators, and land owners and would circumvent the requirement for rule making and public notice.

It should be acknowledged that conservation practices are improved and modified as technology advances and practices outside the scope of NRCS Practice Standards to encourage conservation should not be excluded. Through the process of introducing the rule there has been confusion and an inconsistent message to producers regarding the exemption of agricultural practices and whether or not they need to be tied to NRCS Practice Standards. Redefinition is called for in this area. (p. 2)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

National Sorghum Producers (Doc. #10847)

14.305 The 1977 amendments to the Federal Water Pollution Control Act already provide the exemptions the interpretive rule purports to offer, namely exemptions for normal farming and ranching activities, construction of farm or stock ponds, and agriculture storm water discharge under section 404. Alone, this renders the interpretive rule redundant.

However, because the interpretive rule goes on to require producers to comply with Natural Resource Conservation Service (NRCS) standards which they are not currently required to meet in order to benefit from the exemption, the interpretive rule infringes on exemptions granted to producers by law. Exacerbating our concern is that the EPA, not NRCS, determines whether the newly imposed standards are met and the fact that NRCS standards can always change. In this regard, the exemptions in place since 1977 are degraded.

Moreover, the sweeping expansion of the definition of "waters of the United States" under the proposed rule, when in combination with recapture provisions under the Clean

Water Act that revokes an exemption whenever an otherwise exempt activity affects a jurisdictional water, would likely result in the frequent if not wholly unavoidable loss of exemptions because nearly every collection or conveyer of water is a jurisdictional water. In this sense, the exemptions in place since 1977 are effectively nullified.

Finally, the interpretive rule does not provide exemptions outside of the application of section 404, governing dredging and filling. As such, agriculture is not exempted from, for examples, section 402 or 303 concerning NDPES permitting requirements or limits on Maximum Daily Load Standards, respectively. Again, because of the sweeping definition of "waters of the United States", the least trace of pesticide or fertilizer in a low-lying field (exhibiting a slight change in elevation thus constituting a bed, banks, and an ordinary high water mark) would require permitting.

The proposed rule is made worse by the interpretive rule and, thus, the interpretive rule also ought to be withdrawn. (p. 5-6)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Delaware Council of Farm Organizations (Doc. #12345)

14.306 [M]any of Delaware's family farms already work closely with our state Department of Agriculture, state Department of Natural Resources and Environmental Control, and county conservation districts to utilize voluntary best management practices (BMPs) on our farms. And there are many others that use these BMPs without the guidance or technical assistance of the National Resources Conservation Service (NRCS). The Interpretative Rule requires farmers to work with NRCS on normal farming practices, or else not be exempt under Section 404 and possibly face large penalties if the normal farming practice does not comply with NRCS standards. This may discourage farmers from participating in some of the best conservation practices, thus negatively affecting water quality. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Montana Farm Bureau Federation (Doc. #12715)

14.307 Under the proposed rule, the "exemption" for normal farming and ranching activities applies only to discharges of "dredged or fill material," regulated under section 404. It does not apply to the discharge of pollutants, which may include things such as manure, dust, fertilizer, pesticide, etc. Instead, those types of "pollutants" would be regulated under section 402. With these new rules, a farmer could do things such as plow or plant in a jurisdictional wetland without a permit, only if he or she has been farming there since 1977. That would only be allowed if the farming has not changed the hydrology of the wetland. What's even more troubling is that even if the farmer has not changed the hydrology and has been farming there since 1977 or before, he or she would not be able to apply crop protectants or fertilizer without a NPDES permit. This effectively gives the Agencies veto power over many essential farming and ranching practices, especially

because there is no guarantee the permit will be granted, or guidelines for how long it will take to be granted.

Even though the Agencies issued an "interpretive rule" on March 25th, 2014 specifying 56 farming and ranching practices they consider to be "normal," this does not provide assurances needed to make farmers and ranchers comfortable with the rule. The Agencies claim that these 56 exempted practices expand upon current exemptions. This is simply not true. By identifying a limited number of practices to exempt from the rule and tying them to NRCS guidelines, they are actually limiting the exemptions and the first time in history, are requiring compliance with NRCS guidelines. Farming and ranching will continue to innovate and develop new practices to improve their efficiencies and more effectively produce food and fiber. What if these new practices are not included in the 56 exempted practices? Would a new and better practice be banned? What if a current practice is not included or is accidentally overlooked? (p. 5-6)

Agency Response: **This is a definitional rule which identifies "waters of the United States," nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule. In the final rule, waters subject to "normal farming, ranching and silviculture" are not jurisdictional as adjacent waters; instead they will continue to be subject to case-specific review, as they are today. As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of this rule.**

United FCS (Doc. #12722)

14.308 Along with the proposed rule, an "interpretive rule" has been issued to further interpret and clarify the permitting exemption under Section 404 of the CWA. This interpretive rule was published at the same time as the proposed rule but went into effect immediately. The interpretive rule provides no relief for farmers and ranchers concerning the scope of the proposed WOTUS definition for numerous reasons including:

1. The "expanded" list of excluded activities in the interpretive rule already fall within the "normal" farming and ranching exclusion and were already exempt from permitting requirements if done as part of an ongoing operation. Many of the 56 listed practices are extremely common on a farm or ranch—e.g., fencing, brush management, and pruning of shrubs and trees—and have never been considered by farmers and ranchers to be outside the statutory exemption for "normal" farming and ranching activities.

2. The effective result of the interpretive rule actually limits a farmer or rancher's ability to use the agricultural exemptions by requiring compliance with Natural Resources Conservation Service ("NRCS") conservation practice standards in order to qualify for an agricultural exemption.

3. Through the interpretive rule "guidance", there is a constricting of what constitutes "normal" farming and ranching activities by limiting them to those activities that have been ongoing since the 1970s. If there is a change of land use, an interruption in activities, or a change in crops, the agricultural exemptions would not apply. As a result, the farming and ranching exemption would only apply to a limited number of farmers and ranchers today.

4. The exemptions addressed in the interpretive rule only apply to Section 404 "dredge and fill" permit program, not the Section 402 NPDES permit requirements for discharges of pollutants. This is important because with the expansion of the jurisdiction under the proposed rule, everyday weed control, fertilizer applications, or any number of other common farm or ranch activities could trigger CWA liability and Section 402 permit requirements if material is incidentally deposited, for example, into ditches or ephemeral streams that would be considered under the proposed rule as WOTUS.

5. There are additional issues with the interpretive rule including: (a) who will inspect and enforce compliance with NRCS guidelines; (b) will third parties have the ability to challenge exempt status; (c) EPA's role in NRCS programs that will be defined in a Memorandum of Agreement which has not even been developed yet; and (d) is this an interpretative or a legislative rule under the Administrative Procedure Act. (p. 3-4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Monterey County Farm Bureau (Doc. #13045)

14.309 We recognize that EPA and ACOE have exempted 56 farming and ranching activities as long as they meet current NRCS standards, but any deviation from these standards can result in significant fines calculated on a daily basis. This will severely limit any future changes in agricultural practices that may increase efficiency, lower water utilization, or further enhance water quality simply because they may deemed as non-exempt in concept. These exemptions only apply to CWA section 404 and do not provide protection from CWA Section 402 NPDES permitting requirements that may fall under the proposed rule change. There are very valid concerns on the potential conflicts these exemptions will create for on-farm activities. (p. 3-4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

North Platte Valley Irrigators Association (Doc. #13056)

14.310 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 irrigation practices and whether or not we need V permits. Over the years, our membership has dealt primarily with 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 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 make the appropriate decisions at the local level.

It appears that the proposed rule actually narrows CWA exemptions for irrigated agriculture. (p. 2)

Agency Response: See Agencies' Summary Response 14.2.. The Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for

agriculture are unchanged by this rule and are outside the scope of this rule making. See also Agencies' Summary Response 14.2.2. "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. This definition is unchanged by this rule and it too is outside the scope of the rule.

Farm Credit West (Doc. #13060)

14.311 Along with the proposed rule, an "interpretive rule" has been issued to further interpret and clarify the permitting exemption under Section 404 of the CW A. This interpretive rule was published at the same time as the proposed rule but went into effect immediately. The interpretive rule provides no relief for farmers and ranchers concerning the scope of the proposed WOTUS definition for numerous reasons including:

1. The "expanded" list of excluded activities in the interpretive rule already fall within the "normal" fa1ming and ranching exclusion and were already exempt from permitting requirements if done as part of an ongoing operation. Many of the 56 listed practices are extremely common on a farm or ranch-e.g., fencing, brush management, and pruning of shrubs and trees- and have never been considered by farmers and ranchers to be outside the statutory exemption for "normal" farming and ranching activities.

2. The effective result of the interpretive rule actually limits a farmer or rancher's ability to use the agricultural exemptions by requiring compliance with Natural Resources Conservation Service ("NRCS") conservation practice standards in order to qualify for an agricultural exemption.

3. Through the interpretive rule "guidance", there is a constricting of what constitutes "normal" farming and ranching activities by limiting them to those activities that have been ongoing since the 1970s. If there is a change of land use, an inte1n1ption in activities, or a change in crops, the agricultural exemptions would not apply. As a result, the fanning and ranching exemption would only apply to a limited number of fanners and ranchers today.

4. The exemptions addressed in the interpretive rule only apply to Section 404 "dredge and fill" permit program, not the Section 402 NPDES permit requirements for discharges of pollutants. This is important because with the expansion of the jurisdiction under the proposed rule, everyday weed control, fe1tilizer applications, or any number of other common farm or ranch activities could trigger CW A liability and Section 402 pe1mit requirements if material is incidentally deposited, for example, into ditches or ephemeral streams that would be considered under the proposed rule as WOTUS.

5. There are additional issues with the interpretive rule including: (a) who will inspect and enforce compliance with NRCS guidelines; (b) will third parties have the ability to challenge exempt status; (c) EPA's role in NRCS programs that will be defined in a Memorandum of Agreement which has not even been developed yet; and (d) is this an interpretative or a legislative rule under the Administrative Procedure Act. (p. 3)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Iowa Corn Growers Association (Doc. #13269)

14.312 Our concern is that uncertainties created by this rule will discourage farmers and the private sector from taking the necessary steps to help implement these conservation practices. Requiring permits for conservation work in or adjacent to ephemeral and intermittent streams will increase costs for farmers and result in prohibitive delays. The exemptions for these permits have been unjustly narrowed by this rule. Using NRCS standards to qualify for exemptions will hurt the agency's relationship with farmers and disqualify private sector work. In addition, new technologies may not even have NRCS standards, creating more delays for conservation.

The Iowa Land Improvement Contractors Association surveyed its members and found that most of their conservation work was done without any assistance from the NRCS. For example, 59% of ponds and 67% of grass waterways were built without NRCS assistance. This work may or may not have met NRCS standards even though it was performed by an experienced contractor. If farmers are not willing to move forward on projects because of fear of this rule, they certainly will not expend their own resources to potentially be subjected to additional permitting and regulatory requirements. (p. 6-7)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Illinois Corn Growers Association (Doc. #13996)

14.313 [I]n order to benefit from the 56 exemptions for NRCS-approved conservation practices supposedly available under the Rule, ICGA understands that a farmer must have been farming continuously since 1977 (or 37 years); thus these are not additional protections for the newest and next generations of growers. Additionally, the exemptions are extremely narrow and appear to be limited to section 404 "dredge and fill" programs. Also, the exemptions are not part of the Rule itself but are contained in interpretive rules which the USEPA, the Corps, the U.S. Department of Agriculture and NRCS could narrow at their will without advance notice and public comment. Most importantly, there is no protection from enforcement over routine farming activities such as weed control, fertilizer applications, and other common agricultural activities. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. See also the Compendiums for Features and Waters Not Jurisdictional, Ditches, and Implementation Lastly, the rule does not change any of the enforcement processes or rights for citizen suits provided in the CWA and are outside the scope the rule.**

USA Rice Federation (Doc. #13998)

14.314 USA Rice believes that the Interpretive Rule does not provide enough clarification and therefore doesn't simplify the process for the farmer nor, at this time perhaps, grant expanded exemptions.

Specifically we question and seek further explanation on:

- Whether this rule keeps separate the existing, statutory normal farming exemptions and the new approved list of NRCS exempt practices or actually blurs the distinction such that only those items on the new, exempt list will be allowed as normal farming activities that can be exempt, and then only when conducted to NRCS specifications;
- Why the list only includes 56 conservation practices and not others, including ones specifically applicable to rice farming;
- What is an established (ongoing) farm and how does that limit or expand access to the exemptions and the statutory normal farming practices;
- Why this rule doesn't provide section 402 protections as well for such normal farming activities as weed control and fertilizer application when EPA is seeking to expand its jurisdiction;
- Who is the ultimate arbiter of compliance; and,
- What assurances do producers have of the exempt list remaining unchanged and thus providing the regulatory protections it is supposed to be offering?

USA Rice believes that the agencies involved in this rule must clarify and specify that this list of exempt practices are in addition to the statutory "normal farming…activities" of the Clean Water Act. We are also concerned that the definition of an "established" farm is not limiting, especially as it must keep pace with the changes in U.S. agricultural operations; and that the list of exempted practices should be expanded to include a number of other practices common in rice production. (p. 20)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. See the summary for section a discussion on 14.2.2 Ongoing Farming.

Nebraska Farmer and Cattlewoman (Doc. #14113)

14.315 Additionally, an interpretive rule that was published alongside the proposed definition by the same federal agencies devastates the collaborative relationship that farmers and ranchers have built with the Natural Resources Conversation Services (NRCS) by turning the NRCS into an arm of the EPA and converting the NRCS scientists from professional consultants/resources into EPA regulators. (p. 1)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn.

Western Growers Association (Doc. #14130)

14.316 [W]e submit that the Interpretive Rule should be abandoned completely since most of the farming practices described within it fall within the normal farm exemption within the statute and thus do not need to be clarified. Indeed, the Interpretative Rule may be used to improperly limit normal farming practices in contravening the statute's intent. (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.317 Although we commend the EPA and Corps for attempting to be inclusive with the exemptions for agriculture in the Interpretative Rule, Western Growers is troubled by a number of aspects of the rule and recommend it be withdrawn.

First, as a practical matter it sets up a potential procedural requirement for the NRCS to determine what practice meets a NRCS standard or what is not if the EPA or Corp has a concern. By creating the Interpretative Rule USDA, EPA and the Corps may be unintentionally reducing conservation program participation. The USDA and NRCS have built a long tradition of serving farmers through a voluntary process and this creates a new oversight and regulatory enforcement structure which would not be welcome. Linking standards for voluntary NRCS conservation practices to compliance with mandatory regulatory requirements undermines the paradigm of utilizing voluntary, incentive-based conservation practices to improve environmental quality resulting in less on the ground conservation.

Second, as a matter of law all "normal farming" practices are exempt from the Act, as noted in section 404 of the law. As such it is unclear why a list of "conservation practices" almost all of which would fall under "normal farming practices" is even necessary. Whether building a fence, clearing brush, or utilizing conservation cover, producers utilize these practices as necessary tools for the management of their operations—regardless of whether those practices are implemented in conjunction with an NRCS conservation program or not. Indeed, Western Growers is concerned that by creating a list of what constitutes "normal farming" activities under the Section 404 "normal farming" exemption, courts could begin to interpret that list as an exhaustive list, rather than a descriptive one, which would narrow the Section 404 "normal farming" exemption.

If the EPA and Corps have a rationale for the Interpretative Rule it has not yet been adequately explained and thus this rule should be withdrawn. What would be helpful to the regulated community is for the agencies to explain what agricultural activities they believe are not exempt. (p. 19-20)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Minnesota Agricultural Water Resource Center (Doc. #14284)

14.318 We are concerned that the interpretive rule clarifying permit exemption for certain NRCS approved practices is inadequate. Further, practices that work well in one region may

actually have negative consequences in another region, rendering a national list of approved practices unworkable. (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

LeValley Ranch, LTD (Doc. #14540)

14.319 Exclusions and Exemptions for Agriculture are also a grave concern for LeValley Ranch. Normal farming, ranching, and silviculture activities do not need a permit as long as they follow the Best Management Practices (BMPs) allowed for by the Natural Resource Conservation Service (NRCS). This creates a federal government agency that was never intended to be regulatory to be become the agriculture police to determine compliance. The NRCS continues to see reductions in work force and funding. To add this responsibility to their workload delays all projects even more. In many Delta County projects, delays are noted to be two years or more. Irrigation and food production in the arid west cannot wait a determination of BMPs. Again, this is an overreach of the Proposed Rule. (p. 6)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Kentucky Farm Bureau (Doc. #14567.1)

14.320 Another point of confusion comes through the interpretive rule noting that 56 established "normal" farming practices would be exempt from permitting requirements. Those exemptions already exist under the CWA, and to further list and define those exemptions appears to significantly narrow the m, and possibly exclude the exemptions for farmers who have not had continuous production on their farm since 1977. Who would define "normal" farming practices? (p. 2)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

American Farmland Trust (Doc. #14576)

14.321 We appreciate that EPA and Corps, along with the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS), recognize the value of agricultural-based conservation practices and attempted to clarify the applicability of the exemption from permitting provided under CWA section 404(f)(1)(A).

For example, various conservation tillage practices (practice 329, practice 345) complemented by grassed waterways (practice 412), contour grass strips (practice 332), filter strips (practice 393), riparian buffers (practice 391) and cover crops (practice 327) improve soil health while also promoting positive environmental outcomes including improved water quality. However, under the interpretive rule not all practices required for this type of systems approach are exempted, which could discourage farmers seeking to adopt a conservation systems approach. The resulting outcome could be less conservation

applied to the land, or farmers choosing to avoid such a comprehensive approach fearing that non-conforming practices or practices not explicitly exempted might trigger regulatory action.

We urge EPA and the Corps to list only those conservation practices which require a section 404 permit as opposed to the current list of 56 practices the agencies have determined will not require a permit in the interpretive rule. This simple clarification would give farmers greater legal and regulatory assurance when undertaking most conservation practices by removing ambiguity for those conservation practices which are not included in the interpretive rule list.

There is also the question of functional equivalency for conservation practices that are not installed to NRCS specifications but that still deliver water quality benefits. For example, a two wire versus a three wire fence in most situations will still exclude livestock from entering a stream. Penalizing a farmer for installing otherwise sound conservation practices would not promote what we understand are the agencies' goals in clarifying applicability of the CWA exemption for conservation practices. We urge EPA and the Corps to consider the functional equivalency of conservation practices not installed to NRCS standards that still provide significant conservation benefits.

Regarding potential for enforcement of practice standard violations, NRCS' National Operation and Maintenance Manual provides clear instructions to State Conservationists regarding the manner in which violations of NRCS conservation practices must be handled, including corrective action plans and timeframes by which such violations must be mitigated. Although the NRCS appeals and mediation process is subject to confidentiality (see 7 CFR 614.11(g)), the rule is unclear on whether the discovery of conservation practice violations under the interpretive rule would be kept confidential and handled by the agency and out of the hands of third party litigants.

We urge EPA and the Corps to clarify that NRCS conservationists are not required to share nor will they be asked to share information about farmers' adoption of conservation systems or those whose conservation practices do not comply with USDA standards or their functional equivalent. This includes clarifying in the rule the primacy of USDA arbitration/appeals procedures for farmer compliance. And, to the maximum extent practicable pursuant to 7 U.S.C. 8791(b)(2)(A), maintain confidentiality regarding conservation practice violations that could otherwise be used by third party litigants. (p. 3-4)

Agency Response: **See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

California Association of Winegrape Growers (Doc. #14593)

14.322 In addition to the Proposed Rule's impacts, farmers and ranchers also have to now comply with the Interpretative Rule that requires compliance with previously voluntary NRCS standards for normal farming and ranching activities.

The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps's 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. 14)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Southern Arizona Cattlemen's Protective Association (Doc. #14598)

14.323 The Agricultural Interpretive portion of the proposed rule should not repurpose Natural Resource Conservation Service (NRCS) standards as regulatory sideboards. Efforts to redefine those standards as regulations and enforce those standards, which were not written to be so used, would deter law abiding citizens who have cooperatively engaged in productive conservation measures with NRCS. Producers would be much less confident to engage in proven cooperative conservation practices by an ex post facto repurposing of those standards because appeal of arbitrary EPA and Corps of Engineers interpretations of standards as regulations would be beyond the economic means of most. (p. 3-4)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Oregon Farm Bureau (Doc. #14727)

14.324 Second, the new interpretive rule sets forth a limited number of conservation activities that the agency will exempt from 404 permitting requirements. Even if a certain conservation practice is on the interpretive rule list, in order to be exempt from CWA requirements the project must comply with onerous federal standards developed for activities that are receiving federal funds. As mentioned above, Oregon agriculture relies on voluntary landowners and limited state and private conservation dollars to improve watershed health. If a proposed project aimed at improving water quality is in a riparian area, floodplain or otherwise located on land identified by the new definition as a "water of the United States" but is not either listed on the interpretive rule list as an exempt project or does not comply with federal standards, the project will be less likely to occur. And even when certain projects are able to move forward, the projects will be more expensive due to CWA permitting or meeting federal conservation standards, leaving less

money to use on other watershed priorities. This is bad for landowners, Oregonians, and ultimately waters of the United States. (p. 5)

Agency Response: See the summary response 14.2, the Interpretive Rule has been withdrawn. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Farm Credit Illinois (Doc. #14767)

14.325 The imposition of CWA requirements on waters and lands far removed from interstate, navigable waters is harmful to farmers. The proposed rule's expanded definition of WOTUS likely will force farmers to seek permits or face substantial fines and criminal enforcement actions. Because land would not need to have water on it permanently, seasonally, or even yearly for it to be WOTUS regulated under the Act, farmers will have difficulty knowing what portions of their land are subject the federal government's jurisdiction. A farmer who makes a single mistake, perhaps not realizing that an area of land is now WOTUS, could be subject to thousands of dollars in fines. Indeed, discharging pollutants into WOTUS without a permit, or violating any permit condition, would subject a farmer to criminal or civil penalties, including fines of tens of thousands of dollars per violation, per day. In addition, if any citizen believes a farmer did not properly interpret the vague standards in the proposed rule, the citizen could commence a suit challenging the farmer's use of fertilizers or pesticides on or near drainage features that may be jurisdictional. The costs imposed by such a suit, even if eventually proven to be without merit, could be enormous and beyond the resources of most farmers. Subjecting farmers to vague rules, the meaning and specific application of which can only be determined through expensive legal proceedings and under risk of enormous fines, penalties and adverse judgments, would have a very detrimental effect on American agriculture.

Along with the proposed rule, an Interpretive Rule ("IR") has been issued to further interpret the "normal farming" exemption under Section 404 of the CWA. The IR does not protect farmers from liability. The IR references a Memorandum of Understanding with the USDA that identifies a list of 50+ conservation practices that would qualify for the "normal farming" exemption from the CWA Section 404 dredge and fill permitting program. However, the identified "normal farming" practices are only exempt to t he extent they comply with standards established by the Natural Resources Conservation Service ("NCRS"). The IR states that farmers who deviate from NRCS standards will not benefit from the exemption. Thus, the IR limits farmers' ability to use the CWA's statutory exemption by requiring "normal farming" activities to also comply with NCRS standards - a new requirement t hat is nowhere found in the law. Thus, farmers who previously engaged in "normal farming" activities in or around often dry ephemeral streams or next to or in a yet to be defined "floodplain" or "riparian area" would have to comply with all NRCS standards or risk Clean Water Act enforcement.

Any protection provided by the IR is further illusory because presumably the EPA could add or remove activities from the current list of "normal farming" activities, or otherwise modify or retract its guidance without any advance notice or opportunity for public comment.

In addition, because the exemption in the IR only applies to the Section 404 dredge and fill permit program, it provides no protection to farmers from section 402 permit requirements for discharges of other "pollutants."[55] Thus, farmers could face liability for "normal farming" activities like weed control, fertilizer application or any number of other traditional farming activities. (p. 3-4)

Agency Response: This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. Lastly, the rule does not change any of the enforcement processes or rights for citizen suits provided in the CWA and are outside the scope the rule.

Santa Barbara County Farm Bureau (Doc. #14966)

14.326 Full consideration has not been given to the impacts and burdens farmers and ranchers will face, including increased permitting requirements, farming delays that may be encountered when implementing the Proposed Rule, and the costs of new land use restrictions resulting from this Proposed Rule. Therefore, due to the numerous flaws described within, Santa Barbara County Farm Bureau respectfully requests the Environmental Protection Agency and the U.S. Army Corps of Engineers to withdraw the Proposed Rule redefining waters of the U.S. as well as the Interpretive Rule. (p. 2-3)

Agency Response: This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.

New Jersey Farm Bureau (Doc. #14989)

14.327 We note also the claim that many generally-accepted farming practices will be exempt under this new rule. It is important to note, however, that the proposed exemptions apply only to one section of the Clean Water Act, section 404. Additionally, the proposed exemptions are predicated on adherence to National Resource Conservation Service standards, standards that are, in some cases, exceedingly rigorous to comply with. Additionally, these standards are not part of the proposed rule itself, instead spelled out in the interpretive rule, and could therefore be modified at any time without any obligation

[55] Anyone who wants to discharge a "pollutant" into WOTUS must obtain a permit from either the EPA or the Corps depending on the type of discharge involved. 33 U.S.C. §§ 13 ll(a), 1342, 1344, 1362(12). The term "pollutant" is defined to include "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 ... . " 33 U.S.C. 1362(6). Section 404 only exempts "normal farming" activities from the permit requirements to the extent they discharge dredge or fill material; it provides no exemption for "normal farming" activities that discharge any of the other materials that are defined as "pollutants" under the CWA.

for public comment, something that could result in "Changing the rules in the middle of the game", so to speak. (p. 2-3)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Iowa Farmers Union (Doc. #15007)

14.328 As a baseline matter, farmers need absolute clarity in the final rule reinforcing this exemption and more precisely defining the normal farming activities that fall within the exemption. In practical terms, providing a clear answer to this initial question would eliminate the vast majority of farmers' concerns before ever touching on the much more complex question of defining and identifying jurisdictional waters. The preamble of the proposed rule indicates that existing regulatory exemptions for normal farming activities will not be impacted by the rule. However, this issue has been significantly muddied in conversations within the farming community as a result of the Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (Interpretive Rule), which was finalized by EPA and the Corps on March 25, 2014. [...}

The bottom line take away from the Interpretive Rule is that Iowa farmers have been left with the impression that on-farm conservation activities have to comply with NRCS technical standards in order to be exempt from NPDES permitting requirements. If this was the intent of the Interpretive Rule, such a requirement would create unnecessary technical barriers for conservation activities and would constitute a counterproductive disincentive to farmers who are otherwise inclined to act in a way that would improve water quality. If this was not the intent of the Interpretive Rule, then the final rule should make absolutely clear that farmers will not need a NPDES permit for any normal farming activities carried out as part of an established farming operation, specifically including beneficial agricultural conservation practices that are designed and implemented to protect and enhance water quality and that do not destroy existing waters - regardless of whether such practices comply with NRCS technical standards. (p. 2-3)

Agency Response: **See Agency Summary responses 14.2 and 14.2.2. As stated in the summary essay above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. "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, this definition is outside the scope of the rule making.**

Jackson Family Wines (Doc. #15019)

14.329 We urge that the Proposed Rule and its associated Interpretative Rule be withdrawn due to substantive constitutional and procedural defects. (p. 2)

Agency Response: **As stated in the summary essay above, the Interpretive Rule was withdrawn. See also Compendiums for Process Concerns and Administrative Requirements and Legal Analysis.**

Fresno County Farm Bureau (Doc. #15085)

14.330 In addition to the Proposed Rule's impacts, farmers and ranchers also have to now comply with the Interpretative Rule that requires compliance with previously voluntary NRCS standards for normal farming and ranching activities. (p. 2)

Agency Response: **See Agency Summary response 14.2. As stated in that summary response, he Interpretive Rule was withdrawn and is outside the scope of this rule making.**

American Forest Foundation (Doc. #15093)

14.331 In the proposed rule, EPA acknowledges that the longstanding permitting exemption in Section 404 of the CWA for silviculture is not affected by the proposed rule. AFF appreciates this recognition as the silviculture exemption passed in the recent Farm Bill is an important tool that supports sustainable forest management, which is critical to ensuring that private landowners have an incentive to retain forests and continue to manage them to protect clean water, as the Funks demonstrated on their land. (p. 3)

Agency Response: **The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. The Farm Bill is also outside the scope of this rule making.**

14.332 We would encourage an approach to protecting water quality that supports family- owned and working forests. Instead of increasing regulatory uncertainty, voluntary incentives through BMPs and cost- share programs, like USDA Conservation Programs and USFS State and Private Forestry programs, help to support landowner actions to protect clean water. (p. 4-5)

Agency Response: **This is a definitional rule and it does not establish any regulatory requirements and voluntary incentives and cost-share programs are outside the scope of this rule making.**

Arkansas Farm Bureau Federation (Doc. #15145)

14.333 The EPA and COE have also repeatedly stated that this rulemaking effort is simply to "clarify" or "reduce confusion" related to recent Supreme Court Rulings when, in fact, it is doing just the opposite. It is not only causing more confusion but the attempt to "clarify" what is "normal" farming practices by specifically listing 56 Natural Resources Conservation Service (NRCS) Conservation Practice Standards (CPSs) actually narrows the scope of what is already considered exempt. Specifically listing these 56 NRCS CPSs essentially codifies them as a defacto regulatory standard, a purpose for which these CPSs were never intended. Exempting these 56 CPSs and not the remaining NRCS CPSs, not to mention the many other routine agricultural production practices that may not fall under the guidelines of a strict and very detailed NRCS CPS, will essentially place farmers and landowners in violation of the CWA. (p. 1)

Agency Response: **This is a definitional rule and it does not establish any regulatory requirements. Voluntary incentives and cost-share programs are outside the scope of this rule making.**

Missouri Farm Bureau Federation (Doc. #15224)

14.334 The Interpretive Rule[56] that accompanied this rulemaking (and was effective upon publication in April) is touted as an expansion of agriculture's CWA exemptions. In reality, it provides no meaningful protection from the implications of an expanded jurisdictional reach and, in fact, narrows the "normal" farming exemption. MFB's comment letter expounding on this point is attached. It should be withdrawn along with this proposed rule. (p. 6)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Missouri Farm Bureau Federation (Doc. #15224.1)

14.335 The Guidance was not developed with meaningful public input. Prior to the announcement of the Guidance in late March, we were not aware the agencies had entered into a MOU to modify existing regulations interpreting the statutory exemption for "normal farming, ranching and silviculture" within the Clean Water Act (CWA) by identifying 56 Natural Resources Conservation Service (NRCS) technical standards. This is a significant change, and agriculture organizations should have been consulted early in the process. NRCS' state technical committees (STCs) should have been engaged as well. MFB is an active participant in the Missouri STC, but to our knowledge this matter was not brought before the body.

We are also frustrated by the agencies' decision to accept comments on the Guidance after it is in effect and rush to make it effective upon publication in the first place. Many farmers and ranchers in Missouri and across the nation are unaware the Guidance has been enforceable since April 21, 2014. (p. 1)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.336 The Guidance does not provide additional protections for farmers and ranchers under the Clean Water Act (CWA). "Normal" farming, ranching and silviculture activities carried out on "established" operations have been exempt from section 404 "dredge and fill" permit requirements since the U.S. Congress amended the Clean Water Act (CWA) in 19771. In issuing the IR, we believe the agencies have actually narrowed the 404(f)(1)(A) exemption by specifying 56 activities that will be exempt if carried out consistently with

[56] Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices," published on April 21, 2014 (79 Federal Register at 22276).

NRCS conservation practice standards and as part of an established farming/ranching operation. These standards were voluntary, but are arguably enforceable now as part of the CWA regulatory program. Use of the words "shall" and "must" reinforce this point as does the following excerpt on page three of the MOU: "[d]ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards."

Additionally, requiring activities that were already exempt from regulation under section 404(f)(1)(A), if conducted as part of an established operation, to be carried out in accordance with NRCS specifications is more time consuming and expensive for farmers and ranchers versus the methods used currently. (p. 2)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.337 The Guidance adds confusion and uncertainty. If clarity was a goal of the agencies in developing the IR, a number of important questions remain unanswered such as:

a. What constitutes "established/ongoing" farming?

b. Does a farmer need pre-approval for any normal farming activities not listed?

c. Is pre-approval required if a farmer implements one of the 56 listed practices in waters of the U.S. without complying with NRCS conservation practice standards?

d. Must the listed practices always comply with NRCS specifications to qualify for the exemption or only when they are implemented for conservation purposes?

e. How will the IR be enforced? (p. 2)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

Georgia Cotton Commission, Perry, Georgia (Doc. #15423)

14.338 We believe that the interpretive rule creates an unnecessary regulatory burden for farmers as it actually narrows, not expands, the exemptions for normal farming practices. (p. 1)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.339 Comments on practices that create new exemptions unrelated to upland soil and water conservation practices or unrelated to an ongoing farming operation. These practices should be removed from the list unless and until the agencies submit them as a proposed rule for public comment.[…]

The list includes practices that are not currently exempt under section 404(f)(1) and that could potentially cause significant water quality impairment or lead to a violation of state water quality standards. Some of these are in-stream practices. Many are not associated

with ongoing farming operations. In either case, they should not be broadly exempt as normal farming practices. Conservation practices that are not used in association with ongoing farming, ranching or silvicultural operations would not meet the Section 404(f)(1) exemption criteria and should not be on the list. The inclusion of such practices on the list of exemptions may lead other landowners to believe that no permit is required for them, even though they do not run a farming, ranching or silviculture operation, resulting in violations of state and federal regulations. Moreover, these practices are unlikely to be easily limited by use of the recapture provision. If producers believe that no additional review or approval is required before implementing one of these practices, it is possible that producers will violate both state and federal regulations, including state water quality standards. Such practices are not natural extensions of existing exemptions and, as new exemptions, should be submitted as a proposed rule for public comments prior to their inclusion on the list. Recommendation: Remove practices from the list that fall outside the scope of current exemptions for normal farming practices, unless and until the agencies submit them in a proposed rule for public notice and comment. If any of these practices remain on the list, then these practices should be eligible for exemption only where NRCS technical assistance is provided for installation or implementation. This includes, but is not limited to, the following practices:

• #396 – Aquatic Organism Passage

We have concerns regarding this category because it provides for actions with a potentially significant impact, such as dam removal. However, by definition it does not appear that the practice is associated with ongoing farm, ranch and forestry operations. If included on the list, please define specific actions that are related to farming and forestry that would be exempted.

• #453 – Land Reclamation – Landslide Treatment

This practice does not appear to be generally associated with ongoing farming, ranching, or silviculture operations. In the event of a landslide that impacts rivers, lakes, or wetlands, restoration of the impacted watercourse should be carried out in cooperation with other agencies through the section 404 permitting process.

• #455 – Land Reclamation – Toxic Discharge Control

This practice does not appear to be associated with ongoing agricultural, ranching, and forestry operations.

• #543 – Land Reclamation – Abandoned Mine Land

This practice does not appear to be associated with ongoing agricultural, ranching, and forestry operations.

• #544 – Land Reclamation – Currently Mined Land

If the land is currently mined, it is not associated with an ongoing farming, ranching or (p. 14-17)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.340 Comments on practices that could result in severe water quality impairment if implemented incorrectly. These practices should remain on the list only if implemented or installed with NRCS technical assistance and training. […]

The list includes practices that could provide water quality benefits, but could also cause severe water quality impairment if they are not implemented properly. The agencies recognize the exemption should only extend to those practices that are "designed and implemented to protect and enhance water quality, and do not destroy waters."[57] Given the highly technical nature of some of the more complex practices on the list, such practices should only be exempt with NRCS technical assistance and training to ensure proper implementation.

Recommendation: The agencies should revise the list to require NRCS technical assistance for practices that are complex and highly technical, and that could result in severe water quality impairment if implemented or installed improperly. This includes, but is not limited to, the practices listed above in [Section B] and the following:

• #326 – Clearing and Snagging

This practice allows the use of heavy mechanical equipment in existing streams, and allows significant alteration of natural habitat. It should not be broadly exempted as a normal farming practice.

• #395 – Stream Habitat Improvement and Management

Poorly planned or executed stream habitat alteration could not only degrade the section of the stream directly altered, but also destabilize a stream system causing significant upstream and downstream impacts. This practice is very broadly defined and could result in major harm to waters of the US.

• #578 – Stream Crossings

This practice is broadly written, allowing stream crossings (bridges) for "people, livestock, equipment, and vehicles." This practice closely parallels and should be treated in the same manner as stream crossings for other transportation purposes. A more limited exemption for stream crossings for livestock would still have to consider factors such as fish spawning and ability to pass flood flows.

• #587 – Structure for Water Control

This practice specifies that it may be applied to achieve a wide array of function, including removal of surface or subsurface water from adjoining land, to control the direction of channel flow resulting from tides and high water. These practices have the potential to convert wetland to upland, and may have other significant adverse impacts on water quality.

• #657 – Wetland Restoration

Although we strongly support well-designed and executed wetland restoration to meet a number of objectives, this practice is broadly written, and includes actions that could

[57] MOU at 2 (emphasis added).

result in significant adverse impacts and conversion of one type of water to another. Some level of regulatory review is essential.

• #659 – Wetland Enhancement

This practice is broadly written, and includes actions that could result in significant adverse impacts and conversion of one type of water to another. While a wetland may be enhanced in terms of one function, it may be degraded in terms of others, and interagency coordination and agreement through a regulatory review process is essential. (p. 14-18)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.341 Comments on the remaining water and wetland practices. Practices that remain on the list should include any necessary and appropriate guidance regarding the limitations on their implementation or installation.

Section 404(f)(1) exemptions are still subject to the section 404(f)(2) recapture provision. The recapture provision prohibits the use of a practice standard to exempt an activity where the practice would result in a new use, or reduce the scope and circulation of US waters. However, it is highly unlikely that individual landowners will have the understanding necessary to interpret and apply this regulatory language. As a result, landowners may inadvertently violate the Clean Water Act, as well as other state or federal regulations. For practices that could trigger the recapture provision, it is critical that these limitations be specifically defined, or that the installation or implementation of the practice be done under NRCS supervision.

In the current list, the agencies did this for #412 – Grassed Waterways and #548 – Grazing Land Mechanical Treatment by indicating in the notes column that certain activities that could fall within that practice standard are not exempt. These explanations should be provided for all the practices listed below and be discussed in a way that farmers and landowners can understand, particularly where the activity is being done without NRCS oversight or technical assistance. This can be accomplished through additional guidance developed at the national level, but with state-specific information provide at the state level, and should be made available through all three agencies' websites and outreach materials.

Recommendation: Any practices that remain on the list should be accompanied by a description of any limitations on the practice that could make it ineligible for an exemption. This information should be provided in any outreach done by EPA, the Corps, or NRCS on the Interpretive Rule, and should be written for a farmer audience. The following list is an example of practices that should be accompanied by additional information or guidance on their limitations.

• #315 – Herbaceous Weed Control

Guidance should clarify that this practice is not exempt where it would result in establishment of a new use in waters or wetlands, or would reduce the flow and circulation of waters of the United States.

• #320 – Irrigation Canal or Lateral; and #388 – Irrigation Field Ditch

The construction of new irrigation canals, laterals, and field ditches has the potential to cause adverse draining, flooding, alteration of surface water flows, and alteration of water resources. At a minimum, the scope of these practices should be clarified to exclude the use of jurisdictional waters as irrigation canals; prohibit redirection of flow from a jurisdictional water resulting in secondary impacts; prohibit installation of canals through a wetland in a manner that would alter wetland hydrology; and prohibit side-casting of spoil material in a wetland.

• #342 – Critical Area Planting

Placement of fill material to facilitate planting below the ordinary high water mark of lakes and streams should not be exempted.

• #398 – Fish Raceway or Tank

Guidance should clarify that this practice is not exempt if it involves construction of a fish raceway or tank in existing waters or wetlands, which would result in the establishment of a new use in waters of the U.S.

• #412 – Grassed Waterways

In some areas, there is confusion between grassed waterways, wetlands and intermittent streams. Although this practice is specifically not exempted in the event of conversion of waters to non-waters, additional clarification and limits are needed. For example, the practice allows placement of subsurface drains to lower the water table; lowering the water table in an adjacent wetland should not be exempt.

• #500 – Obstruction Removal

Removal of structures on the shoreline of a lake or stream involving alteration of the bank (e.g. piers, seawalls, groins) should not be exempted.

• #533 – Pumping Plant

Guidance should clarify that this practice is not exempt if it would reduce the reach and circulation of waters of the United States, including wetlands. The Interpretive Rule also does not address the fact that final decisions about conservation practice standards are decided at the state level based on regional and local conditions. The state office cannot weaken the national CPS, but it can make it more stringent. This means that state conservation practice standards often require more from the producer that the national standard to appropriately respond to local and regional resource concerns and climatic conditions, and to comply with state water quality requirements. (p. 14-20)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.342 EPA, the Corps, and NRCS entered into a Memorandum of Understanding (MOU) to implement the Interpretive Rule; however, many questions and concerns remain regarding the collaboration and responsibilities of the agencies.

Recommendation: The agencies should update the MOU to reflect responses to the questions and concerns they have heard throughout the stakeholder outreach sessions and in this docket.

In particular, it is critical that the agencies clarify through an updated MOU:

• which agency will require and provide the technical support that should be required under some practice standards;

• who will address landowner questions regarding potential exemptions;

• the criteria that will be used to make a determination that an activity is exempt, particularly where undertaken without NRCS or other state or federal agency oversight;

• whether the Corps District, EPA Region, and NRCS state offices are coordinating to develop implementation plans, and whether those meetings and plans will be open to public participation and input; and

• how the Interpretive Rule will account for additional limits that states may place on eligible conservation practices to ensure compliance with state water quality standards. (p. 20-21)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.343 The agencies request comment on the process for periodically reviewing and revising the list of exempt practices. As stakeholders in the efficacy of NRCS conservation programs, we strongly believe that ongoing stakeholder involvement in this process is critical, and that a transparent process must be instituted immediately.

Recommendation: The initial review of the exempted practice standards should commence immediately upon the close of the public comment period for this docket. The MOU currently states that review of the exempted practices will occur at least annually, but it does not limit more frequent review or specify the time for the first review. Given that the opportunity to comment on the Interpretive Rule was only provided after it had already taken effect, and that the list contains a number of concerning practices and practices requiring further explanation, it is both necessary and appropriate for the agencies to promptly undertake an initial review of the list based on all submitted public comments.

Recommendation: The review process should be a public process, whereby all stakeholders are provided the opportunity to provide input. The review process should not only be a review of the specific conservation practices up for review, but should include an assessment of the efficacy of the Interpretive Rule in obtaining beneficial water quality outcomes.

Recommendation: Amended conservation practices standards should be subject to review prior to being considered exempt. CPS are subject to an NRCS five-year review process, and states may change the national practice standard to such an extent that the practice may no longer be considered exempt. The review process must ensure that amended

practices continue to meet the statutory exemption requirements before being reinstated on the list.

Recommendation: Additional practices should not be added to the list of exempt practices until the state and federal agencies have had sufficient time to evaluate the impact of the Interpretive Rule, and to develop procedures to coordinate among the agencies. The agencies will need time to evaluate the effects of the initial list of exemptions without the added complexity of a new list. Additionally, consistent with our comments above, new practices added to the list should not be already exempt upland practices; should be associated with an ongoing agricultural operation; should include the requirement for NRCS oversight where necessary; and, should provide and explain any appropriate limitations to help guide the farmer and landowner in implementing these practices. (p. 21)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.344 The agencies request comment on how to provide clarity to the regulated community and the public regarding the scope and extent of the Interpretive Rule. Farmers would likely turn to NRCS first with questions about conservation practice standards, but currently there is no information or outreach from NRCS regarding this collaboration. Similarly, EPA and the Corps are not promoting specific NRCS conservation programs. More collaboration is needed between the agencies to provide a concerted message to the agricultural community, and to achieve the goal of this collaboration to increase participation in NRCS conservation programs.

Recommendation: Revise EPA and the Corps' materials to include specific reference to applicable NRCS conservation programs, and provide contact information so that producers can obtain more information regarding conservation programs and contact the NRCS offices near them. Work with USDA to develop a website landing page and an outreach campaign to deliver a concerted messages to producers that technical assistance is available, and in some cases necessary, to receive a section 404(f)(1)(A) exemption.

Recommendation: Avoid all reference to the Interpretive Rule as providing "certainty" to agricultural producers. Certainty in the farming community typically implies broad regulatory protection or safe harbor across an operation or for a period of time. The Interpretive Rule must be clear that the Section 404(f)(1)(A) exemption applies only to specific practices, only when done in accordance with NRCS conservation practice standards, and should provide information for farmers and the public regarding how to obtain NRCS financial and technical assistance to adopt these practices. (p. 21-22)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

National Milk Producers Federation (Doc. #15436.1)

14.345 NMPF has taken great interest in the Interpretive Rule Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (Docket ID No. EPA-HQ-OW-2013-0820). In light of the potential impact of this measure on dairy farmers, it is imperative that the EPA and the U.S. Army Corp of Engineers (Army Corps), in cooperation with the U.S. Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS), go about this effort in the right way. Unfortunately, neither the proposed rule defining waters of the United States nor the interpretive rule explaining the availability of an exemption from dredge and fill permitting requirements for producers who install certain conservation practices according to NRCS standards meets the test of effectively protecting water quality.

Agency Response: As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.346 Regulatory Role of NRCS

The Natural Resources Conservation Service (originally known as the Soil Conservation Service) was established in 1935 to help prevent a recurrence of the catastrophic loss of soil like that which occurred during the Dust Bowl period. NRCS succeeded in its mission by making its experts available to provide technical advice to producers on how to conserve their soil resources. Through the decades, the scope of its programs has tremendously increased, but this basic model for working with producers has not. NRCS continues to provide voluntary technical assistance to producers who want to conserve the resources on their operation.

Under this model, NRCS presence on a farm is at the request of a producer and does not result in coercive government action. Producers have appreciated the confidence of working with an agency they could turn to solely for conservation advice without fear that their operations would be scrutinized for compliance with all the potential applicable environmental and workplace laws. Other arms of the government such as the EPA and the Department of Labor are charged with enforcing compliance with these types of laws.

This is a basic practice that deserves to be respected and upheld. It increases the likelihood that producers will install beneficial practices because NRCS advice will make it easier to do so. This is a goal shared by all stakeholders. Unfortunately, the interpretive rule obfuscates this historic division of labor within the federal government, potentially setting back conservation efforts by moving NRCS into an apparent enforcement role for CWA compliance as will be explained more fully below. (p. 1-2)

Agency Response: As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

14.327 Interpretive Rule (IR)

Under the interpretive rule (IR), producers may qualify for the section 404 exemption by implementing one of 56 conservation practices included on a list published by the EPA in

conformance with NRCS technical standards. So long as these practices are in conformance with the provisions of these standards, there is no need for a determination of whether the discharges are in waters of the United States nor is site-specific pre-approval required.

The MOU signed by NRCS and EPA reinforces the requirement that conservation practices have to be installed in conformance with the NRCS standards. Even for practices for which NRCS is not providing technical assistance, the landowner is responsible for ensuring that implementation of the conservation practice is in accordance with the applicable practice standard.

Technical standards produced by NRCS now form the foundation for the only IR published on how to gain a 404 exemption for normal farming practices. Prior to the IR, 404 exemptions were granted without reference to NRCS technical standards. (p. 2-3)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.347 Effect of the Interpretive Rule

Using the harvesting of hay as an example, it becomes apparent how a very ordinary farming practice could be affected by the IR's listed practices. After the IR, a producer apparently can only gain a 404 exemption by following NRCS Conservation Practice Standard #511, "Forage Harvest Management". This four-page standard contains criteria for timing of harvest (no compromising plant vigor and stand longevity); for mandatory recommendations for optimum moisture content and levels as well as methods and techniques to monitor and/or determine moisture content and levels; for length of cut as well as the converse for stubble height; for a bar on contaminants. Additional criteria are prescribed to improve or maintain stand life, plant vigor, and forage species mix; to use forage as a nutrient uptake tool; to control disease, insect, weed and invasive plant infestations; and to improve wildlife habitat values.

A very significant portion of conservation and ordinary farming practices are carried out in this country without any reference to NRCS practice standards. For producers who harvest hay utilizing other information or standards, will they now be required to only do so in conformance with standard #511? If they reasonably choose not to, or for the many producers who simply do not work with NRCS on their operations, they will not qualify for a 404 exemption as they would have before the issuance of the IR.

The vagaries of making good decisions about complying with NRCS technical standards are not a theoretical exercise for the dairy industry. Together with NRCS, NMPF published a "Dairy Environmental Handbook: Best Management Practices for Dairy Producers" of farm management practices which are based on the NRCS standards but are almost universally tailored to meet the needs of dairy operations (http://www.nmpf.org/publications/dairy_handbook). Under the IR, dairy producers who follow their industry standard will apparently not qualify for a 404 exemption. A dairy producer would understandably be confused about which standard to follow even though

the NMPF handbook may prescribe the practices that best meet the needs of dairy operations.

Impeding the effective use of the "Dairy Environmental Handbook" would seem to run counter to the Administration's goal to encourage conservation and responsible farming practices. NMPF and the dairy industry have invested a great deal of time and money in working with NRCS to produce the Handbook for dissemination among its members. Now that the practices in the Handbook cannot be used to secure 404 compliance, the industry will rightfully ask itself whether it was worth the investment to try to do the right thing. It seems illogical that this is the message EPA intended by imposing the procedures required in the IR. (p. 3-4)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.348 Is Compliance with NRCS Standards Voluntary?

Deciding not to comply with the identified practice standards is a difficult choice to make, because doing so will expose the producer to legal liability. Choosing to conform to the standards is hardly voluntary under these circumstances notwithstanding EPA's insistence to the contrary. Choosing not to conform means the producer will not gain the 404 exemption for the broad scope of practices EPA has included on its list. In this sense, the IR has the potential to coerce conduct among those producers. NRCS activities, in this case, production of the technical standards, are central to the administration of this regulatory scheme.

According to those who assert that conformance with the practice standards is voluntary, dairy producers will continue to have the option of implementing practices from the "Dairy Environmental Handbook", even though these practices do not conform to NRCS practice standards. Should a producer choose this course of action and later be challenged in court, the only legal recourse will be to challenge the legality of requiring use of the technical standards as a necessary predicate for gaining a 404 exemption. Common understanding would not recognize this option as providing a "voluntary" course to follow.

The potential for coercion is particularly worrisome given the very uneven track record of the federal government in asserting jurisdiction over waters of the U.S. Some federal personnel will invariably tell producers that conformance with the practice standards is the only sure route to avoiding legal liability for a 404 discharge. This is an accurate statement for the practices listed by EPA, and similar practices. (p. 4)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.349 Unlisted Practices

Further troubling is the status of 404 exemptions for normal farming practices that are not included on the EPA list and which are not required to be installed in conformance with

the NRCS standards. One interpretation of the IR would be that 404 exemptions continue to be available for these practices in the exact measure they were available prior to the issuance of the IR. Another interpretation would be that these practices will be under a cloud of suspicion. If they are not installed according to the exacting criteria in the NRCS standards, will government officials and interested members of the public deem the non-listed practices to cause unacceptable environmental degradation?

This question only arises because of the insertion of the IR into the normal farming practice arena and the creation of two classes of practices. To be more precise, NRCS includes approximately 170 practices in its practice manual. The EPA is including only 56 of these on its list of practices through which it prescribes the procedure for gaining a 404 exemption. The IR leaves unaddressed the question of whether exemptions are available for the remaining 114. This will place a significant amount of normal agricultural activity under the IR cloud of legal suspicion. Although fact sheets and Question and Answer documents try to make clarifying statements regarding the Agency's intent and purpose of the IR, these statements are not reflected in the specific language of the IR thus lending support to our claim that the IR narrows the agricultural exemptions allowed under section 404 (f)(1)(A) and places additional requirements on producers to operate under those exemptions. Clearly, the IR does not meet its stated purpose to "clarify the applicability of the exemption from permitting." The IR adds confusion to the issue and generates additional concerns regarding interpretation of "normal" farming practices.

Fear of litigation is not groundless. Producers face it all the time, using precious resources they would rather apply toward improving their operations. In the new world resulting from effectuation of the IR, compliance with NRCS practice standards will inevitably arise as an issue in litigation. It will be resolved by NRCS officials providing testimony on the adequacy of the compliance with very detailed requirements as indicated with the hay harvesting example. In this manner, NRCS will be a direct partner with EPA in enforcing regulatory standards. Producer reliance on NRCS as a trusted partner in conservation will suffer as a result. In the meantime, NRCS will need to determine how it will handle this new responsibility and conduct the necessary staff training. (p. 4-5)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. Nothing in this rule effects the role of NRCS and is outside the scope of the rule making.**

Western Organization of Resource Councils (Doc. #15442)

14.350 Specifically, we support the EPA's intent that the proposed definition of Waters of the U.S. not affect existing regulatory exemptions for agricultural activities, but we share the concerns of many about the definitions of normal farming practices in the interpretive rule. In particular, we urge EPA to take extra care to be clear that agricultural practices not specifically included in the interpretive rule, but which might be required to meet NRCS guidelines, will not trigger permitting requirements under the Act. We hope EPA will clarify how the list of practices will be reviewed and updated over time to avoid

unnecessary interference with normal and resource conserving agricultural practices. We share the concerns of the Senators in the letters cited above that EPA ensure the protection of the privacy of farmers and ranchers, to further clarify and limit the application of the proposed rule to farm drainage and irrigation ditches and upland ditches. (p. 2)

Agency Response: As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Dairy Producers of New Mexico (Doc. #15464)

14.351 The interpretive rule and its explanation of agricultural exemptions are misleading and it appears the Agencies are using the IR to work around the rule-making process, with no input from the affected public. The IR outlines just 56 activities out of more than 160 conservation practices that previously qualified for the normal farming and ranching exemption. DPNM always is concerned when governmental agencies issue rules without advance notice and without public comment. If the IR is indeed Agency guidance, rather than an attempt to write law, the Agencies should develop internal guidance policies. Based on our experience, guidance documents are often interpreted as law by Agency personnel. Procedures like these, unfortunately, make us question the objectivity of the Agencies in proposing new rules.

The Agencies are limiting what is considered "normal farming". The Agencies are once again trying to regulate farmers and implement a "one size fits all" approach for the entire country. Arroyos and washes in the desert southwest without an Ordinary High Water Mark (OHWM) are distinctly different than vegetated gullies in wetter geographic areas of the country and have different flow characteristics and their nexus to WOTUS should be evaluated on a case by case basis

Based on decades of experience with EPA, it is apparent that many Agency staff does not know what "normal farming" is and is requiring compliance with Natural Resources Conservation Services (NRCS) standards although NRCS is specifically not a regulatory agency. The proposed new WOTUS rule could lead to fundamental changes in the relationship between farmers and the US Department of Agriculture. NRCS already has performance conditions in place for operations that receive financial assistance through the Environmental Quality Initiatives Program (EQIP) funding and the "expanded" list of exempt practices already fall within "normal" farming. Limiting the exemptions to "existing or established" farming will create an environment where next generation farmers may be forced out of business if they cannot continue successful farming practices. The Agencies should be aware that bringing new cropland into production is an expensive and lengthy process that includes but is not limited to land acquisition, water rights acquisition, drilling of wells, installation of efficient irrigation systems, building soil health and more. Any farmer who is willing to invest in future food and crop production will design the fields to conserve water and prevent valuable irrigation water from running off into waters of the U.S. Many farmers double crop or have other value added businesses associated with their farms. As such, it is important for the Agencies to

exempt farms who are installing renewable energy systems (wind, solar, methane digesters, etc.) from additional regulations. (p. 2)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. See Agency Summary response 14.2.2 for a discussion of "normal farming". Nothing in this rule effects the role of NRCS and is outside the scope of the rule making.**

14.352 One of DPNM's biggest concerns is related to the role that the Agencies are proposing for the NRCS. NRCS is an advisory agency and their conservation practices evolve over time, after significant research is conducted. NRCS develops standards based on State or regional conditions that reflect the wide-ranging farming practices across the US. How does EPA propose to modify the rule in the future when NRCS develops new conservation standards? What type of public input will be available when the Agencies propose new standards for exempt or non-exempt conservation practices?

EPA's role is to regulate water quality and this proposal is attempting to regulate the land use on lands that drain into tributary waters and jurisdictional waters. Regulating land use and conservation practices are outside the scope of EPA's authority. The Agencies are stating that NRCS will not function in a CWA section 404 compliance role but will provide recommended conservation practices. Will the Agencies then interpret NRCS recommendation as regulations for compliance with the CWA? Will the Agencies defer to NRCS standards if a third party challenges exempt status for a low-lying farm?

The Agencies are proposing that farmers who do not currently have NRCS-approved conservation practices must implement these practices to obtain exempt status. The Agencies are presenting no evidence that these farms are contributing pollutants to WOTUS. The Agencies are suggesting that a farmer contract with technical experts that will result in increased cost to farmers or the NRCS. This proposal will result in farmers having to pay for private technical service providers or taxpayers having to pay for additional NRCS staff to provide the assistance the Agencies are requiring. Either way, the Agencies' proposal is an unfunded government mandate.

A significant amount of farmland nationally is located on terraces that are above perennial stream channels. These farmlands have been subject to periodic flooding for hundreds of years and the statistical flood recurrence interval should have no bearing of whether or not "bottomland" farms are jurisdictional. DPNM is concerned that the Agencies will try and restrict normal farming practices (including use of pesticides and herbicides) on farms located adjacent to perennial streams or rivers. Floodplains do not have an OHWM and existing and future developed farmland located in floodplains should be exempt from CWA jurisdiction. It is DPNM's opinion that a "tributary" is nonjurisdictional if it does not have an OWHM. (p. 3)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. Nothing in this rule effects the role of NRCS and is outside the scope of the rule making.**

Oklahoma Panhandle Agriculture and Irrigation Association (Doc. #15506)

14.353 Our members and water resources have benefited through having a nonregulatory relationship with NRCS for generations. The proposed rule creates an interpretive regulatory burden upon NRCS that will dramatically alter the relationship we have with that agency. We ask that you work with USDA and state agriculture agencies to develop a definition of agriculture practices that can replace the NRCS exemptions in the current rule. (p. 3)

Agency Response: As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making. Nothing in this rule effects the role of NRCS and is outside the scope of the rule making.

Jensen Livestock and Land LLC (Doc. #15540)

14.354 Jensen Livestock and Land LLC incorporate their comments on the agencies' Interpretive Rule on Agriculture Conservation Practices Under the "normal farming, silviculture and ranching" activities exemption under Sec. 404 of the CWA as Exhibit A below. In summary, the Interpretive Rule would limit the "normal farming" exemption, discourage voluntary conservation, and ultimately hurt water quality. Jensen Livestock and Land LLC request the agencies immediately withdraw the Interpretive Rule and make it clear in such withdrawal that the agencies have always interpreted conservation activities to be "normal farming" activities. (p. 28-29)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

New York Farm Bureau (Doc. #15616)

14.355 New York Farm Bureau also submitted comments to the docket regarding the "Interpretive Rule" (EPA-HQ-OW-2013-0820) that accompanies this rule, asking for its withdraw as well. We have also previously submitted a letter in conjunction with 9 other business, government and agricultural organizations from New York asking for the full rule to be withdrawn given the damage it will cause agriculture, business, government and other important entities in our communities and our state. (p. 7)

Agency Response: As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Iowa Farm Bureau Federation (Doc. #15633.1)

14.356 [I]n the Interpretative Rule issued this past March, the Agencies made clear that CWA §404(f)(2) applies to make the "normal farming activities" exclusion inapplicable when

the reach or flow of water is impacted by such farming activity, such as constructing a grassed waterway[58] When the Agencies blur the lines between land and water, as they have in this rule, the breadth of the Agencies' authority becomes so great that the intended exclusions are swallowed by the expansion. (p. 2)

Agency Response: **As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.**

14.357 The impact of all of these new definitions and categories are compounded by the Interpretative Rule.[59] Section 404 and the Interpretative Rule are triggered if a normal farming activity is conducted in a water of the U.S. The Interpretive Rule released March 25, 2014 does not console concerns with this rule as it significantly narrowed the scope and manure of doing farming practices which qualify for the "normal farming activities" exclusion. The rule did not apply this exclusion to any other section of the CWA even though EPA materials have repeatedly made the implication.[60]

Because the definitions have expanded the amount of jurisdictional waters, the likelihood of a farmer needing to utilize the Interpretative Rule increases as a result of this rule. Conservation practices are impacted by the delays and costs of having to obtain a jurisdictional determination, §404 permit, §401 certification, or following the Natural Resources Conservation Service's technical standards. Having to obtain a §404 permit will result in fewer conservation practices being implemented on the land. It will also result in stifling necessary innovations in practice technology to address complex problems. The proposed rule creates many questions about whether the construction of conservation infrastructure will require a §404 permit and §401 certification of state water quality standards.

Once the conservation infrastructure is constructed such as a terrace, grassed waterway, sediment basin, biofilter or treatment wetland, the feature then has the possibility of becoming a water of the U.S. This rule also raises questions about the applicability of the remaining provisions of the CWA, including §402. What is currently considered to be agricultural stormwater is now defined, in many cases, as a water of the United States under this rule. The purpose of conservation practices and infrastructure includes, but is not limited to, slowing down stormwater runoff, increasing holding time before water enters a stream, trapping sediments, increasing soil infiltration and to filter out pollutants. Because the grassed waterway won't be cultivated each year, over time or after a major storm event, a channel will form in some part of the waterway. Terraces hold back water

[58] U.S. E.P.A. and U.S. Dept. of the Army Interpretative Rule Regarding Applicability of Clean Water Act Section 404(f)(1)(A), March 25, 2014, at 2; Memorandum of Understanding Among the U.S. Dept. of Ag., The U.S. E.P.A., and the U.S. Dept. of the Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards, March 25, 2014, at 2.

[59] U.S. E.P.A. and U.S. Dept. of the Army Interpretative Rule Regarding Applicability of Clean Water Act Section 404(f)(1)(A), March 25, 2014, at 2; Memorandum of Understanding Among the U.S. Dept. of Ag., The U.S. E.P.A., and the U.S. Dept. of the Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards, March 25, 2014, at 2.

[60] See e.g. http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/

to trap sediments and allow greater soil filtration. This new rule will act as a disincentive to conservation because of the time delay, and increased costs of obtaining a permit as well as the cost of regulatory compliance. (p. 14)

Agency Response: This is a definitional rule and it does not establish any regulatory requirements. As stated in the 14.2 summary, the Interpretive Rule was withdrawn and is outside the scope of this rule. The permitting exemptions provided in the CWA for agriculture are unchanged by this rule and are outside the scope of this rule making.

Wisconsin Farm Bureau Federation (Doc. #16166)

14.358 The proposed rule by EPA and the Corps was meant to expand the definition of "Waters of the United States" by broadening definitional terms like "tributary" and "adjacent" as well as expanding categories such as "adjacent wetland" to "adjacent waters". The proposed rule would also include jurisdiction to regulate ditches, farm ponds, dry stream beds, and ephemeral streams. In the same breadth, the EPA and Corps released an Interpretive Rule to clarify the 56 exempt farming practices. Why only 56? The Natural Resource Conservation Service (NRCS) currently recognizes several hundred approved conservation practices for farmers to implement. Not only do we question why the Corps and EPA selected the 56 farming practices that are exempt, but because they were included in the Interpretive Rule, they can be changed or all together removed at any time, leaving farmers in a continual state of regulatory uncertainty. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this final rule is narrower than that under the existing regulation, in part because the rule puts important qualifiers on some existing categories, such as tributaries.

As stated in the summary essay above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

Huntington Farms (Doc. #16331)

14.359 We recognize that EPA and ACOE have exempted 56 farming and ranching activities as long as they meet current NRCS standards, but any deviation from these standards can result in significant fines calculated on a daily basis. This will severely limit any future changes in agriculture practices that may increase efficiency, over water utilization, or further enhance water quality simply because they may be deemed as non-exempt in concept. These exemptions only apply to CWA section 404 and do not provide protection from CWA Section 402 NODES permitting requirements that may fall under the proposed rule change. There are very valid concerns on the potential conflicts these exemptions will create for on-farm activities (p. 2-3)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule. The agencies do not believe the rule will have a negative effect on agriculture.

Kentucky Soybean Association (Doc. #16345)

14.360 By singling out 56 NRCS practices as exempt, EPA and the Corps are telling farmers that other conservation practices many of which achieve the same positive environmental effect are potentially subject to permitting. (p. 2)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

Michigan Pork Producers Association (Doc. #16595)

14.361 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 that 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. We also request that EPA and the Corps withdraw the proposed rule on the Waters of the United States and begin to work closely with all affected stakeholders in a meaningful fashion to craft a narrowly tailored proposal that addresses actual verified CWA problems while minimizing its overreach and impact on farms. (p. 2)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. See also Agency Summary response 14.2.2 and Compendium for Process Concerns and Administrative Requirements.

Mendocino County Farm Bureau (Doc. #16648)

14.362 While the Agencies have exempted 56 fanning and ranching practices, as long as they meet the specific NRCS standards, any deviation from these standards can result in significant fines. In addition, 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. 2-3)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

Illinois Pork Producers Association (Doc. #16797)

14.363 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 that 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. We also request' that EPA and the Corps withdraw the proposed rule on the Waters of the United States and begin to work closely with all affected stakeholders in a meaningful fashion to craft a narrowly tailored proposal that addresses actual verified CWA problems while minimizing its overreach and impact on farms. (p. 2)

Agency Response: See response 14.363

Young Farmers and Ranchers Committee American Farm Bureau Federation (Doc. #16580)

14.364 [T]o qualify for the "normal farming and ranching" exemptions, the activity has to be part of an "ongoing/established" farming or ranching operation. Under the Agencies' historical interpretation, that means the operations must have been ongoing at the same location since 1977 to benefit from the exemption. Any newer operation would require a section 404 permit just to move dirt, at least until it becomes an "established" operation. This limitation is most onerous for younger farmers and ranchers who were clearly not farming and ranching before 1977. (p. 2)

Agency Response: See Ongoing Farming, Agencies' Summary Response 14.2.2. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of the rule.

Montana Stockgrowers Association (Doc. #16937)

14.365 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. We have numerous members who will find their own conservation practices on their own ranch, but not strictly follow the NRCS standards. This situation, places a great burden on producers trying to make improvements, but who would then be unsure of whether or not they are in compliance with regulations. Our general questions are: What activities are prohibited? What happens when a violation is suspected? What happens when a violation is determined? Can enforcement decisions be challenged? (p. 5)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

Iowa Soybean Association (Doc. #17175)

14.366 We believe the rule creates uncertainty among farmers who are engaged in normal farming practices and who are also making voluntary efforts for soil and water conservation practices on their farms. While the rule provides an exemption for normal farming practices, the practices listed do not include nutrient and pest management practices. Farmers are concerned that their tile drainage, ditches, farm ponds, field

waterways, edge of field practices and prior converted croplands may not be considered exempt from permitting and enforcement. We believe there should be a detailed list of explicit exemptions for agriculture as well as a process for adding new technologies as they are developed. It would also be helpful to have a list of those practices which are NOT exempt under this rule. (p. 1)

Agency Response: **As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.**

Illinois Fertilizer & Chemical Association (Doc. #15129)

14.367 Withdraw in its entirety the USDA/NRCS interpretive rule as these practices were already exempt and the rule provides no legal protection or certainty for agriculture. (p. 2)

Agency Response: **As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.**

Washington County Water Conservancy District (Doc. #15536)

14.368 Additionally, the Interpretive Rule for agricultural exemptions, which was released simultaneously with the Proposed Rule, is unclear and seems to narrow the scope of agricultural exemptions for several reasons: (1) it explicitly states that farmers who deviate from National Resources Conservation Service's (NRCS) standards will not benefit from the exemption; (2) the Interpretive Rule only seems to apply to "normal" farming practices, so it unclear whether newer farms or farms where the farming stopped for a period and then resumed, or farms that switched crops will fall outside of "normal" farming and ranching practices; (3) it does not apply to CWA section 402 NPDES permitting requirements; (4) it is unclear which agency officials will be the final authority on compliance with the NRCS standards; and (5) the Interpretive Rule is only guidance and therefore, does not provide farmers and ranchers will the level of certainty they need to successfully continue operation of their businesses. The Agencies should revise the Interpretive Rule to address these issues. (p. 31)

Agency Response: **As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.**

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

14.369 Tri-State is concerned that under the proposed rule, a water management pond constructed on dry lands (not an impounded WOTUS), but in proximity to an ephemeral tributary could become a per se jurisdictional WOTUS under the proposed rule's definition of adjacent waters. Such ponds of concern may even have synthetic or clay liners to specifically protect groundwater and surface water, though this factor may not be

fully considered during a review of adjacency, especially where such ponds are physically close to another WOTUS. (p. 7)

Agency Response: There are additional exclusions in the final rule for features created in dry land. See the Compendiums for Features and Waters Not Jurisdictional and Adjacent Waters.

Southern Nevada Water Authority (Doc. #16507)

14.370 SNWA recommends that the interpretive rule regarding exemptions for agricultural practices be amended to include conservation activities implemented in partnership with BOR. (p. 6)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making.

National Wild Turkey Federation (Doc. #11833)

14.371 We support the direction taken in the Environmental Protection Agency and US Army Corp of Engineers Interpretive Rule that confirms continued exemptions for traditional forestry practices. These continued exemptions will be important to ensure that forest management activities can continue to be implemented in a cost-effective manner and at a scale large enough to sustain the timber industry. (p. 1)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

National Waterways Conference, Inc. (Doc. #12979)

14.372 The agricultural "interpretive rule" governing approved conservation practices, which was issued concurrently with the proposed rule, should be withdrawn. First, because this interpretive rule effectively changes existing regulations, it is subject to public notice and comment requirements under the Administrative Procedure Act ("APA"), and the agencies must provide the public an opportunity to comment on it.[61] In addition, there is a great deal of confusion and uncertainty among the agricultural community regarding the applicability of 404(f)(1)(A) exemptions. NWC encourages the agencies to withdraw the interpretive rule and ensure that any future changes to normal exemptions comply with the APA. The entire Republican membership of the Senate Committee on Agriculture agrees that the interpretive rule must be withdrawn immediately.[62] (p. 12)

Agency Response: As stated in the summary essay 14.2 above, the Interpretive Rule was withdrawn and is outside the scope of this rule making. Nothing in the

[61] 5 U.S.C. § 553(b)(3)(A); Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999).
[62] Letter from Sen. Thad Cochran et al. to EPA Adm'r Gina McCarthy et al. (Oct. 23, 2014), available at http://www.cochran.senate.gov/public/_cache/files/dfd0b876-aa10-4f83-b348-e5dc24c5c004/WOTUS-Ag-Interpretive-Rule-Letter.pdf.

rule changes the exemptions for agriculture provided within the CWA and those permitting exemptions are outside the scope of this rule.

The Association of State Wetland Managers (Doc. #14131)

14.373 ASWM reminds the federal agencies of its recommendation that the Interpretive Rule, issued simultaneously with publication of the proposed rule, be withdrawn (please see our formal comment letter on the Interpretive Rule of July 7, 2014). Our support for the proposed rule on definition of Waters of the United States does not extend to the Interpretive Rule which, although intended to streamline processes under the proposed rule, has instead already resulted in significant confusion and opposition. (p. 10)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Western Landowners Alliance (Doc. #15380)

14.374 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 or wetland-related could also reduce confusion. (p. 3)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Trout Unlimited (Doc. #18015)

14.375 The rule recognizes the great conservation strides the agriculture community has made since the 1970s, when the Clean Water Act first came into effect, especially those improvements made via the Farm Bill conservation programs. The intent of the Interpretive Rule (IR) is to clarify that certain conservation practices in waters of the United States following NRCS standards are also exempt from Section 404 permitting requirements in addition to the other exemptions provided by the law.

Some of our producer partners have expressed considerable criticism of the IR. The agencies can resolve these concerns by holding additional work or listening sessions with stakeholders on the WOTUS rule as it nears adoption. Per your March 2014 memorandum of understanding, the agencies concurrently should consider stakeholder input on the IR prior to its first annual review in the spring of 2015. We agree with some agricultural interests that the list of exemptions in the IR needs to be expanded to include additional agricultural and conservation practices that lead to viable agriculture operations, improved fish and wildlife habitat, and clean water supplies. We believe that a continually evolving and flexible IR will enable future partnerships that support healthy agriculture and healthy streams. (p. 3)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Elk River Residents Association Doc. #3737.2)

14.376 We are suffering with endless discharges of sediment and pollutants that fill our river channels, kill salmon and contaminate our only water source. This in-filling causes unnatural flooding that threatens lives, damages homes, farms, and the Public Trust while blocking access to emergency services, jobs, and schools. Government-authorized river in-filling violates the Public Trust. EPA and ARMY CORPS' logging and agricultural exemptions must be examined and withdrawn. (p. 1)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Mercatus Center at George Mason University (Doc. #12754)

14.377 Along with this regulation, the agencies issued an interpretive rule regarding the applicability of the exemption from permitting under the Clean Water Act. We remind the agencies here that significant regulatory actions as defined under Executive Order 12866 are required to undergo review by the Office of Information and Regulatory Affairs within the Office of Management and Budget, and they often must also be accompanied by a Regulatory Impact Analysis.[63] Actions such as interpretive rules can have significant economic impacts, just as regulations do. Agencies should not use interpretive rules to avoid standard procedures in the regulatory process that ensure basic levels of sound decision-making.[64] This is problematic in a US system that is intended to comprise checks and balances. (p. 5)

Agency Response: As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.

Patrick E. Murphy, Member of Congress, Congress of the United States, House of Representatives (Doc. #15371.1)

14.378 The Agricultural "Interpretive Rule" Does Not Exempt All Farming Activities from Federal Agency Oversight

• Congress amended the Clean Water Act in 1977 to exclude normal farming activities and certain other activities related to agriculture, silviculture, and mining

• The Corps and EPA have construed this exclusion narrowly, and nevertheless require Clean Water Act permits for many activities on farms o Example: If a farmer wants to move farm shed on a property, or build additional farm-related facilities, the Corps usually requires the farmer to apply for Clean Water Act permit

[63] Exec. Order No. 12866, 3 C.F.R. 76 (1993).

[64] For more discussion of agency attempts to evade cost-benefit requirements, see John D. Graham and James Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," Harvard Journal of Law and Public Policy: Federalist Edition 1, no. 1 (June 4, 2014): 30–54; Nina A. Mendelson and Jonathan B. Wiener, "Responding to Agency Avoidance of OIRA," Harvard Journal of Law and Public Policy 37, no. 2 (Spring 2014): 447–521; John D. Graham and Cory R. Liu, "Regulatory and Quasi-Regulatory Activity without OMB and Benefit-Cost Review," Harvard Journal of Law and Public Policy 37, no. 2 (Spring 2014).

• The agencies' recent "interpretative rule" simply identifies some additional activities which the agencies will agree fall within the statutory exclusion, but impliedly makes most other activities on farms subject to agency oversight and creates no new rights to farmers (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

Tim Bishop, Ranking Democrat Subcommittee on Water Resources and Environment, United States House of Representatives (Doc. #18018)

14.379 [W]ith respect to the interpretative rule, it was suggested during Q&A that if a specific agricultural conservation practice is not included as part of the March 2014 Interpretive Rule and Memorandum of Understanding, that these practices would, by inference, be excluded from coverage as a normal farming practice under section 404(f). Is this the case? (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

Joe Donnelly, United States Senate (Doc. #19304)

14.380 In November 2013, during a visit to Johnson County, Indiana, Administrator McCarthy experienced firsthand the importance of clean water to Hoosiers. We know that water is a shared resource, and we want to improve water quality throughout the country. We all have incentives to invest in clean water, including safe drinking; more productive farms and businesses; and improved hunting, fishing, and recreational opportunities. For these reasons, leading Hoosier agricultural organizations have voluntarily developed a ten-year nutrient management and soil health strategy that will reduce nutrient loss from farms and improve water quality throughout the state. (p. 1)

Agency Response: **The agencies are supportive of voluntary programs which improve water quality.**

Jim Nielsen, Senator, Fourth District, California State Senate (Doc. #19649)

14.381 This proposed rule compounds an already onerous regulatory process and the agriculture exemptions are too restrictive. The exemptions are extremely narrow; only applying to the Clean Water Act, Section 404 "dredge and fill" permit program. The exemption does not provide any protection from enforcement for routine agricultural practices such as fertilizer application or weed control. Furthermore, a farmer has to have been farming continuously since 1977 to benefit from this exemption. What this proposed rule is doing is placing roadblocks in front of new or future farmers and ranchers. It will make it more difficult to farm or change a farming operation to help it remain competitive and profitable, because they will not benefit from the EPA's interpretive rule. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule is outside the scope of the rule making. The exemptions within section 404(f) are not affected by this rule making.**

14.2.1. NRCS Conservation Practice Standards

Agencies' Summary Response

As stated in the summary above the Interpretive Rule was withdrawn on January 29, 2015 as directed by Congress in Section 112 of the Consolidated and Further Continuing Appropriation Act, 2015, Public Law No. 113-235. The memorandum of understanding signed on March 25, 2014 by the EPA, the Army, and the U.S. Department of Agriculture, concerning the interpretive rule is also withdrawn. The Interpretive Rule and the NRCS practice standards are outside the scope of this rule.

Specific Comments

T. Moxley (Doc. #2520)

14.382 We have a number of programs that have been developed by NRCS and other governmental agencies and NGO's which are instrumental in much of the successes we now enjoy. Those should continue but the effort to further regulate by means of the Clean Water Act should be rejected. (p. 1)

Agency Response: This rule does not change the statutory exemptions provided within the Clean Water Act for agriculture. The agencies support efforts of other agencies and groups to protect and enhance America's waters.

14.383 The Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404 (f) (1) (A) of the CWA to Certain Agricultural Conservation Practices (Interpretive Rule) attempts to define what activities are normal agricultural activities by deferring to NRCS guidance. The interpretive rule is just the newest of a multitude of guidance documents for permitting under Section 404 of the CWA. It is difficult, if not impossible, for interested public parties to know of the existence of these documents. Therefore, it would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place.

NRCS guide lines are subject to review, and parties with an interest in the CWA may not be aware of these changes or their potential impacts on their agricultural operations. NMDA requests the Agencies publish a Federal Register notice when NRCS guide lines are up for review. This notice should indicate that changes in NRCS guidelines will impact agricultural producers due to the applicability of permitting under the CWA, which would not have been necessary prior to changes in NRCS guidelines. We have requested the same of the NRCS when they make changes to their National Handbook of Conservation Practices.[65]

[65] Natural Resources Conservation Service. "Conservation Practices." http://www.nrcs.usdagov/wps/portal/nrcs/delailfull/national/technical/references/?cid=nrcs 143 026H49

Please see our previously submitted comments on the Agricultural Interpretive Rule and the NRCS National Handbook of Conservation Practices in Appendix 8 for further concerns regarding this document. (p. 15-16)

Agency Response: **As stated previously, the Interpretive Rule (IR) was withdrawn and is outside the scope of this rule making. Accordingly, there will be no review of the NRCS guidelines for use under the IR by the agencies posted. The agencies do maintain webpages on agriculture and the CWA to include http://www.epa.gov/agriculture/lcwa.html and http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm.**

14.384 It would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place. (p. 28)

NMDA requests the Agencies publish a Federal Register notice when NRCS guide lines are up for review due to the fact that changes in the NRCS guidelines will affect compliance with the Clean Water Act for certain agricultural practices. (p. 28)

Agencies' Response: **See immediately previous response, 14.383.**

Board of County Commissioners, Huerfano County (Doc. #1771)

14.385 The potential that a permit be required if a rancher wants to move cattle over a wet field exists in the proposed rule and the enforcing staff person will make the judgment of the necessity of a permit, potentially forbidding a rancher to move his cattle. Agriculture is a significant contributor to our local economy and additional obstacles will make a marginal industry even more fragile. (p. 1)

Agency Response: **The CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. The exemption for ranching activities in section 404(f) is not affected by this rule making.**

Washington Association of Conservation District (Doc. #3272.2)

14.386 WACD encourages the continued cooperation between EPA and NRCS in exploring how federal agencies can rely on voluntary, incentive-based conservation programs and services to achieve water quality protection and enhancement. Further, WACD believes that it is critical that EPA and NRCS include the National Association of Conservation Districts (NACD) at the table as these inter-agency activities continue, to ensure that the incentive-based, non-regulatory conservation system delivered by conservation districts retains its integrity and effectiveness. (p. 2)

Agency Response: **The Agencies agree that cooperative working relationships with other Federal agencies can improve voluntary, incentive-based conservation programs which protect and enhance water quality and will continue to work with our partners for ways to achieve those goals.**

14.387 The IR notes that the intent is not to limit the exemption for "normal farming" practices to only those practices explicitly listed, and that this interpretation preserves Congress' intent by ensuring that "beneficial agricultural conservation practices will not be

unnecessarily restricted". The IR notes that other conservation practices that are "similar enough" [to listed NRCS practices] should also be exempt. The WOTUS rule states that the explicitly listed conservation practices exemption is "self-implementing", meaning that no producer application or other prior regulatory activity is needed in order to perform these practices. (p. 2-3)

Agency Response: As stated in the summary above 14.2, the Interpretive Rule was withdrawn and there is no requirement to seek the prior approval of the agencies to conduct exempt activates.

14.388 The IR states that, in order to "qualify" for the exemption, conservation activities must be implemented in conformance with [listed] NRCS technical standards. WACD questions whether this statement (though desirable) is consistent with the above reference to self-implementing, exempt activities under "normal farming", since practices specifically listed are not an exhaustive representation of conservation activities that are exempt. (p. 3)

Agency Response: See summary 14.2 for a discussion on the Interpretive Rule withdrawal.

14.389 [C]ould the rule result in EPA or ACE staff making determinations in the field (or on paper) about what does or does not meet NRCS technical standards? Could the rule result in regulatory agency requests to NRCS to make practice conformance determinations or to review CWA permits? It would be a critical error if the IR places our NRCS partner in a real or perceived regulatory role. Or might the rule draw regulators' or stakeholders' insistence for regulatory agency access or public access to producers' conservation plans as a regulatory accountability measure – a serious impediment to voluntary conservation program participation. (p. 3)

Agency Response: Please see summaries 14.2 and 14.2.1 above for a discussion on the Interpretive Rule withdrawal and NRCS' standard.

14.390 To complicate matters, the IR is guidance, not binding, and this, together with the proposed ongoing exemption listing of NRCS conservation practices under an interagency MOU, lacks needed certainty. (p. 4)

Agency Response: See summary 14.2 for a discussion on the Interpretive Rule withdrawal.

Texas Soil and Water Conservation District #343 (Doc. #6793)

14.391 Almost the entire farming and ranching industries are composed of small businesses. Most are family-run, and the families that run them are not millionaires. They work hard every day to keep their cattle and families in good health. Regulations, like your proposal, make it hard to keep small businesses financially viable. More red tape is the last thing my ranch needs, because it gets in the way of me putting environmentally friendly practices on the ground, many of which are not included in your list of 56. This proposal will have a negative impact on my small business and hundreds of thousands like it across the country. (p. 1)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Nevada County Board of Supervisors (Doc. #6856)

14.392 Under an interpretive guidance rule, farmers and ranchers would be exempt from Section 404 permits so long as any of 56 listed practices comply with Natural Resource Conservation Service (NCRS) standards, despite the fact that those practices have qualified as "normal" farming, ranching and silviculture activities for 37 years. This interpretive rule narrows how the exemption is applied and increases farmers' liability by requiring that farmers comply with NRCS conservation standards, which were previously voluntary, in order to be exempt from Section 404 permitting. While we recognize the agencies' attempt to address farmers' concerns through the guidance document and Memorandum of Understanding with NRCS, this still requires farmers to spend more time on seeking exemptions than on the core practice of farming. (p. 2-3)

Agency Response: **"Normal" farming, ranching and silviculture exemptions provided in CWA and are defined in the agencies implementing regulations and remain unchanged by this rule.**

14.393 The newly proposed interpretation of "normal farming and ranching" would apply only to farms and ranches that EPA determines to be "established" and "ongoing"-not newer or expanded farms and ranches. This new layer of bureaucracy adds to the list of reasons why small family farms are disappearing from the landscape, and not enough young people are choosing careers in farming and ranching. (p. 3)

Agency Response: **"Normal" farming, ranching and silviculture exemptions provided in CWA and are defined in the agencies implementing regulations and remain unchanged by this rule.**

Iowa Department of Agriculture and Land Stewardship - State Soil Conservation Committee (Doc. #7642)

14.394 [W]e are concerned that the fear of litigation over projects built by landowners may stand in the way of good conservation being applied to the land especially in projects that are functionally equivalent to NRCS standards but not involving NRCS engineering. (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn.**

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

14.395 The interpretative rule states that a farmer enacting on of the conservation practices approved under the interpretive rule does not have to have prior approval from the Corps nor the EPA, but the farmer must comply with National Resources Conservation Services (NRCS) technical standards. The rule does not make it clear which agency will ensure that farming practices are in compliance nor what would happen if a farmer is unknowingly not in compliance. If they are unknowingly not in compliance with NRCS standards, we believe that agricultural producers would be open to citizen lawsuits under

the Clean Water Act. The interpretative rule leaves the agricultural producers of our great country in more regulatory uncertainty. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn.

14.396 The interpretive rule states that exempted conservation practices will be reviewed on an annual basis. This is unnecessary as the implementation of conservation practices involves multi-year projects; and we are concerned that a farmer or rancher who has enacted or is in the process of enacting a practice will suddenly be left in a state of limbo if that practice is removed from the approved list. A process for dealing with this situation should be developed and added to the rule. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and is outside the scope of this rule.

Pima Natural Resource Conservation District (Doc. #14720)

14.397 The Agricultural Interpretative portion of the proposed rule should not impose Natural Resource Conservation Service (NRCS) standards as sideboards. Importantly, it is not clear whether the NRCS, which historically assists farmers and ranchers who are voluntary cooperators, becomes a regulatory agency enforcing NRCS standards on farmers and ranchers. The NRCS is in no way prepared to change its original educational and cooperation-based mission and become a policing agency. The Agricultural Interpretative Rule exemptions currently fail to include important standard agricultural practices. The Rule should be extended to include pipelines to water troughs together with water storage facilities for watering livestock on private, state and federal grazing land since these developments are normal farming and ranching practices absolutely fundamental to agriculture. (p. 2-3)

Agency Response: The Interpretive Rule was withdrawn. The role of NRCS and mission is outside the scope of this rule. As stated in the summary, the agencies recognize the vital role of agriculture. The agricultural exemptions in the CWA are not affected by the rule, there are more clearly defined exclusions in the rule, and the agencies have many streamlined regulatory requirements to simplify and expedition compliance permits. See Agency Summary response 14.2.2.

14.398 The District believes the proposed regulations to be a massive Regulatory takings that would effectively devalue private property without just compensation. Even worse, any efforts to enforce the proposed regulations will make law abiding citizens feel victimized and robbed without realistic remedy because appeal of arbitrary and vindictive rulings will be beyond the economic means of most citizens. Additionally, unclear rules and enforcement without consideration for site differences would quickly result in a plunge in voluntary Cooperator numbers. Such an outcome would have a negative effect on the very conservation goals the NRCS has worked decades to put in practice. (p. 3)

Agency Response: See Legal Analysis Compendium and TSD. As stated in the summary 14.2, the Interpretive Rule was withdrawn.

Soil and Water Conservation District (Doc. #14943)

14.399 EPA has stated that they have worked with USDA Natural Resource Conservation Service to exempt 56 additional conservation practices. These practices were already exempt. But now, the way the proposed rule reads, landowners will have more red tape attached to the NRCS standards and compliance. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn. The NRCS practice standards are outside the scope of this rule.

14.401 Also, under your defined language, farmers and ranchers will have more uncertainty of regulations and policies and could be open to citizen lawsuits if they are, unknowingly, not in compliance with a standard. The proposed rule does redefine normal farm and ranch practices. For example: building a fence, planting cover crops, or cattle grazing are normal activities and have not been subject to permits or NRCS standards. The interpretive rule does not distinguish between normal operations and the conservation programs, making normal practices subject to comply with NRCS standards. (p. 2)

Agency Response: As stated in the summary 14.2 and 4.2.1, the Interpretive Rule was withdrawn and the NRCS practice standards are outside the scope of this rule. The proposed rule does not change any of the enforcement provisions within the Clean Water Act or agency regulations.

14.400 NRCS personal are to assist farmers and ranchers helping them solve problems and improve practices on the ground. The NRCS was created to assist landowners and not be a police power. The proposed rule indicates that the EPA and the Army Corps will have a significant input and could veto the conservation practices and push NRCS to the side. This will cause a huge distrust of a previously strong relationship between agriculture, NRCS and the government period. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and NRCS' role and mission remain unchanged by this rule.

New York City Law Department (Doc. #15065)

14.401 Silvicultural Activities. While the proposed rule does not affect the agricultural and silvicultural exemptions in section404 (Ð (l) (A) of the Clean Water Act, EPA and the Corps issued an interpretive rule on April 21,2014 regarding the exemption of certain agricultural practices from the permitting requirement in Clean Water Act Section 404. Section 404(Ð(1XA) of the CV/A exempts only discharges that are part of an "established (i.e., ongoing)" operation. As a regulated entity that conducts silvicultural activities to manage its water supply lands, the City requests clarification as to what constitutes an "established" silvicultural operation. (p. 4)

Agency Response: The Interpretive Rule was withdrawn and is outside the scope of the rule making. For a clarification of what constitutes an "established" silvicultural operation, see summary response below in the Ongoing Farming Section 14.2.2.

North Dakota Association of Soil Conservation Districts (Doc. #15168)

14.402 While we are encouraged to see some NRCS conservation practices are exempted from regulation under the proposed rule, other conservation practices could also be used to enhance water quality. NDASCD suggests the rule clarify that EPA and USACE approves all NRCS upland conservation practices and specifically list those requiring a 404 permit. This would alleviate confusion about what is or is not allowed. (p. 1)

Agency Response: As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making.

Hidalgo Soil and Water Conservation District, Lordsburg, New Mexico (Doc. #19450)

14.403 Interpretive Rule & Other Guidance Documents: The Interpretive Rule for Agricultural Conservation Practices relies on NRCS guidance to define what activities are "normal agricultural activities." These guidelines will be used to determine exemption, and the Interpretive Rule will put NRCS in a position of enforcing compliance. There are a multitude of guidance documents beyond the Interpretive Rule, yet this multitude of documents are not easily accessible to the public in any one location. (p. 2)

Agency Response: As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making.

Dolores Water Conservancy District and Southwestern Water Conservation District (Doc. #19461)

14.404 For the agricultural activities that Congress sought to exempt in Section 404(f) of the Act, the interpretive rule provides scant relief relative to the increased jurisdiction now claimed by the Agencies in the proposed Rule. The exemptions do not change the fact that the scope of waters and land that would come under federal regulatory jurisdiction is vastly broader under the proposed rule compared to the status quo now, or when Rapanos was decided. These narrow exemptions will not protect farmers or other landowners from new restrictions or prohibitions that will come from establishing water quality standards and specific, numeric discharge limits for ditches, intermittent streams and other features that the Agencies now plan to sweep into federal jurisdiction.

The exemptions are also far too narrow in light of Congress' intent. The rule provides no protection from enforcement over other activities, such as weed control, fertilizer applications and any number of other common farm activities that may trigger Clean Water Act liability and permit requirements. The interpretive rule also narrows existing exemptions by tying them to mandatory compliance with what used to be voluntary Natural Resources Conservation Service ("NRCS") practice standards. Farmers previously could undertake these practices as part of their normal farming activities; now, those activities must comply with NRCS standards or else the farmer risks liability and enforcement actions under the Clean Water Act. Farmers should not be required to resort to such a narrow interpretive rule when many of the "waters" affected by agricultural activities in the western United States should not lawfully be considered "waters of the U.S." in the first place. (p. 10-11)

Agency Response: The scope of regulatory jurisdiction in this final rule is narrower than that under the existing regulation, in part because the rule puts

important qualifiers on some existing categories, such as tributaries. Also, as stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making. Additionally the summary address how the agencies have addressed the concerns of agricultural community. In the Clean Water Act Congress provided farmers, ranchers and foresters exemptions from permitting to impact "waters of the United States" for specific activities. See Section I of the Technical Support Document for a discussion of Legal Issues.

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

14.405 We believe 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. 7)

Agency Response: As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making.

Board of Supervisors, Sutter County, California (Doc. #19657)

14.406 We believe 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. 9)

Agency Response: As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making.

Growmark, Inc. (Doc. #4514)

14.407 Water quality and conservation practices should not be driven by ambiguous and burdensome federal regulation. We should seek local solutions to local problems and not hinder existing state efforts to protect and enhance waters. Farmers, landowners, and applicators should not be saddled with unnecessary regulations and permitting, which numerous state agencies testify provide no additional environmental benefits and burden their already-taxed resources. The GROWMARK System is very concerned about the impact of this rule on future conservation progress and the ability of agricultural operations to continue to function efficiently and sustainably. We oppose the proposed rule and request that it be withdrawn before its negative impacts damage ongoing voluntary conservation efforts. (p. 2)

Agency Response: See summary response 14.2. After considering the best available science and the public comments, the agencies reasonably determined not to incorporate regional approaches into the final rule. The agencies believe that, given the wide geologic, hydrologic, and biologic variability across the country, any attempt to introduce regional approaches in the final rule would cause confusion and detract from the agencies' goal of providing clarity. Nevertheless, the final rule takes into account regional variation in a number of ways. For example, (a)(7) identifies five subcategories of waters in specific regions that will be considered similarly situated by rule in the single point of entry watershed when conducting a case-specific significant nexus analysis. The final rule, while providing clear guidance, also incorporates also incorporates sufficient flexibility to account for

regional variability. Further, in implementing the rule, the agencies intend to use their longstanding practices and regional manuals for the identification of waters, which also take into account regional variation. These resources include both the Regional Delineation Supplements and the Regional OHMW Manuals. Nothing in this rule restricts the ability of states to more broadly protect state waters.

Alameda County Cattlewomen (Doc. #8674)

14.408 The IR Has Narrowed the Statutory Exemption Under § 404(f)(1)(A) NCBA and PLC believe the IR has narrowed the scope of the "normal farming, silviculture and ranching activities" exemption. (33 U.S.C. §1344(f)(1)(A), CWA §404(f)(1)(A)). That exemption already covers normal farming and ranching activities such as building fence and grazing cattle for on-going operations, but the IR would require ranchers to meet the strict national conservation standards in order to receive the exemption, thus limiting the exemption to only NRCS compliant fences and grazing plans. (IR at 3, "The activities must also be implemented in conformance with NRCS technical standards.") Grazing cattle and constructing and maintaining fence is largely not done as part of a "conservation activity" but as routine everyday activities (one might argue they are the quintessential "normal" ranching activities) that take place on a farm or ranch. The IR's requirement to meet the NRCS standard for Fencing (#382) and Prescribed Grazing (#528) now forces farmers and ranchers to comply with the costly standards for these "normal" ranching practices. Is it the agencies' policy now that grazing cattle is a discharge activity subject to the 404 Dredge and Fill program? By including Prescribed Grazing in the list of selected practices that were chosen in part for their potential to discharge, the agencies have declared grazing to be a discharge activity. (IR, at 2; Indicating that the agency chose the 56 practices because they were "…conservation activities within the waters of the U.S. that include discharges in waters of the U.S…."). This proposition has never been asserted and it is our belief that grazing should not be a discharge activity under Sec. 404 of the CWA.

As a second example, the NRCS practice code for prescribed burning reveals that not only must a prescribed burn plan be approved by NRCS, it requires "[s]pecifications will be prepared by certified individuals, and prepared for each site and recorded using approved specification sheets, job sheets, technical notes, and narrative statements in the conservation plan . . . . All necessary permits must be obtained and a burning plan developed before implementation of the practice." Further examination of the NRCS Field Office Technical Guide reveals acreage and land slope limitations impractical to implement on larger ranches like those that exist in the Kansas Flint Hills. These items have never before been required of ranchers and will add unnecessary time and expense to a very time sensitive activity. While we have used the example of the Prescribed Grazing and Prescribed Burning, many other standards on the list of 56 face similar consequences.

The result is to force farmers and ranchers to comply with the once voluntary NRCS standards, or face the draconian penalties for violating the CWA, in effect making those standards mandatory. NCBA and PLC believe the true motivation behind the IR is to force farmers and ranchers to conduct routine activities according to NRCS standards, limiting their production activities and choices, and adding significant costs. What the

agencies have failed to recognize is that by so doing, farmers and ranchers will simply avoid this CWA liability by not engaging in any conservation activities, either voluntary or cost-shared.

The federal agencies have not explained to the agricultural community why these "normal" activities and practices were not covered under the plain language of the statutory exemption. Unfortunately, NCBA and PLC believe the IR has effectively limited the 404(f)(1)(A) exemption by precluding conservation practices outside those 56 chosen by EPA, the Corps and NRCS from being protected from 404 permitting, and requiring producers to follow the strict and cost prohibitive NRCS practice standards. (79 Fed. Reg. 22276; ("The agencies have identified specific NRCS agricultural conservation practices that are appropriately considered 'normal farming' activities and exempt from permitting under section 404(f)(1)(A).")) By the language of the IR itself it is clear that conservation activities or normal ranching activities falling outside those chosen by the agencies will no longer receive the exemption. If producers do not follow the strict NRCS standards they now face liability for any discharge that touches a "water of the U.S." (IR at 3). NCBA and PLC believe Congress provided the farming and ranching community with the exemption to insulate farmers and ranchers from permitting requirements under Sec. 404 when conducting common activities and practices that occur on their ranches, inevitably touching a ditch, pond or puddle that will now come under federal jurisdiction based on the proposed definition for "waters of the United States." (EPA-HQ-OW- 2011-0880,"79 Fed. Reg. 22187, April 21, 2014). Requiring a Sec. 404 permit for activities like installing or maintaining a fence will place a significant burden on cattle producers without any corresponding benefit.

In fact, we believe that removing normal ranching activities like construction and maintenance of a fence from the protection of the exemption flies in the face of Congressional intent when it included the "normal farming" exemption in the CWA. Even Senator Muskie who sponsored the legislation in the Senate in 1971, stated that the exemption applies to those activities that "cause little or no adverse effects either individually or cumulatively." (3 Leg. Hist. 474). NCBA and PLC assert that very few, if any, conservation practices would have an adverse effect on water quality, and in fact, cumulatively it is more likely that these practices will have positive impacts on water quality, therefore the agencies' interpretation should be that conservation practices in general, whether voluntary or cost-shared should fall under the "normal farming and ranching" exemption. This would truly provide clarity to the agriculture community on this one aspect under the 404 permitting program. (p. 32-34)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not change the statutory exemptions provided in the Clean Water Act.**

14.409 The IR and the accompanying Q&A document make it clear that practices implemented as part of a cost-shared contract with USDA, or entirely voluntary must meet all the specifications and requirements under one of the 56 NRCS chosen practices to receive the "normal farming and ranching" exemption. (IR at 3; Question and Answer document at 1; available at http://www2.epa.gov/sites/production/files/2014-04/documents/interpretiverule_qa.pdf). NCBA and PLC strongly believe that voluntary conservation practices should not be required to meet stringent NRCS standards, for

many reasons. First and foremost, producers who want to implement conservation practices on their own should be encouraged to do so, not discouraged. Telling producers that they either do it to NRCS standards and specifications or face CWA civil and criminal penalties, is the fastest way to halt voluntary conservation efforts. Second, farmers and ranchers must be able to afford to implement practices, especially if they themselves are footing the bill entirely. Requiring NRCS standards be met can escalate the cost of implementing a practice tenfold. NRCS standards are the "gold standard," and with that comes a cost, which many producers simply cannot afford. Limiting producers to only the NRCS way is going to prevent them from installing or maintaining practices that are beneficial to water quality. The agencies need to ask themselves whether a practice on the ground that has some benefit to water quality is better than not putting a practice in place at all. Third, USDA conservation programs have historically been based on a voluntary approach. The IR is completely turning that approach on its head. By threatening producers with 404 permits and CWA penalties, your agencies are forcing producers to comply with NRCS standards, making them no longer voluntary. If the only way to avoid the requirements is to avoid instituting conservation practices, that is what farmers and ranchers will ultimately do. The agencies should withdraw the IR so that conservation practices can continue to be put on the ground to improve the quality of our land and water. (p. 34)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The NRCS practice standards are outside the scope of this rule.**

14.410 The immediate and unavoidable effect of the IR is to turn the USDA's NRCS into a regulatory compliance agency for CWA enforcement purposes. The chilling effect on participation in conservation activities mentioned above will be compounded when NRCS is seen as wielding the final say on whether a producer is in violation of the CWA or not. Historically, NRCS and its field personnel have been seen as a friend to agriculture; helping producers achieve goals in production and conservation through technical and financial assistance. But, that perception and approach to cooperative and voluntary conservation will now be upended by the IR.

The IR went into immediate effect upon publication in the federal register on April 21, 2014. NCBA and PLC are concerned about reports that the Corps is now requesting NRCS' judgment on whether conservation practices on producers' lands are in compliance with NRCS standards, despite whether these are cost-shared practices or not. This is inappropriate and will overwhelm NRCS resources, requiring the agency to abandon their primary mission in assisting producers on the ground. Due to budget cuts NRCS field offices and personnel are critically low. Placing this extreme burden of being EPA and the Corps' CWA agriculture compliance agency will halt all productive activity by the agency because they will now be overwhelmed with conservation compliance requests. NCBA and PLC cannot put it strongly enough that this is an inappropriate roll for NRCS personnel and we strongly oppose the IR because of this negative consequence.

Ranchers will no longer be willing to discuss their operations or seek advice and assistance from NRCS if NRCS is now a CWA compliance agency. There is no way to

avoid this from happening if the IR remains in effect. The IR states, "[t]he activities must also be implemented in conformance with NRCS technical standards" to receive the exemption. (IR at 3). NRCS is the only agency with the technical expertise to make a judgment on whether a conservation practice meets its standards or not, therefore NRCS will be the agency making the decision whether a producer falls under the "normal farming, silviculture and ranching" exemption, or is violating the CWA and subject to fines of up to $37,500 per day.

Farmers and ranchers will simply not work with, consult, or have any interaction with NRCS if this IR remains in effect, which will decrease participation in conservation programs instituted by USDA, having the exact opposite effect of the stated goal, "…to promote practices under the Agriculture Act of 2014 designed to improve water quality." (79 Fed. Reg. at 22276). Let us be clear, NCBA and PLC believe that participation in both cost-shared and voluntary conservation will decline. Fewer practices will be put on the ground due to the agencies' IR. Making NRCS practices mandatory is the wrong approach. (p. 35-36)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The NRCS practice standards are outside the scope of this rule.**

14.411 The IR changes the rights and responsibilities of farmers and ranchers under the law, making it a substantive legislative rule and subject to the notice and comment requirements under the Administrative Procedures Act (APA). "Substantive rules affect individual rights and are binding on the courts, whereas interpretive rules leave the agency free to exercise discretion." (Evans v. Martin, 496 Fed. Appx. 442, 443 (5th Cir. Tex. 2012); Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1979)). The agencies attempt to mask the regulation as an "interpretive rule" calls into question their intent in promulgating it. If it were truly interpretive and gave the agencies "discretion" then it can provide no real clarity to the agricultural community, which is the stated basis for the IR. If it does provide the clarity the agencies were asked to provide then it most definitely affects individual rights under the CWA and is therefore a substantive rule. NCBA and PLC believe the IR does in fact provide clear new requirements with minimal discretion left to the agency. Only activities associated with 56 conservation practices will now be eligible for the "normal farming, silviculture and ranching" exemption under 404(f)(1)(A). (MOU, Attachment A; available at http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf). Only those practices done in conformance to the NRCS standards will be eligible for the exemption. (IR at 3). These are yes or no questions, leaving the agency with no discretion, making it a substantive rule. The law is clear that if a rule is a substantive rule the agencies must follow all the procedural requirements under the APA. Mercy Hospital of Laredo v. Heckler, 777 F.2d 1028, 1032 (5th Cir. 1985) ("To be sure, certain minimal procedural requirements are placed upon the agency in the promulgation of its substantive rules and regulations…Failure to follow these minimal procedural requirements may justify a determination that the rule or regulation is void."). It is clear that the agencies have not

conducted the required notice and comment requirements prior to this rule taking effect, putting the agencies in violation of the APA. (p. 36)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The NRCS practice standards are outside the scope of this rule.

Bourbon County Farm Bureau (Doc. #11986)

14.412 The confusion this rule would create would also be a potential litigation nightmare for producers who have implemented best management practices that may not fall under the definition of normal, NRCS approved practices. Further, this rule could lead to producers having to spend both time and resources to pursue useless permits that do nothing to improve the environment. (p. 1)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not change the statutory exemptions provided in the Clean Water Act. See Agencies' Summary Response 14.2.2.

Kentucky Milk Commission (Doc. #11987)

14.413 We are concerned this would lead to farmers facing increased frivolous litigation over what are considered "normal" agricultural practices. We feel the rule also would change the role of the Natural Resources Conservation Service (NRCS) from that of providing assistance to producers wanting to install best management practices that would improve water health to a more regulatory role. (p. 1)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn, the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The role of NRCS is outside the scope of this rule.

Riverside County Farm Bureau (Doc. #12729)

14.414 In addition to the Proposed Rule's impacts, farmers and ranchers also have to now comply with the Interpretative Rule that requires compliance with previously voluntary NRCS standards for normal farming and ranching activities. (p. 2)

Agency Response: As stated in the summary, the Interpretive Rule was withdrawn and is outside the scope of the rule making. The role of NRCS is outside the scope of this rule.

Yosemite Farm Credit, ACA (Doc. #12851)

14.415 Along with the proposed rule, an "interpretive rule" has been issued to further interpret and clarify the permitting exemption under Section 404 of the CWA. This interpretive rule was published at the same time as the proposed rule but went into effect immediately. The interpretive rule provides no relief for farmers and ranchers concerning the scope of the proposed WOTUS definition for numerous reasons including:

1. The "expanded" list of excluded activities in the interpretive rule already fall within the "normal" farming and ranching exclusion and were already exempt from permitting requirements if done as part of an ongoing operation. Many of the 56 listed practices are extremely common on a farm or ranch—e.g., fencing, brush management, and pruning of shrubs and trees—and have never been considered by farmers and ranchers to be outside the statutory exemption for "normal" farming and ranching activities.

2. The effective result of the interpretive rule actually limits a farmer or rancher's ability to use the agricultural exemptions by requiring compliance with Natural Resources Conservation Service ("NRCS") conservation practice standards in order to qualify for an agricultural exemption.

3. Through the interpretive rule "guidance", there is a constricting of what constitutes "normal" farming and ranching activities by limiting them to those activities that have been ongoing since the 1970s. With this interpretation, the farming and ranching exemption will only apply to a very limited number of farmers and ranchers today. That is because, if there had been a change of land use, an interruption in activities, or a change in crops, since 1977, the agricultural exemptions would not apply.

4. The exemptions addressed in the interpretive rule only apply to Section 404 "dredge and fill" permit program, not the Section 402 NPDES permit requirements for discharges of pollutants. This is important because with the expansion of the jurisdiction under the proposed rule, everyday weed control, fertilizer applications, or any number of other common farm or ranch activities could trigger CWA liability and Section 402 permit requirements if material is incidentally deposited, for example, into ditches or ephemeral streams that would be considered under the proposed rule as WOTUS.

5. There are additional issues with the interpretive rule including: (a) who will inspect and enforce compliance with NRCS guidelines; (b) will third parties have the ability to challenge exempt status; (c) EPA's role in NRCS programs that will be defined in a Memorandum of Agreement which has not even been developed yet; and (d) is this an interpretative or a legislative rule under the Administrative Procedure Act. (p. 3-4)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not change the statutory exemptions provided in the Clean Water Act for farming, ranching, and silviculture. See Agencies' Summary Response 14.2.2. The NRCS practice standards are outside the scope of this rule.**

Bayless and Berkalew Co. (Doc. #12967)

14.416 The EPA has made the claim that agricultural exemptions included in the rule are sufficient to keep Arizona's agriculture unaffected. This is simply not true. The exemptions are narrow, do not apply to many normal farming and ranching activities, only apply to farms and ranches in existence since 1977, and create a regulatory framework for conservation standards previously voluntary. It should be noted that the conservation practice standards of the Natural Resource Conservation Service are Cadillac standards and workable only under Farm Bill programs because there is a cost share available to assist with implementation. (p. 3)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See Agencies' Summary Response 14.2.2.**

PennAg Industries Association (Doc. #13594)

14.417 It could be implied that agriculture/farms need to adhere to the USDA NRCS standards to be ensure compliance with the Clean Water Act to be deemed normal agriculture practices — not all farmers in the Commonwealth participate in NRCS programs. Would those nonparticipating farms then be "out of compliance"? (p. 1)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See Agencies' Summary Response 14.2.2.**

North Dakota Soybean Growers Association (Doc. #14121)

14.418 Would it not be more appropriate for the EPA to take a good look at the size and true complexity of what it's proposing and to work toward voluntary programs, much as the in USDA's NRCS, to encourage the continuing development of the environmentalist/naturalist in North Dakota's farmers and ranchers? We favor engaging approaches, with clear processes, goals, and inspired leadership, to enjoin America's agricultural community with EPA/Corps work rather than another individual--- opinion--based, regulatory, top--down imposed compliance scheme. (p. 11)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not change the statutory exemptions provided in the Clean Water Act. See Agencies' Summary Response 14.2.2.**

Georgia Chamber of Commerce (Doc. #14430)

14.419 The Chamber's agricultural members do not support EPA's assertions that through the provisions of the companion Interpretative Rule, that agriculture has full exemption from this proposed CWA rule.

These groups have expressed deep concern that voluntary measures approved by the Natural Resources Conservation Service (NRCS) would become mandatory under the Interpretive Rule and, further, that the Interpretive Rule would turn the NRCS into an enforcer of the CWA and that it actually narrows the scope of what is considered normal farming and ranching practices. (p. 13)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See Agencies' Summary Response 14.2.2.**

Tennessee Farm Bureau Federation (Doc. #14978)

14.420 What makes this rule even more complicated is the "Interpretive Rule" (Docket No. EPA-HQ-OW-2013-0820) for conservation practices which coincide with the release of this proposal. The Tennessee Farm Bureau commented on the "Interpretive Rule" also. Why did the EPA need to release an interpretive rule for conservation practices over forty

years after passage of the Clean Water Act to clarify certain conservation practices were included in the Clean Water Act's "farming" exemptions? We believe the expanded jurisdiction of this rule negates many of the exemptions for agricultural practices. Therefore, conservation practices that have traditionally been considered exempt agricultural practices would now be permitted activities under this proposed rule. With the "Interpretive Rule" certain conservation practices would not be subjected to the fallout from this proposed rule. (p. 6-7)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See Agencies' Summary Response 14.2.2

Iowa Farmers Union (Doc. #15007)

14.421 EPA has worked extensively with the state of Iowa over the past decade to improve water quality by:

(1) ensuring that the state is properly enforcing the Clean Water Act in the context of confined animal feeding operations (CAFOs); and

(2) creating a statewide strategy to reduce the nitrate and phosphorus pollution that is contaminating Iowa watersheds and contributing to the hypoxia zone in the Gulf of Mexico.

While addressing the CAFO issue will require increased inspections and NPDES permitting requirements, both of these water quality priori ties have necessitated significant investments by the state and the agricultural community in improving voluntary on--farm conservation and pollution control measures. We already have offered comments on the Interpretive Rule published by EPA and the Corps earlier this year. NRCS programs (the Conservation Security Program, the Environmental Quality Incentives Program, etc.) certainly play a significant role in promo ting o-- farm conservation practices that protect and enhance water quality. Farmers also rely on a variety of state and local entities, including cost share programs available through the Iowa Department of Agriculture and Land Stewardship, regional watershed initiatives, and programs carried out via local soil and water conservation districts. Whether the conservation practice involve installing and maintaining buffer strips, grassed waterways, or wood chip bioreactors, it is absolutely essential that the proposed rule provides the strongest possible protections for any measures that will improve the quality and health of Iowa's watersheds.

In addition to the concerns already expressed above that are specific to the Interpretive Rule and NRCS technical standards, many farmers have expressed more general concerns that the proposed rule will prevent something as simple as installing a grassed waterway (would this be a regulated water? if I have an existing grassed waterway, can I s till farm around it?) The state's voluntary strategy to reduce nitrate and phosphorus pollution by 45 percent (with approximately 90 percent of the pollution coming from agricultural sources) already faces a variety of systemic challenges. For example, many farmers are reluctant to adopt new practices until they see a critical mass of their neighbors doing the same thing. With farmland in high demand, it can be challenging to convince farmers to take valuable land out of production for conservation purposes. Some conservation

practices such as cover crops can actually increase productivity and yields, but farmers need to be uptodate on the latest research on crop rotations to know which cover crops will work on their farm and also feel comfortable incorporating new and unfamiliar cropping practices. In light of these and other challenges, Iowa cannot afford the setback of having farmers across the state believe rightly or wrongly- that the proposed WOTUS rule will prevent them from actively pursuing expanded on-farm conservation practices. Unless the final rule is clearly and strongly protective of the widest possible range of on--farm conservation practices, the rule may serve the counter-productive end of discouraging Iowa farmers from working to improve our state's water quality. (p. 8-9)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. This rule does not change the Section 404(f) exemptions provided in the Clean Water Act for farming, ranching, and silviculture. Under the final rule, 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 change from the proposal 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. See also Agencies' Summary Response 14.2.2.

Southwest Council of Agribusiness (Doc. #15050)

14.422 The SWCA respectfully urges the EPA and the Corps to withdraw the proposed rule as well as the interpretive rule regarding exemptions for specified agricultural practices, and draft guidance. We would instead urge EPA and the Corps to work with state and local governments to craft a consensus approach that properly identifies the parameters of federal and state jurisdictions over waters in a manner that fully complies with rulings of the United States Supreme Court. We would urge that any consensus reached be published in the Federal Register for public review and comment and that, subsequently, both the draft consensus and public comment be reported to the Congress for further deliberation. (p. 1)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn. See also Compendiums for Legal Analysis and Process Concerns and Administrative Requirements.

14.423 In regard to the interpretive rule, the agricultural exemptions purported to be granted largely mirror the exemptions already enshrined in law by the 1977 amendments. Unfortunately, because the rule would require producers to meet Natural Resource Conservation Service (NRCS) standards relative to agricultural practices in order to receive the exemptions, exemptions they have heretofore been guaranteed without having to meet these standards, redundancy is not the interpretive rule's flaw. Rather than bestow agricultural exemptions, the interpretive rule threatens to take away exemptions already in place. Moreover, because of the legerdemain used under the proposed rule to

define nearly all "water" as waters of the United States, the "recapture rule" under the Clean Water Act (that denies a producer an exemption whenever an otherwise exempt agriculture practice affects waters of the United States) would cause agricultural exemptions in place since 1977 to be swallowed up. A producer performing ordinary every day agricultural practices could not help but affect "waters of the United States" under such a sweeping definition. Notably, the exemptions that would be taken away rather than conferred under the interpretive rule only apply to section 404 concerning dredging and filling. Thus, the interpretive rule does not even purport to grant exemptions in the case of section 402 National Pollutant Discharge Elimination System (NPDES) permitting or section 303 limits on Total Maximum Daily Loads (TMDLs). In sum, we urge the EPA and the Army Corps to withdraw the proposed rule, the interpretive rule, and agency guidance and work with state and local governments on consensus recommendations to Congress, providing full opportunity for public input. (p. 2-3)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See also Compendium for Process Concerns and Administrative Requirements as well as Implementation.

J.R. Simplot Company (Doc. #15062)

14.424 The proposed rule makes no changes to the "normal farming and ranching" practices that are currently exempt from 404 permitting. In addition, simultaneous with the proposed rule, USEPA and Corps issued an interpretive rule that identifies 56 conservation practices approved by the Natural Resources Conservation Service (NRCS) that additionally qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of "normal farming and ranching" activities from Section 404 permit requirements and do not require determination whether the discharge involves a "water of the United States." The 56, which are a subset of all NRCS conservation practices, are practices such as irrigation ditches, stream crossings, and wetland restoration that take place in aquatic, riparian, or wetland environments. Through this interpretive rule, the Agencies intend to resolve uncertainties about "normal farming" activities that are exempt from permitting when these conservation practices are used. In other words, effective immediately, producers who use any of the 56 identified practices according to NRCS technical standards need not seek a determination of CWA jurisdiction and need not seek a CWA permit. (p. 7)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not affect the exemptions Congress provided in the CWA. See Agencies' Summary Responses 14.2 and 14.2.2 community in the CWA.

Colorado Cattlemen's Association (Doc. #15068)

14.425 CCA is concerned the agencies' Interpretive Rule on Agriculture Conservation Practices Under the "normal farming, silviculture and ranching" activities exemption under Sec. 404 of the CWA as Exhibit A below would limit the "normal farming" exemption, discourage voluntary conservation, and ultimately hurt water quality. CCA would request that the agencies immediately withdraw the Interpretive Rule and make it clear in such

withdrawal that the agencies have always interpreted conservation activities to be "normal farming" activities. (p. 9)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn. This rule does not affect the exemptions. Congress provided in the CWA. See Agencies' Summary Responses 14.2 and 14.2.2.

North Carolina Farm Bureau Federation (Doc. #15078)

14.426 The Interpretive Rule improperly narrowed the normal farming exemption. On March 25, 2014, the Agencies issued an immediately effective "interpretive rule" concerning the application of "normal" fanning 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 NCFB provided comments to that rulemaking docket and requested withdrawal of the Interpretive Rule. As described in comments submitted by NCFB and by AFBF to that docket, the Interpretive Rule provides no meaningful protection from the harmful implications of the expansion of "navigable waters" in this proposed rule and, in fact, further narrows the already limited "normal" fanning exemption.

Rather than clarity, the proposed rule provides potentially unlimited jurisdiction. The proposed rule does not make it clear to farmers which features will be jurisdictional, but opens the door for the assertion of jurisdiction over countless features that are ubiquitous on America's farm and forest lands. The Agencies' stated goal for this rule is to provide "clarity" and reduce the confusion, red tape and uncertainty allegedly caused by the Supreme Court over what waters are jurisdictional. This proposal, however, clarifies only that the Agencies could regulate almost any low spot on a fanner's field where water sometimes stands or channels. The proposal would categorically regulate as "navigable waters" countless ephemeral drainages, ditches and other features across the countryside that are wet solely from precipitation and may be miles from the nearest truly "navigable" water. It would also regulate small, remote "wetlands"-which may look like nothing more than low spots on a farm field - just because those areas happen to be near a jurisdictional ditch or ephemeral, or located in a "floodplain" or "riparian area".

The proposal does not provide clarity to fanners and ranchers; it only exposes them to unknowing violations of the law by fanning in, and using typical farm nutrients and pesticides on or near, features that look more like land than water. Because fanners and ranchers can be liable for heavy CWA civil and even criminal fines and jail time for unlawful discharges to "navigable waters," they must be able understand how that term applies to their land.

The proposed rule will cause continued confusion over the boundaries of federal jurisdiction. As explained in the following sections, it provides little clarity in the three primary definitional changes described below ("tributaries", "adjacent waters" and "other waters"), each of which results in a significant expansion of federal control over land and water resources across the nation. The proposed rule should be withdrawn. (p. 6)

Agency Response: The final rule provides greater clarity about which waters are jurisdictional by including distance limits, adding definitions for "neighboring" and "significant nexus," and identifying waters that are not jurisdictional. The greater

clarity regarding which waters are subject to CWA jurisdiction will also reduce the existing need for time-intensive case-specific jurisdictional determinations. See also the Compendiums for Ditches and Features and waters Not Jurisdictional. Agencies' Summary Responses 14.2 and 14.2.2. Also the agencies highlight that the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See also the Preamble at Section II and the TDS at Section I, the agencies outline their legal position.

Irrigation Association (Doc. #15217)

14.427 The irrigation industry believes that the intended scope of the Clean Water Act does not and should not apply to this water (even though an "exemption"). The EPA and the Army Corps should partner with the U.S. Department of Agriculture in promoting conservation practices, rather than mandating a "one-size-fits-all" approach to all of agriculture in all geographical areas. (p. 3)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. Further see TDS at Section I Statute, Regulations and Case Law: Legal Issues and the Ditches Compendium.

National Sustainable Agriculture Coalition (Doc. #15403)

14.428 The agencies seek comment on the Interpretive Rule, which "clarifies the scope"[66] of existing statutory exemptions for discharges related to "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices."[67] The Interpretive Rule specifies a list of NRCS practice standards that it will consider "'normal farming' when conducted as part of an ongoing farming operation," thus exempting it from permitting under CWA section 404(f)(1)(A).[68] These exemptions do not affect CWA Section 404(f)(2), known as the recapture provision.[69] NSAC is encouraged to see the agencies working with NRCS toward the goal of encouraging greater participation in NRCS conservation programs to address water quality concerns.

The Interpretive Rule explains that "normal farming necessarily includes conservation and protection of soil, water and related resources in order to sustain agricultural productivity, along with other benefits to environmental quality and continued economic development," therefore, "it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are

[66] U.S. EPA and U.S. Dept. of Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) at 1. (Hereinafter "Interpretive Rule").
[67] Interpretive Rule at 1.
[68] Memorandum of Understanding Among the U.S. Dept. of Agriculture, Envtl. Protection Agency, and Dept. of Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards (March 25, 2014) at 2 (Hereinafter "MOU")
[69] MOU at 2.

similar enough to also be exempt from section 404 permitting requirements."[70] The agencies explain that, "so long as those [practices] are designed and implemented to protect and enhance water quality, and do not destroy waters,"[71] then they should be exempt as normal farming activities. The exemption for upland soil and water conservation activities can extend to "other activities of essentially the same character," but "precludes the extension of the exemption . . . to activities that are unlike those named."[72]

We agree that, under existing authority, the agencies do not have the authority to exempt additional activities outside of the statutory exemptions in 404(f)(1). However, as currently drafted, many exempt practices on the list appear to do just that. We provide more detail in Part II of these comments.

We also agree that conservation practices that are beneficial to water quality should be encouraged, and the regulatory burden on implementing or installing such practices should be minimized, where such practices are installed or implemented according to NRCS conservation practice standards. However, many NRCS conservation practice standards require significant technical assistance and training to be implemented properly and effectively. We are therefore also concerned that the scope of the Interpretive Rule may be abused if producers can self-certify compliance with NRCS conservation practice standards without actually receiving NRCS technical assistance. In Part II, therefore, we propose a set of conservation practices that should only be exempt if applied under NRCS guidance and technical assistance. (p. 13-14)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn.**

14.429 Comments on practices that are upland soil and water conservation activities. These practices should be removed from the list for clarity, because they are already exempt under section 404(f)(1)(A). […]

The list includes practices that are properly characterized as upland soil and water conservation practices. These activities are already exempt under section 404(f)(1)(A). These are important conservation activities, to be sure, but including these practices on the list has resulted in confusion regarding the permitting requirements that may or may not be needed for other upland conservation practices that are not on the list, and has only added to the vitriol and rhetoric of those who oppose the proposed rule itself. We understand that the list was created based on practice standards that could theoretically, conceivably, be done on or near U.S. waters. However, for certain standards, in actuality it is highly unlikely that this would occur – or it would be inappropriate for it to occur – on or near U.S. waters. Where these upland soil and water conservation practices are used in or near waters of the U.S., regulatory agencies could make a case-by-case determination as to whether an exemption is appropriate. Recommendation: For clarity, remove practices from the list that are already exempt as normal farming activities

[70] Interpretive Rule at 2.
[71] MOU at 2 (emphasis added).
[72] Interpretive Rule at 2.

because they are upland soil and water conservation practices. This includes, but is not limited to:

- #314 – Brush Management;
- #327 – Conservation Cover;
- #380 – Windbreak/Shelterbelt Establishment;
- #382 – Fences;
- #422 – Hedgerow Planting;
- #460 – Land Clearing.
- #484 – Mulching;
- #512 – Forage and Biomass Planting;
- #528 – Prescribed Grazing;
- #612 – Tree/Shrub Establishment;
- #650 – Windbreak/Shelterbelt Renovation;
- #660 – Tree/Shrub Pruning; and
- #666 – Forest Stand Improvement. (p. 15-16)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Texas State Soil and Water Conservation Board (Doc. #16157)

14.430 The Texas State Soil and Water Conservation Board has specific concerns with the April 21, 2015 proposed rule under the Clean Water Act (CWA). We do applaud the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) for recognizing that agricultural conservation and protection of soil, water, and related resources are beneficial to enhancing water of the U.S. and have developed a Memorandum of Understanding (MOU) with the U.S. Department of Agriculture to identify conservation practices that occur in We believe the scope of the MOU ignores the work being done by individual states to implement Agricultural and Silvicultural Nonpoint Source Pollution Conservation Plans with practices designed to enhance and protect water quality. Many conservation practices are designed and implemented with NRCS standards and practices. In some states, alternative conservation practices that meet or exceed NRCS standards are being implemented with equal success. We believe these practices should all be self-implementing if they contribute to water quality improvements. (p. 1-2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Utah Farm Bureau Federation (Doc. #16542.1)

14.431 Utah Farm Bureau expressed a number of questions and concerns that were not given satisfactory answers:

- Not all food producers are engaged with NRCS and therefore do not know they have "guidance" for food production practices some as common as brush control and fencing.

• Will the NRCS standards become a regulatory standard if the proposed rule is adopted?

• Would EPA compel NRCS staff to be witnesses and testify against farmers and ranchers based on failing to meet standards?

• Would NRCS be compelled to assume a role in implementing or enforcing EPA's proposed WOTUS?

• What will be the relationship between EPA and NRCS and will it affect their relationship with farmers and ranchers?

• Does NRCS agree to becoming a regulatory arm of the EPA – giving up its historic voluntary, incentive-based relationship with farmers and ranchers? (p. 12)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn. The rule does not affect the exemptions Congress provided to the agricultural community in the CWA. Additionally the role of NRCS is not affected by this rule and is outside the scope of the rule making.**

Young Farmers and Ranchers Committee American Farm Bureau Federation (Doc. #16580)

14.432 [A]s a result of the "Interpretive Rule" published at the same time as the proposed rule, the exemptions are now tied to mandatory compliance with what used to be voluntary Natural Resources Conservation Service (NRCS) standards. Farmers who qualify for the exemption previously could undertake these practices without the need for compliance with any specific standards. Now, unless the activities comply with NRCS standards, the exemption is inapplicable and a section 404 permit would be required. The narrow "normal farming and ranching" exemption does not protect farmers and ranchers from the potentially devastating impact of this expansion of federal regulatory jurisdiction. It will not protect farmers and ranchers—younger farmers and ranchers in particular—or other landowners from new restrictions or prohibitions that will come from new 402 and 404 permit requirements, new water quality standards and "total maximum daily loads" for ditches, ephemeral drains and other features that the Agencies now plan to sweep into federal jurisdiction. (p. 2-3)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress for provided in the Clean Water Act. Also, the NRCS practice standards are outside the scope of this rule. Further, see the Implementation Compendium for discussion on how the rule will apply to different programs.**

Shasta County Farm Bureau (Doc. #16924)

14.433 In addition to the Proposed Rule's impacts, farmers and ranchers also have to now comply with the Interpretative Rule that requires compliance with previously voluntary NRCS standards for normal farming and ranching activities.

The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps's 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: See summary essay 14.2. Also the agencies highlight that the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.

Iowa Soybean Association (Doc. #17175)

14.434 We believe NRCS practice standards were never intended to be utilized as compliance measures for the Clean Water Act. The rules treatment of NRCS Practice Standards as regulatory standards will harm farmers individual efforts at water quality and hinder the efforts of the Iowa Nutrient Reduction Strategy as well as the Iowa Water Quality Initiative. (p. 2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.

Central Utah Water Conservancy District (Doc. #14534)

14.435 [T]he proposed rule when coupled with the Interpretive Rule tends to threaten normal on-going and established farming practices that have previously been exempt and force compliance with the farming and conservation technical standards of the NRCS, that have previously been voluntary. The Interpretive Rule as it may be applied in concert with the proposed revisions of the regulatory definition of "waters of the United States" and the draft technical report on connectivity, appears to narrow rather than retain the current exemption from regulation by limiting it to only those enumerated NRCS-compliant practices. In effect, it will require farmers and ranchers to conduct their routine practices in conformance with otherwise voluntary NRCS standards or forego such practices or seek permits for otherwise normal, lawful and presently excluded agricultural activities. (p. 3)

Agency Response: See summary essay 14.2. Also the agencies highlight that the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.

14.436 With the Interpretive Rule, those relying on a section 404 exemption are not provided any flexibility in how they choose to conduct normal farming operations. Additionally, the 56 practices listed in the Interpretive Rule are already normal farming activities, and would therefore already be exempted without any detailed conservation standards. (p. 3)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Southern Nevada Water Authority (Doc. #14580)

14.437 SNWA recommends that the interpretive rule regarding exemptions for agricultural practices be amended to include conservation activities implemented in partnership with BOR. (p. 6)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

San Luis & Delta-Mendota Water Authority (Doc. #15645)

14.438 The CWA contains broad exemptions from regulation for the agricultural sector. Farmers and ranchers currently do not need CWA Section 404 dredge and fill permits for normal farming practices like plowing or constructing farm roads. [33 U.S.C. §1344(f)(1)]. In addition, stormwater runoff and irrigated agricultural return flows from farm fields are not subject to federal pollution permits. [33 U.S.C. §1342(l)(1) and (p)(1)]. The agencies have said these exemptions would be carried forward under the proposed rule and issued an "interpretive rule" ostensibly to confirm that assertion. Unfortunately, the interpretive rule, as presently drafted, does not clearly protect farmers from requirements related to potential pollutant discharges and future permitting requirements under the CWA, and instead could actually narrow the exemptions for production agriculture under the CWA. The EPS should withdraw the interpretive rule and collaborate with the agricultural sector to ensure that all normal farming and ranching practices, including USDA-NRCS approved practices, continue to be exempt from CWA regulation. (p. 3-4)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Northern California Association (Doc. #17444)

14.439 NCWA believes 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 practices important to the balance of productive farms and ranches and clean water.

We have already provided comments on the interpretive rule, but believe 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 regulations. (p. 8)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Texas Wildlife Association (Doc. #12251)

14.440 TWA's members are required to manage storm and runoff water in the course of managing their rural properties. For example, they perform brush control under programs administered by the Natural Resources Conservation Service, in coordination with agencies of the State of Texas. They also construct terraces to prevent soil erosion 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: **During the public comment period, the agencies met with numerous stakeholders and believe the final rule addresses many of the concerns raised. See Compendium for Process Concerns and Administrative requirements.**

Red River Valley Association (Doc. #16432)

14.441 The agricultural "interpretive rule" governing approved conservation practices, which was issued concurrently with the proposed rule, should be withdrawn. This interpretive rule effectively changes existing regulations, it is subject to public notice and comment requirements under the Administrative Procedure Act ("AP A"), and the agencies must provide the public an opportunity to comment on it. In addition, there is a great deal of confusion and uncertainty among the agricultural community regarding the applicability of 404(f)(l)(A) exemptions. The agencies should withdraw the interpretive rule and ensure that any future changes to normal exemptions comply with the APA. (p. 3)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Iowa State University (Doc. #7975)

14.442 NRCS practice standards: In the interpretive rule issued in an attempt to further define "normal farming practices," 56 Natural Resources Conservation Service (NRCSJ Conservation Practice Standards were listed. There certainly are more than 56 activities that would fall under the heading of "normal farming practices." Additionally, no reference is made as to how Practice Standards would be added to the list as new technologies are developed. In short, listing the 56 Practice Standards increases rather than reduces confusion.

Also, NRCS Conservation Practice Standards were not designed and vetted to be regulatory tools. Using NRCS Practice Standards as regulatory tools represents a fundamental shift in the role of the NRCS, as these standards should not be applied outside of U.S. Department of Agriculture (USDA] programs. As drafted, the proposed rule may discourage a farmer wanting to implement a conservation practice without using USDA cost-share funds or technical assistance, or utilizing an innovative design. Such

private investments in conservation practices should not be discouraged, and NRCS design standards should not be required.

Action: Well-written regulations define what cannot be done, rather than what can be done. To provide clarity and consistency, we ask for a list of conservation practices and normal farming practices that are not exempt under this rule, along with what permits would be required. However, if a decision is made to list acceptable NRCS Conservation Practice Standards, then all practice standards must be listed, not just 56. (p. 2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The NRCS practice standards are outside the scope of this rule. See also Agencies' Summary Responses 14.2.1 and 14.2.2.

Jon Tester, Senator, United States Senate (Doc. #10625)

14.443 [T]he final interpretive rule must clarify how the current Natural Resources Conservation Service (NRCS) conservation practices that are not included on the exemption list will be categorized. It must be clear whether CWA permitting requirements will be automatically required or made on a case-by-case basis. Otherwise the final rule will have failed to meet a basic goa1- to reduce uncertainty and encourage the use of good fanning practice s. Also, I understand the EPA, ACOE and NRCS signed a Memorandum of Understanding that creates a process for reviewing and updating the list of qualifying NRCS conservation practices. Additional clarification is needed to outline what the process will entail and what specific roles NRCS and ACOE will play in carrying this out. (p. 1-2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.

John E. Wash, United States Senator (Doc. #18021)

14.444 Along with the proposed rule about the scope of the CWA, EPA also issued an "interpretive rule" on farming and ranching exemptions under the CWA. That interpretive rule defines 56 Natural Resources Conservation Service (NRCS) agricultural conservation practices that would not be subject to CWA permitting requirements. I recognize and appreciate that the current agricultural exemptions for normal farming practices are preserved. And while I encourage novel, collaborative approaches that are intended to increase certainty for farmers and ranchers and reduce regulatory burdens, it is unclear to me that this interpretive rule accomplishes those goals. Furthermore, I am concerned that issuance of the interpretive rule without robust stakeholder consultation resulted in a framework that has not been adequately tested. Specifically, there is lack of clarity on the scientific or pragmatic justification underlying the limited set of conservation practices approved for qualifying under the exemption, as well as the scope of enforcement responsibility between the involved agencies.

NRCS conservation programs are enormously successful in Montana in incentivizing good conservation practices. A regulatory regime that discourages participation in proven agricultural conservation programs due to risk of regulatory or private intervention under

the CWA will undermine the impressive conservation improvements over the life of the Farm Bill conservation programs. I cannot see how the interpretive rule can be justified if it results in fewer farmers participating in conservation programs. I urge you to reevaluate how tying NRCS programs to CWA permitting will advance the goals of the CWA and NRCS conservation programs, as well as how it will reduce regulatory burdens on farmers and ranchers. I further ask that you provide an explanation of the developmental process of the interpretative rule, including information on collaboration and stakeholder input.

Finally, federal agencies too often implement regulations without fully understanding the impact on farming and ranching. With a much smaller percentage of Americans involved in agriculture on a day-to-day basis, federal agencies have increasingly been left without their own expertise to provide a meaningful rural insight into regulatory actions. Congress recognized this deficiency within EPA while crafting the Agricultural Act of 2014 (P.L. 113-333), otherwise known as the "Farm Bill". Section 12307 of the Farm Bill instructs the Administrator of the EPA and the Science Advisory Board to establish a standing agriculture-related committee with EPA. More than four months after the Farm Bill was signed into law, it is my understanding that this committee has not yet been staffed, nor was it staffed and available to the Administrator when the proposed rule was crafted. Due to the significant interest in the proposed rule by farmers and ranchers, and due to the Congressional mandate that EPA establish a committee to review matters that have a significant impact on agriculture, I ask that you prioritize the establishment of this committee for consultation on the rule. This committee can also be a valuable tool to use in reexamining the interpretive rule as well to ensure any final incorporation of NRCS into CWA administration will be to the benefit and not the detriment of farmers and ranchers. (p. 2-3)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn, the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. Additionally, the summary address how the agencies have addressed the concerns of agricultural community. See also Compendium for Process Concerns and Administrative Requirements.**

Senator Pat Toomey et al., Congress of the United States (Doc. #18818)

14.445 As currently written, this rule will have unprecedented impacts on our nation's farmers, foresters and private landowners. Along with the release of the WOTUS rule, the United States Department of Agriculture (USDA) issued an interpretive rule ("IR") to explain the impacts of the rule on the agriculture sector. This IR presumes to offer farmers a "dredge and fill" permit exemption for "normal farming, ranching, and silvicultural activities" under Section 404 of the Clean Water Act. Despite the release of the IR, there have been many strong concerns voiced across the agriculture community that it does not go far enough to protect usual farming activities. Similarly, the rule does not explicitly prohibit the EPA from requiring farmers to obtain new permits under the CW A. The IR states that exemptions from "normal activities" would be granted if, and only if, farmers comply with federal conservation guidelines, per USDA's Natural Resources Conservation Service (NRCS), that until this time have been voluntary in nature. In effect, under the WOTUS rule, a producer must now meet a federally mandated

conservation standard, or face the consequences, including rigid penalties, of non-compliance under the CW A. Furthermore, this IR has no binding statutory teeth and would create more uncertainty because it provides EPA the authority to amend the list of conservation practices that would qualify for these limited exemptions at any time. We agree with many in the agricultural community that this IR does more harm than good because it would place limitations upon activities that currently are "exempted," rather than broadly exclude all such activities that have not been subject to the law for four decades. In short, this rule would mandate conservation compliance for traditionally voluntary agricultural practices, while increasing associated costs for such activities, effectively creating more regulatory uncertainty. (p. 2-3)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Timothy J. Walz, Member of Congress, First District, Minnesota Congress of the United States (Doc. #19299)

14.446 First and foremost, I am concerned with the process by which this interpretive rule was effectively finalized. At the Subcommittee hearing held on June 19, 2014 we concluded that the agencies involved neglected to engage agriculture and conservation stakeholders in any substantive way prior to publication. Had the IR been an internal document of little substantive consequence this failure to engage impacted stakeholders would have been relatively immaterial. This is not the case. To the contrary, I am of the opinion that the IR has regulatory effect and therefore should have been subject to the customary notice and comment period prior to finalizing. (p. 1-2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

14.447 Beyond the question of process, I am also concerned by the substance of the proposal. As mentioned above, I believe this IR has regulatory effect and that this effect may serve to dis-incentivize the very practices we are hoping to promote. Regulatory effect occurs when an individual is coerce,d by government to perform a specific activity. This coercion is present in the IR. Take for instance conservation practice 4382; Fences. Prior to the IR this practice was performed by farmers safe in the knowledge that it was exempt from 404 permitting as a practice incident to "normal farming." Adding #382 to the list of exemptions is problematic because these exemptions now require that the practice be performed in accordance with NRCS technical standards. The same result which before would have required a certain set of actions now requires a different standard. This is the very definition of coercion. A simple solution to this concern would be to remove practices from the list that are already exempt as "normal farming". Such practices include but are not limited to; #382 - Fences, #460 - Land Clearing, #512 - Forage and Biomass Planting, and #528 - Prescribed Grazing. (p. 2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

Joe Donnelly, United States Senate (Doc. #19304)

14.448 Regarding the interpretive rule, I have concerns it will not meet its intended goal of promoting conservation practices and providing certainty for farmers and ranchers. Before the release of the interpretive rule, many Hoosier farmers were unaware that conservation practices could ever trigger CWA permitting requirements. By creating a specific exemption for a certain number of conservation practices, an assumption has been created that without a stated exemption, other conservation practices could require a CWA permit before being implemented. I am particularly concerned about how this might impact conservation efforts that do not involve the National Resource Conservation Service. As a strong supporter of voluntary conservation practices like cover crops and two-stage ditches that improve water quality and crop production, I do not want the fear of permitting to inhibit voluntary conservation practices from being implemented. I ask that you work with conservation stakeholders to improve the interpretive rule so that it will be successful in promoting conservation practices. (p. 2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.

Fred Cochran et al. United States Senate (Doc. #19306)

14.449 Under current law, normal farming and ranching activities are exempt from permitting requirements. The Interpretive Rule has inserted substantial uncertainty into this process by outlining just 56 activities out of more than 160 conservation practices that previously qualified for the normal farming and ranching exemption under section 404 of the Clean Water Act. Further, it calls into question whether any other normal farming or ranching activity not conducted in accordance with a USDA technical standard can qualify for the exemption. By now requiring, for the first time, that a producer meet this higher standard, the Interpretive Rule has narrowed the normal farming exemption and created a threshold many producers will have difficulty meeting. The change also dramatically increases the risk of litigation as the standards will be impossible to consistently apply and enforce at the farm level.

Beyond adding confusion and uncertainty, the Interpretive Rule would fundamentally change the relationship between the Department of Agriculture and farm families. Over decades of farm policy, USDA has established an unprecedented relationship of trust with farmers, ranchers, and rural stakeholders. This unique relationship is built on voluntary conservation programs and a mutual commitment to protecting natural resources and keeping land in agriculture. Bringing USDA into the Clean Water Act permitting process would profoundly shift the nature of this successful approach by dismantling a longstanding partnership between the Federal government and agriculture community.

With these concerns, we write for an update on implementation of the Interpretive Rule, and ask for its immediate withdrawal. The Interpretive Rule became final on publication with little opportunity for farmers, ranchers, and other rural constituents who are directly impacted by this policy to engage in its development. As the Administration continues to extend the timeframe for finalization of the flawed WOTUS proposal, any further

discussion of how agricultural activities may fit in to this framework must allow for a transparent and public process in which the voice of American agriculture can be heard. (p. 1-2)

Agency Response: As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See also Compendiums for Process Concerns and Administrative Requirements and Implementation.

John D. Dingell et al. Members of Congress, Congress of the United States (Doc. #19310)

14.450 In addition to providing certainty to longstanding policies, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) have coordinated with the U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) to develop an interpretive rule to ensure 56 NRCS conservation practices that improve water quality and do not destroy wetlands and streams will be exempt from Section 404 dredged or fill permitting requirements. Farmers across the Great Lakes are already incorporating these practices. which include irrigation field ditches, wetland restoration and enhancement, and filter strips. The NRCS is working directly with agricultural producers in Illinois, Michigan, Pennsylvania and Ohio to implement conservation practices to address habitat and wildlife protection and restoration, reduce soil erosion and nutrient loading, and reduce terrestrial invasive species through the Great Lakes Restoration Initiative (GLRI). By exempting these practices from Section 404 permitting requirements, the EPA and the ACOE will make it easier for farmers who choose to undertake these types of conservation projects on their land, and encourage broader adoption across the Basin. We are encouraged by the intent and goals of the interpretive rule along with previous efforts made to reach out to those who will be impacted. We urge you to provide more education and outreach to stakeholders in order to insure the rule is workable for all. The GLRI has invested hundreds of millions of dollars across the Basin, making significant progress in addressing the longstanding environmental challenges confronting the Great Lakes that threaten the economic health of our communities. However, this investment will not be successful in the long-term if we don't protect the small streams and wetlands that feed into the Great Lakes. That is why we urge you to finalize this rule swiftly and efficiently to ensure that protections against pollution will again apply to these critical waters, including thousands of the streams that feed into drinking water systems serving 30.6 million in the Great Lakes Basin and 117 million Americans across our nation. (p. 1-2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The funding and projects undertaken by the GLRI is outside the scope of this rule making. See also Agency Summary response 14.1.

Patrick Leahy, et al, United States Senate (Doc. #19655)

14.451 Agency documents and congressional testimony state that the purpose of the interpretive rule is to provide certainty to farmers and ranchers by stating in advance that specific conservation practices are exempt from CWA permitting. However, before the release of

the interpretive rule, the idea that conservation practices could ever trigger CWA permitting did not exist. By carving out a specific exemption for a certain number of conservation practices, an assumption has been created that but for this list, these certain conservation practices would have required a CWA permit. Is this true? (p. 2)

Agency Response: **As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.**

14.452 Privacy is of great concern to farmers, ranchers and forest owners. Many groups we have heard from are worried the interpretive rule could expose farmers and ranchers to citizen suits if they are not in compliance with NRCS standards. Can you tell us if the increased threat of citizen suits is real and if there are steps that EPA can take to insulate agriculture from unnecessary citizen suits? (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The role of NRCS is unchanged by this rule making and is outside the scope.**

14.453 The interpretive rule has also raised questions over requirements for conservation practices not included on the list. Many farmers and ranchers believe conservation practices have always qualified for the Section 404 "normal farming" activity exemption. However, issuing an interpretive rule with a finite number of conservation practices suggests that this was not always the case. Many stakeholders are concerned that conservation practices not included on the list of 56 practices automatically require a CWA permit. Can you clarify what the interpretive rule means for NRCS conservation practices not included on the list of 56 exempt practices? Did the EPA, Army Corps, and NRCS consider broadening the interpretive rule to cover more conservation activities? (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

14.454 Another question the interpretive rule raises is its effect on existing conservation efforts. NRCS provides important and valuable resources for conservation; but, as you know, there are many conservation efforts which do not involve NRCS financial or technical resources. Some stakeholders are concerned that requiring NRCS compliance in order to qualify for a CWA permit exemption could be damaging to existing conservation work not carried out with NRCS. For example, NRCS worked with the dairy industry to create the Dairy Environmental Handbook, which outlines best management practices for producers. Some of these practices are based on NRCS standards; however, they do not necessarily mirror NRCS requirements. If a producer follows guidelines in the Handbook, rather than guidelines from NRCS, will they be subject to liability under the CWA? Does the interpretive rule make this problem worse or does it help producers in this situation? (p. 2)

Agency Response: **As stated in the summary 14.2, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA.**

14.2.2. Ongoing Farming

Agencies' Summary Response

Normal farming is not defined in the Clean Water Act, it is clarified in the agencies' implementing regulations and has been court cases have dealt with the "established" or ongoing provisions. Many commenters raised questions about what activities would be considered "normal" farming, silviculture, and ranching. These comments were raised in the context of implementation of the IR, and as noted, comments on the IR and its implementation are beyond the scope of this rule.

However, the final rule includes a provision that waters subject to established, "Normal" farming, silviculture, and ranching activities are not "adjacent" waters. Given this provision, the agencies recognize the utility in providing further clarification on these terms. They are 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.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

"To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation."

Further, the regulations state that activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation. If the proposed activity is not exempt under Section 404(f)(1), the work may be authorized under one or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: http://www.usace.army.mil/cw/cecwo/reg/ and the RGPs can be found on the local Corps District

regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

The May 3, 1990 Wilcher memorandum states:

> If a farmer has been plowing, planting and harvesting in wetlands, he can continue to do so without the need for a Section 404 permit, so long as he does not convert the wetland to dry land. Activities which convert a wetland which has not been used for farming or forestry into such uses are not considered part of an established operation, and are not exempt...“In determining whether an activity is part of an established operation, several points need to be considered. First, the specific farming activity need not itself have been ongoing as long as it is introduced as part of an ongoing farming operation. For example, if crops have been grown and harvested on a regular basis, the mere addition or change of a cultivation technique (e.g., discing between crop rows to control weeds rather than using herbicides) is considered to be part of the established farming operation. Second, the planting of different agricultural crops as part of an established rotation (e.g., soybeans to rice) is exempt. Similarly, the rotation of rice and crawfish production is also exempt (construction of fish ponds is not an exempt activity and is addressed below). Third, the resumption of agricultural production in areas laying fallow as part of a normal rotational cycle are considered to be part of an established operation and would be exempted under Section 404(f). However, if a wetland area has not been used for farming for so long that it would require hydrological modifications (modifications to the surface or groundwater flow) that would result in a discharge of dredged or fill material, the farming operation would no longer be established or ongoing.

As mentioned earlier, courts have ruled on these provisions of “established” or ongoing. In United States v. Brace, 41 F.3d 117 (3d Cir. 1994) the court found that all or substantially all of the site must be part of the established operation. “We recognize that the designation of the use of some very small sites will be effectively inseparable from the use of the surrounding land for established farming operations. Thus, we would not require that every square foot be used for farming in order for a site to meet the established operation exemption. In this case, however, it is clearly reasonable to require that all or substantially all of the thirty-acre site be part of an established operation.”

Specific Comments

Minnehaha County Commission, South Dakota (Doc. #4116)

14.455 The fear is that the farmers' discharge is not regulated but ours would be. For example, we have no control over how much nitrogen and phosphorus leaches from their fields into our ditches yet we could potentially be held accountable to only discharge X part per million. Being that farmers generally have a very strong voice in Washington, it is likely that they will remain exempt from being regulated. (p. 1)

Agency Response: **This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water.**

Tennessee Association of Conservation Districts (Doc. #10162)

14.456 [W]e have appreciated the EPA and ACOE statements that the original exemption of "normal and traditional" agricultural production practices would remain and thus continue to be exempt from regulation under this section of the CWA. (p. 1)

Agency Response: The agencies recognize the vital role of farmers in providing the nation with food and fiber. The exemptions provided by Congress within the CWA continue to remain unchanged by this rule.

14.457 [W]e appreciate the simultaneous release of the Interpretative Rule outlining 50+ conservation practices that do not need a permit where they may impact Waters of the US. As I stated earlier, all the practices we promote have a beneficial impact on water and other important natural resources and we look forward to the expansion of this list to virtually all current and future beneficial practices. We do understand the difference between conservation practices and their place in the rule and agricultural production practices, strictly, which are, as you have stated, still exempt from regulation under this act and any currently proposed rule changes. We appreciate our federal partner, USDA's Natural Resources Conservation Service (NRCS), working with EPA and the ACOE to understand these practices and that leading to their exemption. (p. 2)

Agency Response: The Interpretive Rule was withdrawn and is outside the scope of this rulemaking. This rule does not change the agricultural exemptions provided in the Clean Water Act See Agencies' Summary Responses 14.2.

14.458 [W]e encourage USDA and NRCS to continue to work with any agency of jurisdiction so there is better understanding of their mutual mission and responsibilities, be it technical assistance or regulation. It will benefit the goals to which we should all be dedicated. (p. 2)

Agency Response: The agencies agree that coordination and training across Federal Agencies ensures more understanding and leads to increased clarity to the regulated public.

14.459 TACD's concern is how does this impact our ability to work with landowners to voluntarily implement conservation practices? (p. 2)

Agency Response: The rule will not have an effect on the implementation of USDA programs and assistance.

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

14.460 Our last concern is the interpretive rule states that only practices performed on an "established (i.e. ongoing) farming, silviculture, or ranching operation" are eligible for exemption. This is contrary to many policies of the USDA, which aim to provide incentives to the young people to get involved in agriculture, and could jeopardize the future of farming. The increasing average age of farmers and ranchers not only in the Northeastern SWCD but in the country in general and the lack of recruitment of younger individuals into fields of Agriculture is a major concern of the USDA and the NSWCD. (p. 2)

Agency Response: **As previously stated, the IR has been withdrawn and the rule will not have an effect on the implementation of USDA programs and assistance.**

Chaves Soil & Water Conservation District, New Mexico (Doc. #13953)

14.461 EPA's so-called exemptions will not protect farmers and ranchers from the proposed "waters" rule. If farmlands are regulated as "waters," farming and ranching will suffer. A farmer has to have been farming continuously since 1977 to benefit from the exemptions. The rule narrows existing exemptions by tying them to mandatory compliance with what used to be voluntary Natural Resources Conservation Services (NRCS) standards. Farmers previously could undertake these practices as part of their normal farming activities; now, those activities must comply with NRCS standards or else the farmer risks CWA enforcement. (p. 1)

Agency Response: **As previously stated, the IR has been withdrawn and the rule will not have an effect on the implementation of NRCS programs and assistance. The agricultural exemptions in the Clean Water Act remain unchanged and are outside the scope of the rule.**

14.462 The exemptions do not change the fact that the scope of waters and land that would come under federal regulatory jurisdiction is vastly broader under the proposed rule. These narrow exemptions will not protect farmers or other landowners from new restrictions or prohibitions that will come from establishing water quality standards and specific, numeric discharge limits for ditches, intermittent streams and other features that EPA now plans to sweep into federal jurisdiction. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this final rule is narrower than that under the existing regulation, in part because the rule puts important qualifiers on some existing categories, such as tributaries. Also, as stated in the summary, the definition of "adjacent" in the rule does not include those waters that are subject to established, normal farming, silviculture, and ranching activities. See also Compendiums for Ditches and Features and Other Waters Not Jurisdictional and Implementation.**

Washington State Water Resources Association (Doc. #16583)

14.463 Additional Concerns with the Proposed Rule: Normal Farming Practices. Two key farming practices, nutrient management and pest management, are missing from the list of normal farming practices in the proposed rule. MACO recommends that nutrient management and pest management be explicitly included in the list of approved normal farming practices, rather than allow for further confusion and assumptions that these two common practices are implied. (p. 2)

Agency Response: **This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements that are triggered when a person discharges a pollutant to a covered water, and any associated exemptions are outside the scope of the rule. The exemptions provided in the Clean Water Act for certain agricultural activities are also outside the scope of the rule. Accordingly, this rule does not change the existing 402 regulations,**

including the applicability of the pesticides general permit described in the Implementation Compendium in this Response to Comments document.

Louisiana Farm Bureau Federation (Doc. #1603)

14.464 Under the proposed rule, the agencies' goal is to promulgate a rule that is clear and understandable and protects the nation's waters, supported by science and consistent with the law. We find however, that the proposed regulatory language effectively does away with current limitations on EPA and Corps authority and seems to only provide more confusion and less clarity for our farm and ranch families whose land would be judged by these agencies. This is evident and supported by a statement issued by EPA Administrator Gina McCarthy explaining that the rule exempts current normal farming activities including plowing, seeding and cultivating. However, failing to include, as does the proposed rule, the use of fertilizers, herbicides and pesticides which are considered to be normal farming activities. It is our concern that many practices in agricultural production could require government approval through a complex process of federal permitting if the proposed rule becomes final. (p. 2-3)

Agency Response: This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements that are triggered when a person discharges a pollutant to a covered water, and any associated exemptions are outside the scope of the rule. The exemptions provided in the Clean Water Act for certain agricultural activities are also outside the scope of the rule. Accordingly, this rule does not change the existing 402 regulations, including the applicability of the pesticides general permit described in the Implementation compendium in this Response to Comments document.

Women Involved in Farm Economics (Doc. #4113)

14.465 Our concern is that traditional farming activities that once were addressed for the purposes of the CWA on a case-by-case determination will become jurisdictional by default. And while WIFE appreciates the exemptions to the general jurisdictional rule for "[n]ormal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products" and more than 50 conservation practices, the expansion of CWA jurisdiction will likely incorporate activities beyond the purview of nonfarmers. For example, under the wording of the proposed rule, both farm ditches with flows sufficient to be considered "perennial" and multipurpose stock ponds along intermittent or ephemeral streams throughout the arid West would be considered subject to the CWA. (p. 1-2)

Agency Response: As stated in the summary 14.2 the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. See also the compendiums for Tributaries, Ditches, and Features and Waters Not Jurisdictional Waters.

Maple Leaf Farms (Doc. #5532)

14.466 Under this new definition, dry streambeds, ditches and even depressions in fields that only occasionally fill with water qualify as navigable waterways under the Clean Water Act. We understand that EPA has issued a new interpretive rule that claims to exempt

certain agricultural conservation practices, but these exemptions apply only to dredge and fill permit requirements. They do not protect farmers and land owners from federal veto power over pest and weed control, fertilizer application and other essential farming activities. (p. 1)

Agency Response: See summary 14.2.2 for a discussion on ongoing farming. Additionally, the Interpretive Rule was withdrawn and the rule does not affect the exemptions Congress provided to the agricultural community in the CWA. The rule does not change the permitting requirements under Section 402 and therefore they are outside the scope of this rule. See Implementation Compendium for a discussion on 402 permitting.

Iowa Farm Bureau Federation and American Farm Bureau Federation (Doc. #7633)

14.467 Iowa Farm Bureau and AFBF are concerned that EPA's oversimplification of the "normal" farming and ranching exemption is misleading to farmers and ranchers. As you know, this exemption does not simply exempt ordinary or commonplace farming and ranching practices from Clean Water Act permit requirements—which is how most people would interpret EPA's broad statements quoted above. Instead, the exemption only applies to section 404 permits, not section 402 permits that would be required for applying fertilizer, manure, or pesticide in jurisdictional ephemeral streams, ditches, or wetlands. For this reason, grazing or moving cattle that deposit manure into a jurisdictional wetland or ephemeral feature actually would not qualify for the normal farming or ranching exemption (although we would argue that cows should not be viewed as "point sources" anyway). In addition, the exemption does not apply to activities that have the purpose of "bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters [may] be reduced." 33 U.S.C. § 404(f)(2),[73] The agencies have also long interpreted "normal" to mean only activities conducted as part of an "established (i.e. ongoing)" farming or ranching operation. See 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(A)[74] (p. 1-2)

Agency Response: See summary response 14.2.2 Ongoing Farming. Further, this is a definitional rule that addresses the scope of waters covered by the Clean Water Act. It does not establish or change existing the CWA permitting requirements, which are therefore outside the scope of this rule.

14.468 At our meeting, AFBF General Counsel Ellen Steen reiterated a question she had raised with you privately, and that AFBF has raised publicly, concerning whether "established" and "ongoing" means that the farming or ranching operation must have been ongoing at the particular location since 1977. Your response is, to our knowledge, the first time that EPA has provided any clarification on this point, so it provides important guidance for

[73] The preamble to the proposed rule indicates that this "recapture" provision would apply where, for example, plowing would eliminate a "bed and bank" of an ephemeral stream in a farm field. 79 Fed. Reg. at 22,204.

[74] Apparently, at least for some activities, the agencies also now interpret the exemption to apply only to practices that complv with Natural Resources Conservation Service technical standards. See U.S. Environmental Protection A2encv and U.S. Department of the Armv Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) (March 25, 2014).

farmers and ranchers. You indicated that when farming or ranching has not been ongoing since 1977, otherwise "normal" farming or ranching activities such as plowing, planting, etc. would require a section 404 permit—but only for the first year. After the first year, you indicated that the operation would be viewed as "established" for purposes of the exemption. We believe a serious consequence of the proposed assertion (p. 2)

Agency Response: See summary response 14.2.2 Ongoing Farming. Further, nothing in this rule changes the permitting requirements and is outside the scope of this rule.

Glenn County Rangeland Association (Doc. #12724)

14.469 The proposal does not contain enough specific information to evaluate or integrate into rangeland management plans already being administered by landowners and rangeland operators. The terms used to describe how to determine which lands would be under the proposed rule and which would be exempt are too vague, undefined and appear to overlap. (p. 1)

Agency Response: This is a definitional rule that addresses the scope of waters covered by the Clean Water Act. The evaluation and management of rangelands is outside the scope of this rule. See summary essay 14.3, Definitions, below for a more detailed discussion on terms used by the agencies.

Kentucky Farm Bureau Mutual Insurance Company (Doc. #12974)

14.470 Throughout the years we have work with NRCS and our local Extension Office to insure that we are using the most current practices to preserve our natural resources. I am very proud of the product we produce and the positive impact we have on our environment. I fear the proposed rule could affect my ability to continue my farming operation. (p. 1)

Agency Response: See summary response essay 14.2.

Pershing County Water Conservation District (Doc. #12980)

14.471 The proposed rule does attempt to put farmers and rancher's minds at ease by stating "[t]he rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities While this is a good thing, the rule itself leaves a lot of gaps in which jurisdiction may still be asserted. By using vague and imprecise language in the rule, it is unclear just how much protection those in agriculture will have. In a publication the EPA released discussing the continued agricultural exemptions, they state that exemptions apply to "Normal Farming." It is unclear what is meant by "normal." Additionally, this wording does not exist in the rule. Normal Farming practices in one part of the state or country are different than those in other parts of the same state and country. (p. 3-4)

Agency Response: See summary response essays 14.2. and 14.2.2.

Nebraska Cattlemen (Doc. #13018.1)

14.472 It is an additional concern that the Interpretive Rule treatment of "normal farming" activities does not apply to sections other than §404. That creates a question mark and added confusion over what differences there would be between §404 and the rest of the

Act as it relates to the farming exemptions. Many of the questions that have long ago been answered or understood will now be at issue again. For example, if a farmer or rancher incidentally deposits fertilizer into a ditch or ephemeral stream we know that most likely we are not dealing with a "point source discharge to waters of the United States" because the area has not been deemed jurisdictional and this normal farming activity would be exempt under the Act. With the proposed change, this same incident could occur in a categorically determined jurisdictional area and not be considered "normal farming" activity. This increased confusion and uncertainty is not necessary. Again, the Nebraska definition of waters of the state is in place and has been implemented for forty years in a rational fashion. There is no problem that needs to be fixed in Nebraska. (p. 14)

Agency Response: **See summary response 14.2 and 14.2.2.**

14.3 TERMS SUGGESTED FOR DEFINITION

Agencies' Summary Response

Many comments were received expressing concern that the terms and definitions in the proposed rule were unclear or inadequately defined. A number of commenters also expressed a need for additional definitions of terms used in the proposed rule. The agencies responded to the suggestions for new and amended definitions in various ways. In some cases, the terms are not used in the rule; therefore, the agencies did not provide definitions (e.g. riparian area, uplands). Other clarifications were added to the preamble (e.g. ephemeral, intermittent, and perennial. In some cases, the agencies also made changes directly to the rule to clarify definitions (e.g. significant nexus). While the agencies considered other requests for definitions, the agencies reasonably concluded that the rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. The agencies also concluded that attempting to add new definitions for some terms, such as ditches, would actually introduce confusion. Preamble, IV.

Waters

There were a several comments expressing concern that the term "waters" is the keystone of this rule and yet, was undefined. The preamble explains that, "The agencies use the term "water" and "waters" in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.

Tributaries, OHWM, and Bed and Bank

A number of commenters requested clarification on the definition of "tributary" and terms related to that definition. The rule's definition of "tributary" retains many elements from the proposed rule, but the agencies did make some changes to reflect comments provided on the

proposed definition. Further explanation on the definition of tributary is provided both in the preamble and as a response within the "Tributaries" compendium.

The rule's definition of "tributary" at paragraph (c)(3) 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 does not have such characteristics, it is not a "tributary" under this rule. The preamble further clarifies that wetlands and waters such as ponds and lakes that contribute flow to a traditional navigable water, interstate water, or the territorial seas but typically lack a bed and banks and ordinary high water mark are considered "adjacent" but are not "tributary."

Due to the importance of physical indicators of flow to the definition of tributary, several commenters requested that the agencies define ordinary high water mark and bed and banks in this rulemaking process. To provide additional clarity and for ease of use for the public, the agencies are including the Corps' existing definition of ordinary high water mark in EPA's regulations as well. Existing Corps regulations define ordinary high water mark as the line on the shore 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. 33 CFR § 328.3(e). That definition is not changed by the rule and is added to EPA's regulations at paragraph (c)(6) of the rule text. While a definition of bed and banks was not added to the rule text, it is clarified in the preamble that for purposes of the rule, "bed and banks" means the substrate and sides of a channel between which flow is confined. The banks constitute a break in slope between the edge of the bed and the surrounding terrain, and may vary from steep to gradual.

Flow regimes

Several commenters requested specificity on the contribution of flow and flow rate requirements for tributaries. In response to these comments, the agencies clarified that any water where flow is of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark is considered a "tributary." In response to comments requesting definitions of specific flow regimes and to add additional clarity, the following descriptions of ephemeral, intermittent, and perennial are included within the preamble:

Longstanding agencies' practice considers perennial streams as those with flowing water year-round during a typical year, with groundwater or contributions of flow from higher in the stream or river network as primary sources of water for stream flow. Intermittent streams are those that have both precipitation and groundwater providing part of the stream's flow, and flow continuously only during certain times of the year (e.g., during certain seasons such as the rainy season). Ephemeral streams have flowing water only in response to precipitation events in a typical year, and are always above the water table. Precipitation can include rainfall as well as snowmelt.

Adjacent, Neighboring, and Bordering

Multiple commenters requested changes to the definitions of adjacent and neighboring, while others noted the absence of definitions of other terms, such as bordering, within the definition of

adjacent. With regard to terms within the definition of "adjacent," the agencies determined that bordering and contiguous are well understood, and for continuity and clarity the agencies continue to interpret and implement those terms consistent with the current policy and practice. Therefore, explicit definitions are not needed for these terms.

In response to concerns about the definition of neighboring, a variety of changes and clarifications were made to that definition in paragraph (c)(2) of the rule text. A number of comments stated that the definition was unclear and included terms which were undefined. In response to these comments and to provide greater clarity and consistency, in the rule the agencies modified the definition of neighboring to provide greater specificity as 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. Additionally, in order to provide more certainty to the public, the 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.

Riparian Area and Floodplain

Many commenters stated that the proposed definitions of "riparian area" and "floodplain" were unclear, poorly defined or too expansive. In response, the agencies have omitted the definitions of floodplain and riparian area and redefined neighboring using bright lines and distance limits as described above. The term "floodplain" is still used within the rule, but has been simplified to refer specifically to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding). The agencies concluded that the use of the term "riparian area" in the rule text was unnecessarily complicated.

Significant Nexus and related terms

A number of commenters stated that the definition of "significant nexus" and terms within the definition, such as "single landscape unit", "similarly situated", and "in the region" were unclear and warranted further definition. The definition of the term "significant nexus" in the rule at paragraph (c)(5) is consistent with language in SWANCC and Rapanos, and with the goals, objectives, and policies of the CWA, however some changes and clarifications have been added in response to comments.

In the rule text, the agencies define the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry, or a single point of entry watershed. Since Justice Kennedy did not define the "region," the agencies determined that the single point of entry watershed is a reasonable and technically appropriate scale for purposes of the significant nexus standard. A single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea.

Concerns that "similarly situated" was not adequately defined are addressed both in the rule text and in the preamble. The rule text states that, "[w]aters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." The preamble further describes the term: "Since the focus of the significant nexus standard is on

protecting and restoring the chemical, physical, and biological integrity of the nation's waters, the agencies interpret the phrase "similarly situated" in terms of whether the functions provided by particular waters are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together." The agencies have also added a list of functions to the definition of significant nexus to be considered in the analysis. To add clarity to the definition, the rule has omitted the term "single landscape unit."

Wetlands

A number of commenters suggested changes to the definition of wetlands, in particular recommending that the definition be changed to better align with the Army Corps' 1987 Wetland Delineation Manual and regional supplements. The delineation manuals are used in the field to draw jurisdictional boundaries around areas that meet the regulatory definitions of wetlands. The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands" since no changes are being made to the existing definition.

Exclusions and related terms

Many comments requested clarification to the exclusions listed in paragraph (b), both generally and to specific terms and concepts listed in that paragraph. The exclusions are addressed in the preamble at Section IV.I and comments seeking clarification are addressed in the Features and Waters Not Jurisdictional compendium.

PCC and Waste Treatment Systems

Some commenters requested or suggested definitions of prior converted cropland (PCC) and waste treatment systems. "Prior converted cropland" has been excluded from the definition of "waters of the United States" since 1992 and is defined by the USDA and NRCS at 7 CFR § 12.2 and in §514.30 of the National Food Security Act Manual, Fifth Edition, November 2010. Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979. This is addressed in the preamble at Section IV.I and comment seeking clarification are addressed in the Features and Waters Not Jurisdictional Compendium.

Ditches

A number of commenters requested a definition for the term "ditch". The agencies considered several options for addressing the definition of ditches but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. The ditch exclusions are addressed in the preamble at Section IV.I and comment seeking clarification are addressed in the Ditch Compendium.

Groundwater and shallow subsurface flow

Many commenters described confusion between the terms "groundwater" and "(shallow) subsurface-flow" and requested definitions to clarify the difference. The rule text no longer contains the term "shallow sub-surface flow" in the definition of neighboring, although as the preamble clarifies, "shallow sub-surface" can be used for significant nexus evaluations and the preamble provides clarity on types of hydrologic connections which can be considered at Section III and within the Technical Support Document Section II and VIII. The groundwater exclusion is addressed in the preamble at Section IV.I and comment seeking clarification are addressed in the Features and Waters Not Jurisdictional Compendium.

Upland and dry land

Many commenters requested that the rule includes definitions of upland(s) and dry land. The rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

The phrase "dry land" appears in the 1986 and 1988 preambles, and this rule's preamble provides clarification on "dry land" at Section V.I.

Other exclusions

There were a number of comments related to the clarity and need for definitions of other terms contained in the exclusions. The agencies believe that changes to definitions in the rule (e.g. "tributaries") and clarifications of terms in the preamble such as "tributaries" and "puddles" have addressed many of the concerns that the exclusions are unclear because the rule does not include explicit definitions for each excluded item. The ditch exclusions are addressed in the preamble at Section IV.I and comment seeking clarification are addressed in the Ditch Compendium.

The most commonly mentioned terms not already discussed above were "gully", "rill", and "swale." The rule identifies all erosional features, including gullies and rills that do not meet the definition of tributary, as non-jurisdictional features. Further, tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. These terms are addressed in the preamble at Section IV.G and Section IV.I. Comments seeking clarification are addressed in the Features and Waters Not Jurisdictional, Tributary and Ditch Compendiums.

Farming Exemption Definitions

There were also several comments expressing concern regarding unclear and missing definitions related to §404(f) exemptions. Commenters requested definitions for upland soil and water conservation, minor drainage, irrigation ditches, farm drainage, and normal farming. Nothing in the rule affects the farming exemptions provided in the CWA. Comments seeking clarification on 404(f) are included within section 14.2 of this compendium.

Specific Comments

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

14.473 Why didn't the EPA define "water" in this rule? (p. 10)

> **Agency Response: The Clean Water Act and its implementing regulations specify that jurisdiction extends to "waters of the United States." As such, this rulemaking addresses "waters of the United States." The agencies have over 30 years of experience in implementing the Clean Water Act. Based on that experience in working with stakeholders and the public, the agencies concluded that the water features that may be subject to Clean Water Act jurisdiction are well understood and that a definition of "water" may only introduce confusion.**

14.474 Is "water" wet under the proposed definition? (p. 10)

Agency Response: **Yes. However, not all waterbodies are wet all of the time, such as non-perennial streams and some wetlands. As Justice Kennedy stated in his Rapanos opinion, waterbodies that do not flow all the time can be important, noting that it makes little sense that "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. … To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so" (Rapanos at 2242).**

14.475 What is the minimum flow requirement for qualification as a "water of the U.S."? (p. 10)

Agency Response: **The agencies have not defined a specific minimum flow requirement for a water to be a "water of the United States." The agencies proposed to define the term "tributary" for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency to have a significant effect on downstream waters. Water features that meet this definition of "tributary" would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas, unless they are excluded under paragraph (b). Streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams, and the Science Advisory Board's September 30, 2014, letter to the Administrator stated that the proposed rule's definition of the term "tributary" is supported by science. The Connectivity Report concludes that streams, regardless of their flow regime, have important effects on larger downstream waters. The Science Advisory Board's final review of the Connectivity Report strongly supports this conclusion.**

Terry E. Branstad, Governor, State of Iowa et al. (Doc. #8377)

14.476 Confusion arises from both the new definitions and the undefined terms therein. Interpreting the defined terms requires the interpretation of undefined terms such as upland, ditch, gully, rill and swale. It is unclear how anyone can differentiate between these categories of water-carrying features. As another example, while the proposed rule offers definitions of floodplain and riparian area that tie those terms to water bodies, the preamble indicates that uplands may occur in these riparian areas and floodplains. This implies an expansive interpretation of the defined terms and hence an expansive interpretation of the adjacency of waters. Without clearer delineation of ordinary high water mark and the various categories of geographic features, the proposed rule cannot be clearly understood. The failure to provide clarity moves jurisdictional determinations from the gray area that the State of Iowa was becoming familiar with to a new and more expansive gray area that is not understood. (p. 5)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of**

the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "ditch," "gully," "rill," and "swale."

The agencies modified the definition of "neighboring" to address concerns through the use of bright lines and distance limits. The term "riparian area" was removed from the final rule. While the term "floodplain" is still used within the rule, the preamble clarifies that the agencies are referring to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding).

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such comments on those topics are outside the scope of the rule.

The final rule has incorporated the Corps longstanding definition of ordinary high water mark for greater clarity. The definition of OHWM was not included the proposed rule. In response to comments, the agencies added the Corps existing regulatory definition to the final rule to provide additional clarity. The agencies Further the Corps has developed regional OWHM manuals which do covers parts of Iowa. These manuals are located at http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494.1)

14.477 "Other waters" are waters that specifically do not fall into the category of waters susceptible to interstate commerce (traditional navigable waters), interstate waters, territorial seas, tributaries, etc. There are some specific "other waters" examples (such as mudflats or prairie potholes), however a certain percentage of determinations are on a case-by-case basis. If an alleged "significant nexus" occurs, "CWA jurisdiction" is found. We urge the agencies to provide definitions and/or metrics (such as a minimum number of functions) for terms such as "other waters," "quantifiable flow rates," "significant nexus," or "shallow subsurface connection." For example: Both "significant nexus" and "shallow subsurface connection" are critical to the proposed regulations. Both terms should have structured, precise definitions. (p. 4)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "significant nexus," "shallow subsurface connection," and flow rates.

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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8). See Other Waters Compendium for further explanation.

The agencies revised the definition of significant nexus, it now lists functions that will be considered. For further discussion of significant nexus see especially the preamble at Section III.C, summary response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX.

Texas Comptroller of Public Accounts (Doc. #10952)

14.478 In addition to concerns regarding the proposed definitions above, several terms in the proposal have been left undefined such as "similarly situated" and "landscape unit." These and other vague terms may cause delays and other difficulties for the regulated community, giving rise to even more questions and uncertainty. [75] For example, how will ditches be treated when related terms such as "uplands" and "contribute flow" are not defined? (p. 3)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "similarly situated," "landscape unit," and "upland."

See the Preamble Section IV.I and summary response 6.0 in the Ditches Compendium for a discussion of the regulation and exclusion of ditches as appropriate.

See also summary responses 6.1 and 6.3 in the Ditches Compendium for further explanation of the terms "upland" and "contribute flow" as related to ditches.

North Carolina Forest Service, NC Dept. of Agriculture (Doc. #14122)

14.479 Replace entirely the current definition of the term "wetlands" using the following suggested language below in underline:

• "The term wetlands means areas which exhibit indicators of all of the three following attributes: I) at least periodic inundation or saturation by surface water or groundwater; 2) a prevalence of vegetation that is typically adapted to grow and propagate in saturated or

[75] See e.g. National Association of Home Builders, Testimony before the Subcommittee on Water Resources and Environment, June 11, 2014. http://transportation.house.gov/uploadedfiles/2014-06-11-kelly.pdf . (Last visited Sept. 11, 2014).

nearly saturated soil conditions; and 3) hydric soils or soils which exhibit a reducing process. Wetlands typically include swamps, marshes, various types of bogs, (some of which may occur in isolation) and similar wet-natured areas. Wetlands also often occur, but may not always occur, immediately alongside the margins of rivers, streams, ponds, lakes, permanent impoundments, commercially-navigable canals, and seas."

Justification for Comment 6: The current US EPA wetland definition relies heavily upon only saturation and the existence of hydrophytic vegetation. These are only two of the three attributes that must be considered when delineating and defining wetlands. The suggested changed definition accounts for all three attributes, while offering some degree of flexibility for protecting WOTUS. In addition, the suggested changed definition makes it clearer as to where wetlands may be expected to exist, which should improve clarity and regulatory transparency or expectations. (p. 4)

Agency Response: See Agencies' Summary Response 14.3. The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. The delineation manuals are used in the field to draw jurisdictional boundaries around areas that meet the regulatory definitions of wetlands and are also outside the scope of this rule.

Maine Department of Environmental Protection (Doc. #14624)

14.480 There is insufficient specificity in the definition, which will lead to regulatory uncertainty.

A fundamental principle of regulation is the need for clear understandable direction which can be followed and understood. This objective was made more difficult by the Agencies' apparent attempts to use two separate approaches to determine jurisdiction that the two opinions in the *Rapanos* case presented. What seems to have resulted from this approach is a lack of clear direction regarding how connected a water can be to a navigable water in order to be considered a WOTUS.

As drafted, the proposal presents insufficient specificity that is necessary to define the resource to be regulated. For example, terms and phrases in the definition of "significant nexus" such as "other similarly situated waters in the region," "it must be more than speculative or insubstantial," "perform similar functions," "are located sufficiently close together or sufficiently close to a water of the United States,"' and "evaluated in a single landscape unit" all lack the specificity necessary to establish regulatory certainty. This also increases the likelihood of regulatory inconsistency. These terms appear to provide for an expansion of jurisdiction of waters regulated as WOTUS.

The Agencies should also provide clarity regarding which ditches are not considered jurisdictional and that conveyances that are part of an MS4 system are not "waters of the United States." (p. 4)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of

the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See preamble Section III for further explanation and clarity on how to conduct significant nexus analysis and the Technical Support Document Sections I and II for further discussion on the legal basis for the approach to jurisdiction and the significant nexus analysis.

The definition of the term "significant nexus" in the rule at paragraph (c)(5) is consistent with language in SWANCC and Rapanos, and with the goals, objectives, and policies of the CWA, however some changes and clarifications have been added in response to comments.

See summary response 14.3 and the citations therein for explanation of terms related to the definition of "significant nexus" including "in the region," "similarly situated," and "single landscape unit."

See summary response 5.0 in the Significant Nexus Compendium for further explanation and discussion of reasons why the agencies chose not to define specific related terms including "more than speculative or insubstantial."

See summary response 6.2 in the Ditch Compendium for explanation of ditches which are excluded from jurisdiction and the treatment of MS4s.

For further explanation of the jurisdictional status of storm water systems, see summary response 7.4.4 in the Non-Jurisdictional Compendium.

Michael Teague, Secretary, Energy And Environment et al. State of Oklahoma (Doc. #14625)

14.481 Undefined or poorly defined terms like tributaries, adjacent waters, floodplains, riparian areas, rills, gullies, and uplands inject additional confusion in a proposed rule meant to clarify CWA jurisdiction. Because many of these features vary significantly from state-to-state and ecosystem-to-ecosystem, States are ultimately in the best position to understand the connection of these features to navigable waters and, thus, determine whether the connections are significant. Further efforts to craft definitions in a rule that is national in scope could be futile, which is why development of processes and procedures that defer critical decisions to States may have more merit. (p. 4)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributaries," "adjacent waters," "floodplain," "riparian area," "rills," "gullies," and "upland."

Nothing in this rule restricts the ability of states to more broadly protect state waters.

Arizona State Land Department (Doc. #14973)

14.482 The Proposed Change is presented as a tool to clarify the meaning of "waters of the United States." In reality, the Proposed Change serves to increase the confusion surrounding this definition because it utilizes unclear terminology to define an already amorphous phrase.

The current regulatory provision provides a number of examples of the "other waters" that comprise the "waters of the United States." The Proposed Change seeks to supplant this specific guidance with permissive and subjective language that appears to be limited only by an unknown federal standard in its inclusion of waters that have been, are, or could be susceptible to a number of uses. Included within this seemingly limitless federal purview are waters- including wetlands-that have a "significant nexus to a traditional navigable water, interstate water or the territorial seas."[76] In addition, the Proposed Change includes a federally-constructed definition of a "tributary," and requires all waters meeting this definition to be included among "waters of the United States" by rule, with few exceptions.

Far from clarifying the current definition of "waters of the United States," the addition of nebulous and far-reaching standards promises to create a situation in which those upon whom the regulation is enforced will simply not know where the line is drawn. This will negatively impact the ranchers, farmers, and other small business owners throughout Arizona whose livelihoods depend upon their ability to utilize the waters available to them while successfully navigating the federal regulatory process. (p. 2)

Agency Response: See Agencies' Summary Response 14.3 and Other Waters Compendium. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. 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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8). See Other Waters Compendium for further explanation.

For further discussion of tributaries see the Tributary Compendium.

North Carolina Department of Environment and Natural Resources (Doc. #14984)

14.483 The Federal Agencies cannot by rule marginalize the express intent of Congress and the role of the states. Under the proposed rule, few pieces of sizable property and virtually no property in eastern North Carolina could be developed without a federal permit. The proposed definitions for the terms "tributary," "adjacent," "riparian area," and "floodplain" are so broadly defined that there are few, if any, land and water resources

[76] Definition of"Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22188-89 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328).

left to primarily state authority. For example, under the proposed rule, all "tributaries" of traditional "navigable waters" and all waters (not confined to tributaries) and wetlands "adjacent" to such tributaries, would be subject to federal authority. A "tributary" needs only a bed and bank and a discernible ordinary high water mark. It must contribute flow, though not necessarily directly. Indeed, if there are breaks in the tributary, natural or manmade, it is not "disqualified," so long as the bed and bank and ordinary high water mark are identifiable upstream of the break. This is true even if the stream goes underground or the stream flattens into a wetland. There may be no exception for a small tributary which connects to a wetland to which many tributaries contribute water, even if the flow of the small tributary is an insignificant contributor to the wetland area. The term "adjacent" includes waters within the same "riparian area" or "floodplain" (both broadly defined) as the tributary which eventually influences the traditionally navigable water. It also includes waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a tributary which eventually connects to the traditionally navigable water. By this definition, storm water systems or ditches for flood waters or road runoff may be classified as a tributary and subject to federal jurisdiction if they "contribute flow" to a "water of the US." (p. 3)

Agency Response: **See Agencies' Summary Response 14.1 and 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent," "riparian area," and "floodplain."

For discussion of tributaries and breaks in OHWM, see the Tributary Compendium and the Technical Support Document Section VII Tributaries.

For further discussion of ditches see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.

For further discussion of storm water systems, see the Preamble at Section VI.I and summary response 7.4.4 in the Features and Waters Not Jurisdictional Compendium.

In response to the concern that the agencies' proposed definition of "riparian area," and "floodplain" were too expansive, the agencies have revised the definition of "neighboring". The agencies have omitted the definitions of floodplain and riparian area and redefined neighboring using bright lines and distance limits. The term "floodplain" is still used within the rule, but has been simplified to refer specifically to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding). The agencies concluded that the use of the term "riparian area" in the rule text was unnecessarily complicated. See Adjacent Waters Compendium.

Additionally, in order to provide more certainty to the public, the 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 see Preamble at Section III and Features and Waters Not Jurisdictional Compendium

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "adjacent." Lastly, see the Preamble at Section VI.E for a discussion of Federalism and states' role.

Arctic Slope Regional Corporation (Doc. #15038)

14.484 Not deterred by these setbacks, the Agencies now propose to expand the scope of jurisdictional waters—a category for which "no additional analysis would be required"[77]—to include "tributaries" and also bordering, contiguous, "riparian" and "floodplain" areas. And the Agencies have also proposed a significant expansion of "other waters"—which fall within the WOTUS definition on a case-by-case basis—to include any water that "significantly affects the chemical, physical, or biological integrity" of any of the expanded jurisdictional waters.

The words in quotation marks in the preceding paragraph are defined in the Proposed Rule. But those definitions, not to mention the many undefined terms and phrases used in the Proposed Rule, are burdened with ambiguities that create uncertainty and inconsistency. These ambiguities will cause the Proposed Rule (if adopted) to have a chilling effect on development that may go well beyond any intended result, as would-be developers will find it difficult to predict whether their projects, even if small in scope and confined to watery areas heretofore considered non-navigable, will somehow still be subject to Agency oversight. It is simply not possible to predict the breadth and scope that may be given to those defined and undefined terms by Agency officials. The uncertainty is particularly problematic here because the risk is so large: any project touching waters that are deemed to be jurisdictional will be subjected to intense (and expensive) scrutiny and regulation. Similarly, the "other waters" category will leave developers and regulators alike wondering when, exactly, it is necessary to perform a case-by-case analysis, and, if so, what the result is likely to be. (p. 3-4)

Agency Response: See Agencies' Summary Response 14.3 and Compendiums for Tributaries and Adjacent Waters. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion.

See especially the citations in summary response 14.3 for discussion of specific terms including "tributaries," "riparian area," "floodplain," and "significant nexus."

See Preamble at Section III.C and IV.G and Other Waters Compendium for further explanation.

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

14.485 Definitions are needed for the following terms:

[77] 79 Fed. Reg. at 22,188-89.

Flow

Gullies

Insubstantial

High flow as it relates of determining floodplain

Moderate flows as it relates of determining floodplain

Nexus

Non-wetland swales

Rills

Riparian area

Significant

Significantly

Speculative (p. 11-12)

Agency Response: **See Agency Summary and Response 14.3 and citations therein.**

Delaware Department of Natural Resources and Environmental Control (Doc. #16558)

14.486 There are many areas within the proposed rule which need further definition to assist states and water programs. These include but are not limited to: identifying and defining adjacent waters, tributaries, and ephemeral streams, especially in identifying unregulated ditches versus regulated waters; defining 'shallow subsurface hydrologic connection' which will be critical in establishing specific adjacent and other waters categories reducing the need for case-by-case jurisdictional determinations; clearly defining other exemptions for waste water treatment systems with special consideration to storm water systems; defining floodplain in regard to regulatory scope for waters and wetlands taking into account biological, physical, and hydrologic considerations; and distinguishing between the jurisdictional definition of Waters of the U.S. and waters that are assumable by states under §404(g) of the CWA by providing a more definitive clarification of the scope of assumable waters. (p. 2)

Agency Response: **See summary response 14.3 and the citations therein for discussion of specific terms including "adjacent waters," "tributaries," "ephemeral streams," "shallow subsurface flow," and "floodplain."**

Defining the assumable waters under section 404(g) of the CWA is beyond the scope of this rule The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for "waters of the United States" within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). EPA has initiated a separate process to address how the EPA can best clarify assumable waters for dredge and fill permit programs pursuant to the Clean Water Act section 404(g)(1), and has invited nominations from a diverse range of

qualified candidates for serving on a new subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and recommendations. 80 FR 13439 (Mar. 16, 2015).

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

14.487 Undefined or poorly defined terms like tributaries, adjacent waters, floodplains, riparian areas, rills, gullies, and uplands inject additional confusion in a proposed rule meant to clarify CWA jurisdiction. Because many of these features vary significantly form state-to-state and ecosystem-to-ecosystem, States are ultimately in the best position to understand the connection of these features to navigable waters and, thus, determine whether the connections are significant. Further efforts to craft definitions in a rule that is national in scope could be futile, which is why development of processes and procedures that defer critical decisions to States may have more merit. (p. 4)

Agency Response: See summary response 14.3 and citations therein for discussion of specific terms including "tributaries," "adjacent waters," "floodplain," "riparian area," "rills," "gullies," and "upland."

Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters, but the purpose of this rule is to define the scope of waters protected under the Clean Water Act, a federal law. 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. See also the Preamble at Section VI.E for a discussion of Federalism and states' role.

Office of the Governor, State of Montana (Doc. #16694)

14.488 The State is concerned "waters" is not defined and that "waters of the United States" may be construed to Include activities Impacting dry land that Is "adjacent" and/ or "neighbors" a water body or is within a "riparian area" or "floodplain." If this rule were to include activities affecting land, the rule would greatly expand federal jurisdiction. To avoid any potential confusion in the future, we recommend that "waters" be defined as "a body of surface water, including seas, lakes, streams, and wetlands." This would clarify that only activities directly impacting water would be regulated. (p. 5)

Agency Response: See Agencies' Summary Response 14.3.

New York State Departments of Environmental Conservation (Doc. #18895)

14.489 The lack of clarity in the proposed rule prevents New York State from providing meaningful comments about the impacts of the proposal. Specifically, the following terms are undefined or not clearly defined in the proposed rule, leaving wide latitude for interpretation and prompting legal challenges:

- Tributary;
- Upland;
- Adjacent waters;

- Shallow subsurface hydrologic connections as "neighboring" waters;
- Floodplain; and
- Significant nexus.

We recommend that a significantly revised rule clearly defines these terms and provide examples of what EPA and the Army Corps believe are encompassed by them. This will enable the states to better understand the intent of EPA and the Army Corps and successfully implement the rule. The regulated community will also be able to better understand the rule's requirements. (p. 3)

Agency Response: **See summary response 14.3 and citations therein.**

Board of County Commissioners, Huerfano County (Doc. #1771)

14.490 In short, the proposed rule is unnecessary and should not be adopted for enforcement. At the very least, the definitions in the rule should be hard and fast and not open to interpretation. (p. 2)

Agency Response: **See Agencies' Summary Response 14.3 and citations therein. This is a definitional rule that would be relevant in the implementation and enforcement of the Clean Water Act.**

Nye County Board of County Commissioners (Doc. #3255.2)

14.491 Although certain "upland" ditches or those ditches that do not contribute flow to "waters of the US" would be excluded under the proposed changes, the key terms "upland" and "contribute flow" are undefined. This ambiguity creates uncertainty for the County and other potentially affected agencies, and could potentially leave the EPA and USACE open for legal challenges. (p. 2)

Agency Response: **See Agencies' Summary Response and citations therein.**

Sheridan County Commission, Sheridan County, Montana (Doc. #3271.2)

14.492 [T]here are many elements of this proposed rule that are unclear and need to be well defined before action should be taken. Every aspect of this proposed rule should be fully considered and spelled out in black and white, no gray area, so everyone fully understands the implications of what this proposed rule may affect in the unfortunate circumstance that it does become law. (p. 2)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

Washington County Board of Commissioners (Doc. #4114)

14.493 We believe the terms riparian zone, floodplain, ditch and upland must be better defined, as well as more clearly defining the definition of ditches that will be exempt from the new rule. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "riparian area," "floodplain," "ditch," and "upland."

For further discussion of ditches which are excluded from jurisdiction see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.

Lincoln County Conservation District, Washington (Doc. #4236.2)

14.494 The Lincoln County Conservation District does not agree with the term "contribute flow" in the proposed rule, without any definition of what "contribute flow" means. In the absence of any definition of "contribute flow" in the proposed Rule, the District proposes and requests that for any tributary within the county to be considered as "Waters of the United States," it would be required to contribute flow to a larger traditional navigable water, interstate water or territorial sea on a regular basis, with significant flow volume and significant flow duration. To keep this definition to a reasonable and simple basis, contributing flow on a regular basis would involve the contribution of significant flow volume for at least 50% or more of the time on a yearly basis for a minimum 10 year period or more. A significant flow volume would require at least a flow of 1 cfs (cubic foot per second) or more for a significant duration. (p. 3)

Agency Response: **See Agencies' Summary Response 14.3 for discussion of the term "contribute flow" see Tributary Compendium and the Technical Support Document Section VII.**

Delta Conservation District (Doc. #4719.2)

14.495 [R]ather than providing clarity and less complication over covered waters, the rule relies on undefined or vague concepts such as "riparian areas", "landscape unit", "ordinary high water mark", as determined by the agencies "best professional judgment" and "aggregation", which will inevitably cause unnecessary litigation. (p. 1)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "riparian area," "landscape unit," and "ordinary high water mark."

Concerns on aggregation of waters is addressed in the Preamble at Section III.

Fairfield County Commissioners (Doc. #4775)

14.496 [K]ey terms used in the proposed regulation-tributary, adjacent waters, riparian areas, flood plains, and even ditch exemptions on uplands and flow-lack clarity. It is uncertain

how these definitions will be applied. We urge further research and restraint in expanding the definition of "waters of the U.S." (p. 1)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," and "floodplain."

North Cass Water Resource District (Doc. #5491)

14.497 [T]he rules do not define "in combination with" or "similarly situated" waters. The District is concerned these in artfully drawn and vague phrases will ultimately expand jurisdiction to every slough and prairie pothole in the Red River Valley. (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "similarly situated."

White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936.1)

14.498 Poorly defined key terms need to be reviewed and detailed definitions with examples, must be provided and limitations expressed. The following are some of the terms: uplands, contribute flow, gullies, rills, non-wetland swales, upland ditches, shallow subsurface flow, through another water, adjacency, neighboring, tributaries as it pertains to ditches, flood plain, and "other waters". (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and citations.

Murray County Board of Commissioners (Doc. #7528.1)

14.499 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)

Agency Response: **The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments.**

Baldwin County Commission (Doc. #7940.1)

14.500 [T]he following key terms used in the proposed regulation are unclear; tributary, adjacent waters, riparian areas, flood plains, and even ditch exemptions on uplands and flow. For the flood plains, the definition does not follow the usual FEMA definition, so we have yet to determine the area that includes. For instance, because Baldwin County receives on average 66 inches of rain a year, large areas of flood plain can be submerged at any given time. Will the federal government be allowed to regulate this property as well? It is uncertain how these vague definitions will be used to effectively implement new bureaucratic and regulative CWA programs in the future. We conducted multiple public hearings on this issue, and our citizens are all fearful of the negative foreseen and unforeseen consequences this may have on our county government and individual communities; (p. 2)

Agency Response: **See Agencies' Summary Response. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; permitting requirements are only triggered when a person discharges a pollutant to a covered water. States and tribes may be authorized to administer the permitting programs of the CWA sections 402 and 404.**

City of San Diego, Transportation & Storm Water Department (Doc. #7950.2)

14.501 How can exempt channels be distinguished from jurisdictional channels, especially if they are near a "water of the U.S."?

Recommendation: Provide GIS map Layer or otherwise clarify and identify newly added jurisdictional channels. (p. 1)

Agency Response: **For a discussion on Tributaries see Preamble Section IV.F, TDS at Section VII, and the tributary compendium. Additional, the final rule excludes some ditches from jurisdiction see Preamble Section IV.I and the Ditches compendium for more discussion.**

The agencies' proposed rule does not include a specific delineation and determination of waters across the country that would be jurisdictional under the proposed rule. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters generally in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. The development of maps of jurisdictional waters requires site-specific knowledge of physical features of waters. The agencies have no plans to undertake such a task. This task would be cost prohibitive and require access to private lands.

14.502 Clearly define using scientific terms and definitions as to what uplands are and define drainage of only uplands. (p. 1)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.**

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

14.503 We suggest the clarity be added in definitions, roadside ditch and storm drainages, mapping efforts, and economic analysis. (p. 4)

Agency Response: **See Agency Summary Respone 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

Maps are discussed in the Agencies' Summary Response 14.1.

The agencies updated the economic analysis for the final rule. See Economic Analysis of the EPA-Army Clean Water Rule for more details.

14.504 We specifically request to see the mapping of waters that will and will not be included as jurisdictional within Moffat County so that we can comment on the financial impacts of the proposed rule to tax payers within Moffat County (p. 2)

Agency Response: **Maps are discussed in the Agencies' Summary Response 14.1.**

Olivenhain Municipal Water District (OMWD) (Doc. #8596)

14.505 Among the concerns that OMWD has about the proposed rule is that broad definitions are added for several terms, such as "tributary," "significant nexus," and components of the existing term "adjacent." These definitions are supposed to help determine what is considered a Water of the United States. However, due to the rule's vagueness, it has become unclear on how these terms will be used to implement Clean Water Act programs. (p. 1)

Agency Response: **See Agencies' Summary Response and Compendium for Implementation. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

City of Chesapeake (Doc. #9615)

14.506 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. 4)

Agency Response: **See Agencies' Summary Response 14.3. 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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific lmits in (a)(8). See Other Waters Compendium for further explanation.**

See summary response 5.0 in the Significant Nexus Compendium and Technical Support Document Section IX for further discussion of case-specific analyses.

Custer County Commission (Doc. #10186)

14.507 Another very serious issue here is the definition of the word "WATERS". This simple word needs to have a very clear definition placed on it before the rule should be accepted, and the definition should have a direct input from those that will be affected. (p. 2)

Agency Response: **See Agencies' Summary Response 14.3.**

Pleasant Vale Township, Pike County, Illinois (Doc. #10200)

14.508 Key terms used by the "waters of the U.S." definition-tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed-are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," "floodplain," and "upland."

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

Board of Commissioners, Brown County, Minnesota (Doc. #11988)

14.509 In the proposed rule, terms such as "riparian zone", "floodplain", "ditch" and "upland" are undefined and left open to interpretation. This could cause confusion about what is or what is not under "jurisdiction". Clarification of these terms is essential. We are concerned with how "connectedness" is defined, as many road ditches and storm sewer drains are connected to flowing water bodies downstream. Brown County is responsible for both county roads and county drainage. (p. 1)

Agency Response: **See Summary Agencies' Response and citations therein. For further discussion of ditches which are excluded from jurisdiction see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.**

City of Palo Alto, California (Doc. #12714)

14.510 We ask that a final rule include science-based criteria and greater clarity of adjacent and neighboring "waters" and a definition of floodplain and riparian areas that are not entirely arbitrary. (p. 3)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "adjacent waters," "neighboring," "floodplain," and "riparian area."

The Preamble at Section III.C discusses the rationale for determining adjacent waters which includes neighboring are jurisdictional by rule. Further III of the Technical Support Document provide additional information to support the agencies position.

See also the Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

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

14.511 In addition to the proposed definitions better descriptions are needed to define uplands, adjacent, neighboring, riparian area, flood plain, and significant nexus. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "upland," "adjacent," "neighboring," "riparian area," "floodplain," and "significant nexus."

Cincinnati Township (Doc. #13974)

14.512 Key terms used by the waters of the U.S. definition such as tributary, adjacent waters, riparian areas, flood plains, are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes**

through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," and "floodplain."

The Board of County Commissioners of Otero County New Mexico (Doc. #14321)

14.513 The Commenters stress that if the rule stays in place, then "region" needs to be further refined scope. Some watersheds are entirely too large an area for reasonable and practical application of the rule. (p. 17)

Agency Response: The agencies revised the definition of significant nexus, it now lists functions that will be considered. See the preamble at Section III.C, summary response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX for discussion of the scope of "in the region."

Delta Board of County Commissioners (Doc. #14405)

14.514 It is clear that the phrase "waters of the U.S." is not limitless, yet that is exactly what the agencies have proposed through their broad and ill-defined tern "tributary." Key phrases have been left undefined. The definition for "through another water," a key phrase in the definition, was simply left out by the agencies. Not only does this foster confusion instead of clarity in the regulated community, it could be stretched by regulators or litigants now or in the future. If the agencies' intent was not to create such a broad definition, than they should have put such intent in the regulation. (p. 3)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. The agencies have reasonably determined which terms are central to the "waters of the United States" rule and require regulatory definitions. Other terms are clarified in the preamble. Additional terms may be clarified in guidance after the agencies have gained experience implementing the rule. The definition of tributary clarifies that "A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section."

For discussion of the term "through another water" see Tributary Compendium and the Technical Support Document Section VII.

Natural Resources, Clearwater, FL (Doc. #14426.1)

14.515 The proposed rule includes vague language and omits key definitions, which creates confusion over jurisdiction and may lead to inconsistent implementation. Specifically, the terms 'other waters', 'significant nexus', 'adjacent', and 'upland' are unclear and will result in more requirements for site specific evaluations, inconsistencies in application, and more uncertainty for the regulated community. Additional terms that require more

clear definitions are 'wetlands', 'floodplains', 'riparian area', 'floodway', 'ditches', 'neighboring', and 'tributaries'. (p. 2)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 for discussion of specific terms including "significant nexus," "adjacent," "upland," "wetland," "floodplain," "riparian area," "ditches," "neighboring," and "tributaries."

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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8). See Other Waters Compendium for further explanation. See summary response 5.0 in the Significant Nexus Compendium and Technical Support Document Section IX for further discussion of case-specific analyses.

The agencies did not use the term "floodway" in the final rule and therefore the agencies did not define the term in the rule.

14.516 We recommend that region-specific guidelines be developed with local stakeholders and used for determinations. (p. 2)

Agency Response: **After considering the best available science and the public comments, the agencies reasonably determined not to incorporate regional approaches into the final rule. The agencies believe that, given the wide geologic, hydrologic, and biologic variability across the country, any attempt to introduce regional approaches in the final rule would cause confusion and detract from the agencies' goal of providing clarity. Nevertheless, the final rule takes into account regional variation in a number of ways. For example, (a)(7) identifies five subcategories of waters in specific regions that will be considered similarly situated by rule in the single point of entry watershed when conducting a case-specific significant nexus analysis. The final rule, while providing clear guidance, also incorporates sufficient flexibility to account for regional variability. Further, in implementing the rule, the agencies intend to use their longstanding practices and regional manuals for the identification of waters, which also take into account regional variation. These resources include both the Regional Delineation Supplements and the Regional OHMW Manuals. Nothing in this rule restricts the ability of states to more broadly protect state waters.**

Big Horn County State of Wyoming (Doc. #14571)

14.517 The proposed rule fails to offer clarity on important definitions, and dramatically expands federal jurisdiction of waters beyond what is authorized in the Clean Water Act. (p. 3)

Agency Response: **See Agencies' Summary Response 14.3 and Legal Analysis Compendium. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

Riverside County Flood Control and Water Conservation District (Doc. #14581)

14.518 The District believes that the Proposed Rule should include a definition or examples of what is "speculative or insubstantial". With respect to what could constitute a "speculative" effect, when two natural water features are not physically connected by surface flow, the one cannot have a significant effect on the other. To infer such an effect is speculative. An example of an "insubstantial" effect would be one that does not occur within a reasonable time horizon. The Connectivity Report discusses aquifer replenishments that take place over centuries; the District maintains that processes that take decades or centuries to complete are evidence that there is not a substantial connection of a headwater to identified jurisdictional waters. In the desert of southeastern California, for example, flows that connect headwaters to tributaries and eventually to traditional navigable waters, interstate waters and territorial seas may occur decades apart. Such infrequent effects on the physical, biological and chemical integrity of traditional waters should be recognized as insubstantial in the Proposed Rule. (p. 6)

Agency Response: **See Summary Agencies' Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 5.0 in the Significant Nexus Compendium for further explanation and discussion of reasons why the agencies chose not to define specific related terms including "speculative or insubstantial."

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

14.519 We additionally request that the Proposed Rule's changes to 40 C.F.R § 122.2 and other relevant sections of the federal regulations be modified as follows:

(a) Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term ''waters of the United States'' means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section excluding man-made water supply reservoirs that lack a significant nexus to downstream waters; (p. 5-6)

Agency Response: Summary Agencies' Summary Response 14.3 for Features and Waters Not Jurisdictional. The treatment of impoundments is discussed in the Preamble Section IV.E, TDS at Section VI, as well as the Traditional Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments subsection 2.4 Impoundments.

Public Works Department, City of Buckeye, Arizona (Doc. #14591)

14.520 Added to PART 328--DEFINITION OF WATERS OF THE UNIT ED STATES § 328.3 "Definitions" (and other similar sections)

Fully-constructed Stormwater Control Measures. The term fully-constructed stormwater control measures (SCMs) means man-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. Fully - constructed SCMs include the following man -made features: constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, groundwater recharge facilities, stormwater reuse facilities, swales, bioswales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made channels, storm drains, retention and detention structures and other constructed stormwater control and conveyance structures, devices, and features. (p.1)

Agency Response: See Agencies' Summary Response 14.3. For discussion of the jurisdictional status of storm water features, see Features and Waters Not Jurisdictional Compendium.

14.521 Roadside ditches. The term roadside ditches means common roadway features , typically with a bottom and side slopes, found along or near the side of a roadway, intentionally designed and constructed as an integral part of a roadway system to convey water away from or along the roadway, preserve the structural stability of the roadway, and/or to enhance public safety. Roadside ditches are an artificial and integral constructed part of a topography altered for the purpose of facilitating a roadway as a part of a larger transportation system. When present, flows within roadside ditches may be ephemeral, intermittent, or perennial. (p. 2)

Agency Response: See Agencies' Summary Response. Preamble Section IV.I and the Ditch Compendium.

Board of County Commissioners, Larimer County (Doc. #14741)

14.522 From a regulatory context, key terms and proposed definitions such as "tributary", "adjacent waters", "riparian areas", "flood plains", and "uplands" that are used in the proposed rule are broadly worded or inadequately explained. Larimer County is uncertain how the new and modified definitions will be interpreted. This causes us concern that more of our public stormwater infrastructure will become jurisdictional and subject to additional requirements without resulting in a demonstrated environmental benefit.

Vague definitions can also make the process to determine if a waterway is jurisdictional, cumbersome, time-consuming and expensive causing delays and higher costs for County projects. (p. 2)

Agency Response: See Agencies' Summary Response 14.3 and Features and Waters Not Jurisdictional Compendium. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. The final rule also excludes from jurisdiction certain stormwater features created in dry land.

National Association of Counties (Doc. #15081)

14.523 Recommendations:

• Redraft definitions to ensure they are clear, concise and easy to understand

• Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies

•Create a national map that clearly shows which waters and their tributaries are considered jurisdictional (p. 10-11)

Agency Response: See Agencies' Summary Response 14.1 and 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

City of Rockville, Maryland (Doc. #16498)

14.524 City recommends that a definition of "ditches draining uplands" be added to the final rule. (p. 2)

Agency Response: See Agencies' Summary Response 14.3 and the Ditch Compendium.

Cortland County Soil and Water Conservation District (Doc. #16607)

14.525 Some examples of lack of clarity and specific questions raised by county residents and staff include:

- Part 328 Definitions (b)(1) What constitutes "designed to meet the requirements of the Clean Water Act?"

- Part 328 Definitions (b)(3) What are considered "uplands?"

- Part 328 Definitions (b)(4) Don't most ditches ultimately contribute flow, either directly or through another water to navigable waters, etc.? Does this apply to a whole ditch system or just a section?

- Part 328 Definitions (b)(5) What about ponds fed by springs or seeps? Stormwater ponds?

- Part 328 Definitions (b)(5) What about flows from seeps and springs? (p. 1)

Agency Response: SASR and Compendiums for Ditches and Features and Waters Not Jurisdictional Compendium.

Ramsey County Public Works (Doc. #16665)

14.526 The acceptance by local governments and ultimately the effectiveness of the new rule is completely dependent on the clarity of the rule's intent, particularly with respect to the definition of key words. The LGAC report specifically identifies the following terms need to be defined more clearly using plain English, examples and pictures where feasible: "other waters", "Significant nexus", "adjacent", "upland"", and "tributaries". The LGAC report also suggests wording for other terms, including "wetlands", "floodplains", "riparian areas", "floodway", and "ditches". Ramsey County supports the recommendation of the Minnesota Cities Stormwater Coalition (MCSC) to use the term "fully-constructed stormwater control measures" to describe urban stormwater control measures and BMPs. (p. 1)

Agency Response: See Agency Summary Respones 14.3 and citations therein for discussion of specific terms including "significant nexus," "adjacent," "upland," "tributaries," "floodplain," "riparian area," and "ditch". In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. See Other Waters Compendium for further explanation.

The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments.

The agencies did not use the term "floodway" in final rule as such the agencies did not define the term in the rule.

For further discussion of storm water systems, see the Features and Waters Not Jurisdictional Compendium.

Hot Springs County Commissioners (Doc. #16676)

14.527 The Hot Springs County Commission requests that these [tributary, ditches, adjacent, neighboring, and other waters] definitions be redrafted to substantially limit the reach of the EPA into "waters of the state." (p. 8)

Agency Response: See Agencies' Summary Response 14.3 and citations therein. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. This is a definitional rule. State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing Clean

Water Act programs. The EPA recognizes that states maintain the authority to more broadly protect state waters and nothing in the rule affects that

See also Other Waters Compendium.

The EPA recognizes that states maintain the authority to more broadly protect state waters and nothing in the rule affects that.

Cascade County Commissioner (Doc. #16904)

14.528 The definitions of farm drainage, irrigation ditches, and upland ditches warrant additional clarification. Many agricultural ditches for farm drainage and irrigation run for miles and eventually contribute flow into a tributary. It is unclear how the term "contribute flow" will be interpreted to distinguish between exempt and jurisdictional waters. Regarding upland ditches, these ditches may also not be "excavated wholly in uplands, drain only uplands, and have less than perennial flow." Our agricultural producers have identified a need to improve this language. The Cascade County Commissioners recommend the editorial suggestions from the National Farmers Union letter dated September 22, 2014 and stating, "The agencies should restate this description of 'upland ditches' as a definition of 'uplands' by writing, an upland is any land that is not a wetland, floodplain, riparian area or water." (p. 2)

Agency Response: See Agencies' Summary Response 14.3 and citations therein. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See also Ongoing Farming subsection 14.2 of this compendium.

For discussion tributaries and the term "contribute flow" see Tributary Compendium and the Technical Support Document Section VII.

Lander County Board of Commissioners (Doc. #17098)

14.529 The key terms of the "Waters of the U.S." defined by tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed provides a definition of waters that is unclear and inadequately explained, and could cause additional legal challenges and delays; (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," "floodplain," and "upland."

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

City of Poquoson (Doc. #17358)

14.530 The following key terms are used repeatedly in the proposed rule, but are not clearly defined or adequately explained: tributary, adjacent waters, riparian areas, floodplains, uplands, and the exemptions listed. This results in less, not more, clarity. Undefined terms will lead to legal challenges, project delays, more case-by-case determinations, differential regulatory applications of the rule, and general confusion. (p. 3)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," "floodplain," and "upland."

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

City of Poway, California (Doc. #18838)

14.531 The City of Poway is also concerned that some definitions are unclear. Specifically, "tributary", "adjacent waters", "riparian areas", "flood plains", "uplands" and the exemptions listed—are inadequately defined and raise important questions. Unclear, vague definitions lead to variable enforcement, legal challenges, and delays. (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," "floodplain," and "upland."

See Features and Waters Not Jurisdictional 7 Compendium for further explanation of the exclusions listed in paragraph (b).

Dolores Water Conservancy District and Southwestern Water Conservation District (Doc. #19461)

14.532 A number of critical terms used in the guidance (such as "significant nexus," "significant effect," and "adjacent") are not explicitly defined and remain subjective. Reclamation is concerned about the level of scientific analysis required in making a jurisdictional determination using these critical terms. To local irrigators on the ground, this offers little practical advice when trying to determine whether their ditches and drains are jurisdictional. The significant nexus test, for instance, takes into consideration biological, hydrological, and scientific and historical factors that are not available to the typical farmer. Reclamation suggests that the Corps and EPA consider issuing additional

guidance clarifying these critical terms, and providing detailed examples.[78] The District echoes those six year-old comments by the Bureau of Reclamation and requests that the Agencies accord them due respect. (p. 5-6)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "significant nexus" and "adjacent." The agencies revised the definition of significant nexus, it now lists functions that will be considered. See the Preamble for an explanation of Significant Nexus Determinations at Section III.C, Agencies' Summary Response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX.

For further discussion of significant nexus see the preamble at Section III.C.

Department of Public Works & Engineering, City of Cookeville, Tennessee (Doc. #19619)

14.533 There are several key terms that must be defined and the definitions agreed upon by all federal agencies. These definitions should be taught in a certifiable class and federal agency personnel as well as state and local government personnel and interested private citizens should be allowed to become certified in determining waters of the US. Look to the State of Tennessee's Hydrological Professional regulations and certification classes.

Terms needing to be defined:

- Upland
- Perennial flow
- Ordinary High Water Mark (OHWM)
- Significant nexus
- Roadside ditches – perhaps with reference to flow regime
- Tributary – a more detailed definition that rules out roadside ditches would be better (p. 2)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes**

[78] "Bureau of Reclamation Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabell (FR Vol. 72, No. 110, June 8, 2007)," at pp. 1-2, attached to letter from W.R. Taylor, Director, Office of Environmental Policy and Compliance, United States Department of the Interior, Office of the Secretary, to D.M. Downing, U.S. EPA, "RE: Environmental Protection Agency and the U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After Rapanos (Docket Number: EPA-HQ-OW-2007-0282)" (Feb. 5, 2008); downloaded Sept. 10,2014, from http://www.fws.gov /habitatconservation/rapanos carabell/DOI comments on post Rapanos Guidance.pdf (hereafter "BOR 2008 Guidance Comments").

through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and citations therein for discussion of specific terms including "upland," "perennial flow," "OHWM," "significant nexus," "tributaries" and "ditches."

See also the Implementation Compendium for more discussion on how the agencies will implement this rule.

Montana Association of Conservation Districts (Doc. #18628)

14.534 (It is unclear what some definitions mean) While we agree that one can very seldom or sometimes never get everyone to agree that a certain word means a certain thing, MACD believes that clarity on the definitions can be improved. There are firms that provide technical writing "translations" so that the average American gets the gist of a particular idea. We ask that EPA review the definitions so that they are more precise. (p. 2)

Agency Response: See Agencies' Summary Response 14.3 In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

The preamble to the rule and the Response To Comment Document provides a number of examples to help illustrate which waters are intended to be covered.

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

14.535 The current regulatory definition of "waters of the United States" has been on the books since 1986.[79] For the first time in nearly 30 years, the Agencies propose to redefine the term, and yet have only included a definition of "water" and "waters" as a footnote in the preamble. What's more, the Agencies state that the terms "water," "waters," and "water bodies" are not limited to the water, in the traditional sense, contained within a river, stream, lake, pond, etc., but also include "chemical, physical, and biological features" associated with those waterbodies:

"The agencies use the term 'water' and 'waters' in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms 'waters' and 'water bodies' interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."[80]

In a rule that purports to redefine "waters of the United States" under the CWA, it is inappropriate for the Agencies to actually define "water" only in a footnote to the rule's preamble, rather than in the regulatory text. Moreover, given the breadth of the revised definition, virtually any area where water pools after a rain could be deemed

[79] 51 Fed. Reg. at 41,206 (Nov. 13, 1986).
[80] 79 Fed. Reg. at 22,191 n.3.

jurisdictional. If "ephemeral streams" are regulated, why not "ephemeral ponds" or "ephemeral pools"? The Agencies state in their proposal that they are not asserting jurisdiction over "puddles," see 79 Fed. Reg. at 22,218. It is not at all clear, however, how a "puddle" is any different than an "ephemeral pool." (p. 30)

Agency Response: See Agencies' Summary Response 14.3. The agencies have updated the footnote in the preamble that address "water." In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. The agencies have also added explicit exclusions to the rule including one for puddles. See Preamble at Section IV.I, and Features and Waters Not Jurisdictional Compendium for more information.

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

14.536 The PA Chamber also remains concerned about how the agencies will continue to interpret the phrase "single and complete" project for the purposes of permitting. To date, such determinations have been made inconsistently for various projects, leading to considerable permitting delays and regulatory uncertainty. With this rule bringing in additional environmental features, such as ditches, impoundments and culverts that were not previously subject to federal regulation, and individual section 404 permits being very costly for an applicant to secure, the PA Chamber's ongoing concerns about interpretation of "single and complete" projects are only amplified. One year ago, the state legislature passed a long-overdue comprehensive funding package, Act 89 of 2014, which was supported by the PA Chamber and will result in the rehabilitation of hundreds of bridges and thousands of miles of roadway. This proposal threatens to add unneeded cost to the state and local agencies and their contractors tasked with completing this vital work. (p. 3)

Agency Response: See Agencies' Summary Response 14.1. The final rule does not establish or change any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States". See the Implementation Compendium for discussion on how the agencies will implement this rule.

See the Preamble and TDS Section I for a discussion of the historic scope of the "waters of the United States" regulation.

Resource Development Council for Alaska, Inc. (Doc. #14649)

14.537 The definition of a "significant nexus" remains unclear, and should have a specific definition applicable to the distinct characteristics in Alaska. Additionally, "floodplain" and "adjacent waters" should be clearly defined as a "floodplain" could encompass all of the North Slope. (p. 2)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of

the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See also Preamble at Section III, TDS Section II, and Compendiums for Significant Nexus and Adjacent Waters.

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

14.538 The question considered here is the potential effect of the Proposed Rule, if finalized as proposed, on this facility relative to the status quo (i.e., the effect of the current definition of waters of the U.S.). The potential effect could have origins on-site or off-site somewhere between the facility and the receiving waters. As proposed, the definition of "waters of the U.S." consists of a list of seven inclusions, a list of five exclusions for certain water-containing structures or features that could also "meet the terms" of listed inclusions, and a list of seven subdefinitions3. Importantly, the inclusions rely on both (sub)defined terms and undefined terms which may be discussed in the preamble (e.g., perennial flow). In addition, some listed subdefinitions contain conditional terms (e.g., "can be"), and these have the effect of making the subdefinition unclear and its meaning uncertain. The combination of undefined terms and unclear subdefinitions makes the proposed definition ultimately flawed. (p. 3)

Agency Response: See TSD Section I for a discussion of the historic scope and effect of Supreme Court cases on the existing practice. Further the final rule provides additional exclusions. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms and definitions.

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

Federal StormWater Association (Doc. #15161)

14.539 The proposed rule expands this category in two ways. First, the proposed rule would assert jurisdiction over "all waters" (not defined), rather than wetlands only, that are "adjacent" to a navigable or interstate water or territorial sea or an impoundment or tributary thereof.5 Second, the proposed rule expands the definition of "adjacent" by adding a definition of "neighboring" that includes all water located in (1) a "floodplain" (defined only as an area formed by sediment deposition from inland or coastal waters under "present climactic conditions" (not defined) and that is inundated during periods of "moderate to high flows" (not defined)), (2) a "riparian area" (defined as an area where surface or subsurface hydrology directly influences ecological processes and plant and animal community structure), (3) an area that has a shallow subsurface hydrologic connection (not defined), or (4) an area with a confined surface hydrologic connection (not defined – apparently less than a tributary but could be a non-jurisdictional feature such as a rill, gully or non-wetland swale) to such water. (p. 4)

Agency Response: **See Summary Response 14.1. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "waters," "adjacent," "neighboring," "floodplain," and "riparian area."

In response to the concern that the agencies' proposed definitions of "riparian area," and "floodplain" were too expansive, the agencies have revised the definition of "neighboring". The agencies have omitted the definitions of floodplain and riparian area and redefined neighboring using bright lines and distance limits. The term "floodplain" is still used within the rule, but has been simplified to refer specifically to the 100 year floodplain.

As a result, terms related to those definitions, such as "present climatic conditions" and "moderate to high flow" are no longer part of the rule text and are not defined.

Additionally, in order to provide more certainty to the public, the 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. See Preamble at Section III.

See Adjacent Waters Compendium for a detailed discussion on the revised definition of "adjacent."

14.540 Current regulations also assert jurisdiction over "other waters" if the use, degradation, or destruction of those "other waters" could affect interstate or foreign commerce, with specific examples of water bodies that may be included in this category. 33 CFR § 328.3(a)(3). The proposed rule expands this narrow category to all "other waters" (not defined) that alone or in combination with other similarly situated waters have a significant nexus to a navigable or interstate water or territorial sea. "Significant nexus" is defined as a nexus that is more than speculative or insubstantial. Once the "significant nexus" is established for single water, or a category of waters that are similarly situated, all are per se jurisdictional. (p. 4)

Agency Response: **See Agencies' Summary Response 14.3. 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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8). See Other Waters Compendium for further explanation. The agencies revised the definition of significant nexus, it now lists functions that will be considered. For further discussion of significant nexus see the preamble at Section III.C, summary response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX.**

Texas Chemical Council (Doc. #15433)

14.541 In defining adjacent waters, the agencies indicate that "all waters" adjacent to a listed jurisdictional water are now also jurisdictional. The agencies do not indicate what is considered a "water" for purposes of defining "all waters." (p. 6)

Agency Response: See Agencies' Summary Response 14.3 In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

GBMC & Associates (Doc. #15770)

14.542 The proposed rule uses several terms and concepts that need to be further defined, expressly delineated or clarified before an accurate review of their use and implications upon Section 404 jurisdiction can be assessed. The terms in question are listed below.

a. Floodplain

b. Riparian area

c. Man-made ditch or pond

d. Bed and banks

e. Breaks, in OHW features. (p. 5)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein, especially for discussion of specific terms including "floodplain," "riparian area," "bed and banks, and "ditches."

Portland Cement Association (Doc. #13271)

14.543 The Agencies should take the opportunity to update the definition of "wetland".

Since 1993, EPA and the Corps have relied on the 1987 wetland delineation manual to identify what is and what is not a wetland. Under this manual, a wetland requires three things –

- Hydrology
- Vegetation (of a type adapted to grown in water); and
- Soils (of a type that results from the growth of the adapted vegetation).

Without all three (under normal conditions), the Agencies do not consider an area to be a wetland.[81]

The current regulatory definition of "wetland" predates the 1987 manual. First proposed in 1983, it defines wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." (our emphasis).

In other words, the definition requires hydrology and vegetation, but not soils – the only reference to soils is that vegetation is required that is adapted to growing in saturated soils. When the Corps proposed the definition, it considered including all three factors, but decided against it. Thus, the current definition of "wetland" does not encompass the practice that the Agencies have embraced for the last 20 years.

The Agencies are reproposing the definition "wetland," but the only change they have proposed is removing the space from between "ground" and "water." This is a very good opportunity for the Agencies to add to the definition, making it clear that a wetland requires hydric soil, as well as hydrology and facultative vegetation. (p. 27-28)

Agency Response: **The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. The delineation manuals are used in the field to draw jurisdictional boundaries around areas that meet the regulatory definitions of wetlands and are also outside the scope of this rule.**

Council for Quality Growth (Doc. #15147.1)

14.544 [K]ey terms used by the "waters of the U.S." definition-tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed-are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays. (p. 1-2)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," "floodplain," and "upland."

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

[81] As the Agencies are aware, while the 1987 manual is available at http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf , it has since been augmented by a series of regional supplements. None of the supplements, however, change this basic formulation.

CEMEX (Doc. #19470)

14.545 The proposed rule depends on a raft of unclear, undefined and overbroad terms, including "ordinary high water mark," "floodplain," "present climactic conditions," "moderate to high flow," ecological processes and plant and animal community structure in the[e] area," "exchange of energy and materials," "lake," "pond," "similarly situated," and "single landscape unit." Clarity is necessary and essential for these terms as well as numerous aspects of the proposed rule to address not only determinations and permitting, but also to address potential enforcement issues and citizen suits. (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and citations therein.

The agencies modified the definition of "neighboring."

Terms related to those definitions, such as "present climatic conditions," "moderate to high flow," "ecological processes…" and "exchange of energy and materials" are no longer part of the rule text.

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

American Petroleum Institute (Doc. #15115)

14.546 Definitions of key terms including but not limited to "uplands," floodplain," "subsurface connection," "neighboring," "riparian area," "other waters," and "waste treatment," are unclear. A more complete understanding of these terms is essential to implementing the Proposed Rule. Placing stakeholders in situations where key definitions are absent, forthcoming, or defined in documentation, which may or not be uploaded into the rulemaking docket, precludes effective comment. (p. 52)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein as well as the Compendium for Process Concerns and Administrative Requirements."

Lafarge North America (Doc. #16555)

14.547 The proposed rule depends on a number of unclear, undefined and overbroad terms, including "ordinary high water mark," "floodplain," "present climactic conditions," "moderate to high flow," ecological processes and plant and animal community structure in the area," "exchange of energy and materials," "lake," "pond," "similarly situated," and "single landscape unit." (p. 3)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and citations therein for discussion of specific terms including "ordinary high water mark," "floodplain," "similarly situated," and "single landscape unit."

Snyder Associated Companies, Inc (Doc. #18825)

14.548 The added definitions for many terms including "tributary", "significant nexus", "neighboring", "riparian", etc. cause more confusion than provide clarification. (p. 2)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "significant nexus," "neighboring," and "riparian area."

Coon Run Levee and Drainage District (Doc. #8366)

14.549 [K]ey terms used in the proposed regulation-tributary, adjacent waters, riparian areas, flood plains, and even ditch exemptions on uplands and flow-are unclear. It is uncertain how these definitions will be used to effectively implement various clean water act programs. (p. 2)

Agency Response: **See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," "riparian area," and "floodplain."**

The final rule contains an expanded exclusion for ditches, see the Preamble Section IV.I and summary response 6.0 in the Ditches Compendium for a discussion of the regulation and exclusion of ditches as appropriate.

See also the Ditches Compendium.

See Implementation Compendium for discussion of various programs' implementation.

Cattle Empire (Doc. #8416)

14.550 EPA has newly created proposed definitions for several never before defined key terms in this proposed rule, but has failed to define others, such as "lakes", "ponds" and even "uplands". This appears to give EPA and USACE room to maneuver as needed when applying jurisdiction over waters to expand said jurisdiction. (p. 4)

Agency Response: **See Agencies' Summary Response 14.1. In response to comments regarding the definition of "upland," the rule no longer includes the term**

"upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

While the agencies considered other requests for definitions, the agencies reasonably concluded that the rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. The agencies also concluded that attempting to add new definitions for some terms, such as "lake" or "pond", would actually introduce confusion. See Preamble at Section IV.

Alameda County Cattlewomen (Doc. #8674)

14.551 The agencies use the phrase "dry land(s)" numerous times throughout the proposed rule, yet never defined the phrase.[82] It is unclear to ACCW where a water ends and "dry land" begins. EPA and the Corps should define the term to allow the public to fully understand the proposed rule and its extent. (p. 16)

Agency Response: See Agencies' Summary Response 14.1. The phrase "dry land" appears in the 1986 and 1988 preambles, and this rule's preamble provides clarification on "dry land" at Section V.I.

Michigan Farm Bureau, Lansing, Michigan (Doc. #10196)

14.552 Leaving aside the agencies' failure to define "upland" or "dry land," the notion that anyone would dig a ditch that drains only land that is already dry, and which goes nowhere, defies the basic purpose behind digging a ditch in the first place. When the proposed rule applies to these scenarios and all adjacent, riparian, floodplain, wetland, and "other" water features are considered jurisdictional, few ditches if any would fall under this exclusion. The same scenario exists with ponds, pools, and other excavated features. Few if any locations would actually qualify as "dry land" under the proposed rule, and those that do would have very little likelihood of actually getting any water in them once they were excavated. (p. 9)

Agency Response: See Agencies' Summary Response 14.3. In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

The phrase "dry land" appears in the 1986 and 1988 preambles, and this rule's preamble provides clarification on "dry land" at Section V.I.

The final rule contains an expanded exclusion for ditches, see the Preamble Section IV.I and summary response 6.0 in the Ditches Compendium for a discussion of the regulation and exclusion of ditches as appropriate.

[82] Proposed Rule at 22193, 22199, 22218-19, 22263-74.

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

Pershing County Water Conservation District (Doc. #12980)

14.553 Words such as "converted cropland," "uplands," and "traditional," are not specifically defined. While we can assume that the irrigation canals and ditches within the District may fall under these exemptions, without express definitions of these exemptions, the District runs the risk of having the EPA define them how they see fit and exercise jurisdiction how they see fit. (p. 4)

Agency Response: "Prior converted cropland" has been excluded from the definition of "waters of the United States" since 1992 and it remains substantively and operationally unchanged. As a result, comments addressing the substance of the exclusion or its implementation are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. For further discussion of PCC see the Features and Waters Not Jurisdictional Compendium.

In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I. The final rule provides additional exclusions for ditches. See Preamble at Section IV.I and the Ditches Compendium for additional information.

Indiana State Poultry Association (Doc. #13028.1)

14.554 Many terms, some new, are defined in this rule. These include: adjacent waters, drainage ditches, dry creeks, ephemeral streams, floodplain, gullies, low spots, neighboring waters, non-wetland swales, rills, riparian areas, significant nexus, storm water ditches, treatment ponds, tributary, water storage, and other waters. Unfortunately, a large number of these items are ill-defined, ambiguous or their definitions rely on other undefined terms. This clouds the issue, creates uncertainty and sets up producers to fail. (p. 2)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "adjacent waters," "ephemeral streams," "floodplain," "gullies," "rills," "non-wetland swales," "neighboring," "riparian area," "significant nexus," and "tributary."

The agencies did not use the term "dry creek" final rule and therefore, the agencies did not define the term in the rule.

Monterey County Farm Bureau (Doc. #13045)

14.555 Vague definitions of various terms used in this proposed rule change are of great concern when interpreted by regional field offices of EPA and ACOE. Discretionary and even subjective, interpretations of terms like "waters', "floodplain", "waste treatment", "Subsurface connection", and "uplands" will impact local agricultural operations if not consistently applied in similar fashion and in uniformity. Loose interpretations of these terms, either by regional field offices or through civil actions, could have tremendous impacts on the unique character of the growing region. It is through these feared interpretations that control over features that are generally considered as land are interpreted as water, thus conferring federal control of all remote and unconnected conveyance and collection features. (p. 2)

Agency Response: See Agencies' Summary Responses 14.1 and 14.3 and the Implementation Compendium. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

North American Meat Association (NAMA) and American Meat Institute (Doc. #13071)

14.556 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." (p. 12)

Agency Response: This is a definitional rule, which includes a definition of "significant nexus" provides a list of functions but does not require the use of any "quantifiable method". In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. By clarifying the scope of waters protected under the CWA, this rule will increase predictability and consistency.

See summary response 14.3 and the citations therein for "significant nexus" and discussion of specific terms including "upland" and "perennial flow."

PennAg Industries Association (Doc. #13594)

14.557 The definition of Normal Agriculture needs to mirror each individual states definition to ensure consistency. (p. 2)

Agency Response: See Agencies' Summary Responses 14.2 and 14.2.2 14.2 of this compendium, for a discussion of 404(f) exemptions for "normal farming, ranching and silviculture."

Western Growers Association (Doc. #14130)

14.558 Moreover the EPA and Corps must define "upland", "perennial", "ephemeral", and "intermittent" in the rule as discussion of these terms in the preamble are not satisfactory. These clarifications and definitions should be developed in direct consultation with the affected parties to ensure they will be understood and accepted by the agricultural sector. (p. 2)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section IV.I. See also Compendium for Process Concerns and Administrative Requirements.

Rose Acre Farms (Doc. #14423)

14.559 There are also a variety of ambiguous terms and phrases throughout the proposed rule. Terms such as "dry land", "uplands", "through another water" and "shallow surface flow" are undefined and leave both those that are regulated and regulators without any clear meaning of what is covered and not covered by this proposal. There are numerous other equally vague, undefined and ill-defined terms and phrases throughout the proposed rule. Equally unclear or undefined are the exclusions in the proposal. (p. 2)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 for discussion of specific terms including "dry land," "upland," and "shallow subsurface flow."

For discussion of the term "through another water" see Tributary Compendium and the Technical Support Document Section VII.

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

LeValley Ranch, LTD (Doc. #14540)

14.560 Key phrases have been left undefined. The definition for "through another water," a key phrase in the definition, was simply left out by the agencies. Not only does this foster confusion instead of clarity in the regulated community, it could be stretched by regulators or litigants now or in the future. If the agencies' intent was not to create such a broad definition, than they should have put such intent in the regulation. (p. 4)

Agency Response: **See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. The agencies have reasonably determined which terms are central to the "waters of the United States" rule and require regulatory definitions. Other terms are clarified in the preamble. Additional terms may be clarified in guidance after the agencies have gained experience implementing the rule. The definition of tributary clarifies that "A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section."**

For discussion of the term "through another water" see Tributary Compendium and the Technical Support Document Section VII.

North Dakota Soybean Growers Association (Doc. #14594)

14.561 The North Dakota Soybean Growers Association believes that the Agencies proposed definitions do not add the clarity the CWA provisions, in fact they add ambiguity and increase opportunity for confusion and misapplication within the Agencies and outside of them, while adding additional undefined terms, as water, making virtually impossible for the average citizen to understand the rule's meanings to their own situations. The proposed rule definitions and/or their impacts, coupled with a process without an administrative challenge process, will increase Court activity, not diminish it. If the Agencies cannot concisely explain the definitions and their applications to farmers, ranchers and other citizens, the Agencies intent and means for delivery will be forever flawed. (p. 12)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. This is a definitional rule; the regulatory processes for administering CWA programs are outside the scope of the rule. See Implementation Compendium for a discussion.**

American Soybean Association (Doc. #14610)

14.562 Innumerable issues surrounding tile drainage have become apparent. Minor drainage is a topic of interest to many soybean farmers, and the term is not defined in the proposed rule. Former Deputy Administrator Bob Perciasepe confirmed to the ASA Board in July 2014 that "minor drainage" includes tile drainage. But other issues remain, including questions about constructed wetlands and state programs that encourage flooding tile to further wildlife habitat goals. Would these wetlands be considered waters of the United States and therefore come under the jurisdiction of the Clean Water Act? The proposed rule does not answer these questions. (p. 2)

Agency Response: **See Agencies' Summary Responses 14.1 and 14.2.3 Definitions related to 404(f) exemptions, including "farm drainage," and "irrigation ditches" are beyond the scope of this rule. Nothing in the rule affects the CWA 404(f) exemptions provided in the CWA, as such these comments are outside the scope of this rulemaking.**

The Mosiac Company (Doc. #14640)

14.563 The proposed rule extends jurisdiction to "[a]ll waters, including wetlands," adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263. The proposed rule does not explain what is considered an adjacent "water", but the preamble states that the term "water" is used "in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems." Id. at 22,191 n.3. (p. 15)

Agency Response: **See Agencies' Summary Response 14.3, Preamble at Section IV.G, TSD at Section VIII, and the Adjacent Waters Compendium.**

Great Plains Canola Association (Doc. #14725)

14.564 Specifically, the rule's definition of "minor drainage" is not clearly expressed in the proposal. Any new rule must make clear that the exemption for minor drainage includes the maintenance of all existing drainage ditches, a management action which takes place in many cases on an annual basis. (p. 2)

Agency Response: **There were several comments expressing concern regarding unclear and missing definitions related to 404(f) exemptions, including "minor drainage." Nothing in the rule affects the farming exemptions provided in the CWA, as such these comments are outside the scope of this rulemaking. See Ongoing Farming subsection 14.2.2 of this compendium.**

Irvine Ranch Water District (Doc. #14774)

14.565 The definition of groundwater, including groundwater drained through a subsurface drainage system, should be clarified to expressly include groundwater dewatering for geotechnical stabilization as exempt from the CWA. (p. 6)

Agency Response: **See Agencies' Summary Response 14.3. The agencies do exclude groundwater in the final rule. The groundwater exclusion is addressed in the preamble at Section IV.I and Groundwater Agencies' Summary Response in the Features and Waters Not Jurisdictional Compendium.**

National Sunflower Association (Doc. #14894)

14.566 Specifically, the rule's definition of "minor drainage" is not defined in the proposal. It must be made clear that the exemption for minor drainage includes the maintenance of all existing drainage ditches both natural and man-made, which takes place in many cases on an annual basis. The installation and maintenance of tile drainage on farmland must also be included in the minor drainage exemption. (p. 2)

Agency Response: **There were several comments expressing concern regarding unclear and missing definitions exemptions, including "minor drainage." Nothing in**

the rule affects the farming exemptions provided in the CWA, as such these comments are outside the scope of this rulemaking. See Agencies' Summary Response in Ongoing Farming subsection 14.2 of this compendium.

Monarch-Chesterfield Levee District, St. Louis, Missouri (Doc. #14904)

14.567 There are other key terms left undefined, such as perennial, yet used in the proposed rule; their meaning and impact too are left unclear. (p. 3)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

Missouri Soybean Association (Doc. #14986)

14.568 As part of the public record of the proposed rule, the public and regulated community would have benefited from accurate maps or electronic geospatial data depicting the type and extent of water bodies that would be jurisdictional under the proposed rule. It is widely believed that the technology exists to produce such maps and in fact the U.S. Geological Survey (USGS) already has detailed stream and water body mapping data across the US, most of which we speculate would become jurisdictional under the current proposed rule. Such information would help provide the very clarity and transparency that EPA insists it is trying to provide while providing stakeholders a needed tool to better understand the extent and reach of the rule on their own land. (p. 2)

Agency Response: See Agencies' Summary Response 14.1.

14.569 The rule contains many undefined and subjective terms and phrases and the following is a partial list of examples of some of the areas that are poorly defined in the rule. The list below references the section out of 40 CFR 230.3.

a) 'Dry land' - undefined and used throughout rule.

b) 'Upland' - undefined and used in significant context throughout the rule.

c) Line (s)(6) - here the phrase 'all waters' is used which is vague and doesn't seem to not add any real meaning.

d) Line (t)(l) - included is the phrase "designed to meet the requirements of the CWA" - does this include voluntary measures or other systems that have a water treatment or control purpose but are not statutorily or administratively required? Does the phrase "waste treatment systems" include stormwater control, agricultural conservation practices, water treatment areas, constructed wetlands, as well as other voluntary measures?

e) Line (t)(2) -this line 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" - This is an overly confusing sentence, is this the equivalent to saying "EPA retains final authority for jurisdiction determinations for CWA purposes."

f) Line (t)(3) - included is the phrase 'excavated wholly in uplands', but should this instead say "excavated and located wholly in uplands"?

g) Line (t)(3) - the phrase uses the word "excavated", which presumably implies that the ditch was man-made or altered. However natural processes also "excavate" ditches by the act of erosion and through other natural dynamics. Does EPA intend this to be man-made ditches only?

h) Line (t)(4) - included is the phrase "do not contribute flow" - the intent of this should be better defined and explained.

i) Line (t)(S)(i-iii) - included is the phrase "Artificial" - is this term equivalent to "man-made"?

j) Line (t)(S)(iv) - included is the phrase "Small ornamental waters ... .for primarily aesthetic reasons" - the words 'small' and "primarily' are subjective terms and 'ornamental" is an undefined term.

k) Line (t)(S)(vi) – it's unclear as to what this provision will cover and so this should be better explained. Consider the following change as underlined. "Groundwater, including subsurface water and groundwater drained through and contained within subsurface tiles and drainage systems;

l) Line (t)(S)(vii) - The word "gullies" is used, however, isn't this the same as a ditch? The rule needs to better differentiate the meaning between a gully and a ditch. Also explain what is meant by "nonwetland swales".

m) Line (u)(2)- included is the phrase " ..... within the riparian area or floodplain of a water ..... or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water". The word "floodplain" should be removed, because if left in it will catch every square inch of land in the floodplain. The phrase "shallow subsurface hydrologic connection" is used but it is unclear how this is different than groundwater and what is 'shallow'? What is meant by 'confined?

n) Line (u)(4) - The definition of "floodplain" is too broad and leaves farmers and the public guessing what the limits to its boundary is.

o) Line (u)(4) - The term "present climatic conditions" is used. Explain why this is important and significant? Also the phrase "moderate to high water flows" is subjective and must be interpreted.

p) Line (u)(6) - included is the phrase " ..... and that under normal circumstances do support'. What are normal circumstances? The phrase "a prevalence of vegetation" is again a subjective term, so how is the public to know what the prevalence is? ls this based on a percentage? (p. 6-7)

Agency Response: **See Agencies' Summary Response 14.3 and the Compendiums for Features and Waters Not Jurisdictional. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 for discussion of specific terms including "dry land," "upland," "waters," "gullies," "non-wetland swales," "shallow-subsurface flow," and "floodplain."

Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979 and comments addressing this exclusion are beyond the scope of this rulemaking. Waste treatment systems are addressed in the preamble at Section IV.I and in summary response 7.1 of the Features and Waters Not Jurisdictional Compendium.

"Prior converted cropland" has been excluded from the definition of "waters of the United States" since 1992 and is defined by the USDA and NRCS at 7 CFR § 12.2 and in §514.30 of the National Food Security Act Manual, Fifth Edition, November 2010. As a result, comments addressing the substance of the exclusion or its implementation are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. For further discussion of PCC see summary response 7.2 in the Features and Waters Not Jurisdictional Compendium.

The final rule contains an expanded exclusion for ditches, see the Preamble Section IV.I and the Ditches Compendium for a discussion of the regulation and exclusion of ditches as appropriate.

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b)(i).

Small ornamental waters are discussed further in the Features and Waters Not Jurisdictional Compendium.

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. See Preamble at Section IV.I and the Groundwater Agencies' Summary Response in the Features and Waters Not Jurisdictional Compendium.

In response to the concern that the agencies' proposed definitions of "riparian area," and "floodplain" were too expansive, the agencies have revised the definition of "neighboring". The agencies have omitted the definitions of floodplain and riparian area and redefined neighboring using bright lines and distance limits. As a result, terms related to those definitions, such as "present climatic conditions" and "moderate to high flow" are no longer part of the rule text.

Iowa Farmers Union (Doc. #15007)

14.570 At a minimum, the final rule should: [...] Provide basic definitions for "gully," "rill," and "swale," specifically including language that differentiates these erosion features from "tributaries" that are jurisdictional. (p. 7)

Agency Response: See Agencies' Summary Response and citations therein.

For further discussion of tributaries and related terms see the Preamble Section IV.F, TSD Section VIII and the Tributary Compendium.

See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).

For further discussion of ditches that are excluded from jurisdiction see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.

Wyoming Wool Growers Association (Doc. #15037)

14.571 A number of new definitions and amendments are added to existing regulations purportedly to achieve that goal but it leaves out important definitions such as "floodplain" and "upland soil and water conservation". (p. 1)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

There were several comments expressing concern regarding "upland soil and water conservation." As these terms are not used in the rule or preamble the agencies have not defined them.

Colorado Cattlemen's Association (Doc. #15068)

14.572 CCA also believes that the agencies should also map the sheer expanse of their proposed definition and respond to maps presented to the agencies from industry showing our projection and interpretation of their proposed definition. (p. 6)

Agency Response: See Agencies' Summary Response 14.1.

American Forest Foundation (Doc. #15093)

14.573 While the concepts of significant nexus, ecoregion, and other situated waters attempt to address scale and specific conditions, they tend to produce generalized findings and potentially unnecessary conclusions about the need for federal jurisdiction. (p. 4)

Agency Response: See Compendium for Significant Nexus. The definition of the term "significant nexus" in the rule at paragraph (c)(5) is consistent with language in SWANCC and Rapanos, and with the goals, objectives, and policies of the CWA, however some changes and clarifications have been added in response to comments.

The agencies revised the definition of significant nexus, it now lists functions that will be considered. For further discussion of significant nexus see the preamble at Section III.C, summary response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX.

American Forest & Paper Association (Doc. #15420)

14.574 The Proposal includes an exemption for "gullies and rills and non-wetland swales" ((122.2)(b)(5)(vii)). The Proposal does not define "gully," "rill," or "swale," but the Preamble talks in terms of lacking features such as an Ordinary High Water Mark (OHWM) and distinct bed and banks. See 79 Fed. Reg. at 22218-19. That explanation must be included in the regulation itself. It would be helpful as well if EPA provided a qualitative aspect to the definition: for example, that they are natural topographic features that may carry water at times. (p. 10)

Agency Response: **See Agencies' Summary Response 14.3. There were a number of comments related to the clarity and need for definitions of the terms "gully", "rill", and "swale." The rule identifies all erosional features, including gullies and rills that do not meet the definition of tributary, as non-jurisdictional features. Further, tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. These terms are addressed in the preamble at Section IV.G and Section IV.I. See Features and Waters Not Jurisdictional Compendium for further explanation of the exclusions listed in paragraph (b).**

The agencies did incorporate the existing definition of OHWM into this rule. For further discussion of tributaries and related terms see the Tributary Compendium.

For further discussion of ditches which are excluded from jurisdiction see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.

Jensen Livestock and Land LLC (Doc. #15540)

14.575 The agencies use the phrase "dry land(s)" numerous times throughout the proposed rule, yet never defined the phrase.[83] It is unclear to Jensen Livestock and Land LLC. where a water ends and "dry land" begins. EPA and the Corps should define the term to allow the public to fully understand the proposed rule and its extent. (p. 16)

Agency Response: **See Agencies' Summary Response 14.3. The phrase "dry land" appears in the 1986 and 1988 preambles, and this rule's preamble provides clarification on "dry land" at Section V.I.**

National Barley Growers Association (Doc. #15627)

14.576 The Proposed Rule does not define the term "minor drainage," leaving barley producers to wonder whether maintenance of all existing drainage ditches, which takes place in many cases on an annual basis, as well as tile drainage, falls within or without the definition of protected water. (p. 5)

Agency Response: **There were several comments expressing concern regarding definitions including "minor drainage." Nothing in the rule affects the 404(f) farming exemptions provided in the CWA, as such these comments are outside the scope of this rulemaking. See Ongoing Farming subsection 14.2 of this compendium.**

14.577 Under the Clean Water Act, federal jurisdiction extends to "navigable waters," which are defined as "waters of the United States." Some activities on land, including agricultural activities, require permits when they affect a "water of the United States." The Proposal should narrowly define which activities "affect" a water of the United States, otherwise there is the possibility of confusion, inconsistent decision making, sudden freezing of projects, and an overall chilling effect on activities on land. This part of the WOTUS definition also needs serious review and narrowing. (p. 6)

[83] Proposed Rule at 22193, 22199, 22218-19, 22263-74.

Agency Response: **The final rule does not define what activities affect a water of the United States nor does it establish or change 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. The exemptions provided by the CWA for agriculture remain unchanged and are outside the scope of rule. See Implementation Compendium for a discussion of programs and permitting.**

14.578 In public statements, EPA has said that permits will not be required for normal farming activities; however, the term "normal farming activities" is subject to interpretation by EPA and/or the Corps. There is significant concern that the Proposed Rule will lead to inconsistent decisions, punitive fines, and chill normal activities on farms, including barley farms. To avoid federal overreach in this area, the Proposed Rule needs substantial clarification. (p. 6)

Agency Response: **See Agencies' Summary Response 14.2. and 14.2.2.**

Bayer CropScience (Doc. #16354)

14.579 All of these new definitions must be read together, for individually they are vague, self-reinforcing, and broadly expand the jurisdictional reach of the CWA. For example, the agencies definition of "floodplain" would place no geographic boundaries on the regulated area of a floodplain (e.g., the conveyances located in the land area inundated by a 25-year versus 500-year flood), and only the vague assurance that the agencies would apply "best professional judgment" (BPJ) for such jurisdictional determinations. Similarly, the agencies' statement that no "uplands" located in "floodplains" can ever be "waters of the US" is not reassuring, for "uplands" is not defined anywhere in the rule or preamble. BCS is concerned that relying on agency BPJ to make jurisdictional determinations of "significant nexus" will be speculative for the proposed rule includes no chemical, physical or biological metrics for determination of jurisdictional importance. (p. 3)

Agency Response: **See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. In response to the comment on "best professional judgment". The agencies 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 response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

In response to the concern that the agencies' proposed definitions of "riparian area," and "floodplain" were too expansive, the agencies have revised the definition of "neighboring". The agencies have omitted the definitions of floodplain and riparian area and redefined neighboring using bright lines and distance limits. See

Preamble at Section IV.G and the Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

See preamble Section III for further explanation and clarity on how to conduct significant nexus analysis and the Technical Support Document Sections I and II for further discussion on the legal basis for the approach to jurisdiction and the significant nexus analysis.

The agencies revised the definition of significant nexus, it now lists functions that will be considered. For further discussion of significant nexus see the preamble at Section III.C, summary response 5.0 in the Significant Nexus Compendium, and Technical Support Document Sections II and IX.

American Hort (American Horticulture Industry Association) et al. (Doc. #16359)

14.580 The proposal includes a number of imprecise and broadly defined terms, such as "adjacent," "riparian area," and "floodplain," that do not clearly delineate which waters are covered. For the first time, "tributary" is defined and includes bodies of water such as man-made and natural ditches. "Other waters" also may be subject to the jurisdiction of the CWA on a case by- case basis if there is a "significant nexus" to traditional navigable water. The lack of clear definitions will make it more difficult for horticultural 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. These murky definitions will make it extremely difficult for nursery and greenhouse growers and landscape professionals to understand and comply with the law. (p. 3)

Agency Response: See Agencies' Summary Response 14.3. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

The agencies modified the definition of "neighboring" to address concerns through the use of bright lines and distance limits. The term "riparian area" was removed from the final rule. While the term "floodplain" is still used within the rule, the preamble clarifies that the agencies are referring to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding).

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

For discussion of tributaries see the Tributary Compendium.

For further discussion of ditches that are excluded from jurisdiction see Preamble Section IV.I and summary response 6.2 in the Ditch Compendium.

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 modified the proposed "other waters" category to provide for case-specific determinations under more

narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8).

See summary response 5.0 in the Significant Nexus Compendium and Technical Support Document Section IX for further discussion of case-specific analyses.

US Canola Association (Doc. #16361)

14.581 [T]he rule's definition of "minor drainage" is not defined in the proposal. It must be made clear that the exemption for minor drainage includes the maintenance of all existing natural and man-made drainage ditches, which takes place in many cases on an annual basis. Maintaining and installing tile drainage on farmland must also be included in the minor drainage exemption, as university extension services have stated that these practices are an effective way to reduce soil salinity and preserve soil health. (p. 2)

Agency Response: This rule does not use the term "minor drainage" Nothing in the rule affects the farming exemptions provided in the CWA, for which this phrase is relevant as such these comments are outside the scope of this rulemaking. See Ongoing Farming subsection 14.2 of this compendium.

Pershing County Water Conservation District (Doc. #16519)

14.582 Words such as "converted cropland," "uplands," and "traditional," are not specifically defined. While we can assume that the irrigation canals and ditches within the District may fall under these exemptions, without express definitions of these exemptions, the District runs the risk (p. 4)

Agency Response: See Agencies' Summary Response 14.3. "Prior converted cropland" has been excluded from the definition of "waters of the United States" since 1992 and is defined by the USDA and NRCS at 7 CFR § 12.2 and in §514.30 of the National Food Security Act Manual, Fifth Edition, November 2010.. For further discussion of PCC see summary response 7.2 in the Features and Waters Not Jurisdictional Compendium.

In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

Utah Farm Bureau Federation (Doc. #16542.1)

14.583 Instead of providing clarity and certainty, the proposed rule offers confusion and inevitable litigation. EPA's proposed rule establishes a reliance on undefined or vague terms and concepts like "landscape unit," "riparian areas," "flood plain" and "ordinary high water mark" as they are determined by these agencies "best professional judgment." All are easy targets for groups, sometimes radical environmental groups and activist judges to assail normal farming and ranching practices or to seek "sue and settle" outcomes. (p. 6)

Agency Response: See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused

confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

In response to the comment on "best professional judgment". The agencies 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

See summary response 14.3 and the citations therein for discussion of specific terms including "landscape unit," "riparian area," "floodplain," and "ordinary high water mark."

Shasta County Farm Bureau (Doc. #16924)

14.584 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: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. See Implementation Compendium for more discussion.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "floodplain," "subsurface connections," "waters," and "waste treatment."

Montana Stockgrowers Association (Doc. #16937)

14.585 Many important words or phrases are not defined in the actual text of the rule. For instance, "upland', "significant", in "significant nexus", "other waters", "through another water." Although the agencies have provided some definitions or references to possible definitions in the prefatory materials of the Federal Register document, this is not adequate to analyze fully the scope of this proposed rule. Each one of these terms we have identified needs a full definition and needs to be included in the actual text of the CFR or be removed. (p. 6)

Agency Response: See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. The commenter does not explain why definitions provided in prefatory materials are not adequate to analyze fully the scope of the rule. The agencies have reasonably determined which terms are central to the "waters of the United States" rule and require regulatory definitions. Other terms are clarified in the preamble. Additional terms may be clarified in guidance after the agencies have gained experience implementing the rule.

In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

The definition of the term "significant nexus" in the rule at paragraph (c)(5) is consistent with language in SWANCC and Rapanos, and with the goals, objectives, and policies of the CWA, however some changes and clarifications have been added in response to comments.

See summary response 5.0 in the Significant Nexus Compendium for further explanation and discussion of reasons why the agencies chose not to define specific related terms including "significant."

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 modified the proposed "other waters" category to provide for case-specific determinations under more narrowly targeted circumstances. The waters subject to case specific analysis are limited by type in (a)(7) and by specific limits in (a)(8). See Other Waters Compendium for further explanation.

For discussion of the term "through another water" see Tributary Compendium and the Technical Support Document Section VII.

Water Advocacy Coalition (Doc. #17921.1)

14.586 The rule does not provide clarity and indeed creates confusion. Definitions of numerous key terms and concepts, like "uplands," "floodplain," "shallow subsurface connection," "waters," and "waste treatment," are unclear. (p. 13)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "floodplain," "shallow subsurface connection," "waters," and "waste treatment."

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

14.587 Key terms used by the "waters of the U.S." definition-tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed- are inadequately explained and raise important questions, Because the proposed definition s are vague, this will result in further legal challenges and delays. In addition to the vague definitions, some definitions seem to be inconsistent with other federal agency definitions dealing with similar items (Floodplain for example). (p. 3)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent waters," riparian area," "floodplain," and "upland."

While the agencies strive for consistency with other Federal Agencies, the definitions used by other agencies are outside the scope of this rule.

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

See Features and Waters Not-Jurisdictional Compendium for discussion of the exclusions listed in paragraph (b).

Association of American Railroads (Doc. #15018.1)

14.588 As a basic principal matter, the Agencies have expanded what is a "water" without defining "water." Without a definition of "waters," virtually any feature that is "neighboring" could conceivably constitute a Water of the United States. The Agencies use the term "wetland" which is defined in some references to waters, but have not proposed a definition of waters. EPA's Connectivity Report sets forth a definition of "water body"—any sizable accumulation of water on the land surface, including but not limited to streams, rivers, lakes, and wetlands—but does not define "waters." The Agencies must either define "waters" or withdraw the concept that "waters" located within adjacent, floodplain, and neighboring areas are jurisdictional from the rule. (p. 11)

Agency Response: **See Agencies' Summary Response. In response to the request for a definition of "waters," the preamble explains that, "The agencies use the term "water" and "waters" in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."**

See also Adjacent Waters Compendium for a detailed discussion on the revised definition of "adjacent."

American Road & Transportation Builders Association (Doc. #15424)

14.589 ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and

ambiguous definitions of "wetlands."[84] This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining a "wetland" as follows: "If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland." (p. 2)

Agency Response: **The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments.**

Airports Council International - North America (Doc. #16370)

14.590 [W]e believe the following questions/clarifications/requests, at a minimum, need to be addressed before a practical final rule can be promulgated: a. On page 22199 of the proposed Rule "wetlands" are described as: "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." The above text does not mention the 1987 Corps of Engineers Wetlands Delineation Manual as the "final authority" on how to delineate a wetland (http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf). We request that the Agency explain how or if the manual plays a role in the method used to define a wetland for EPA and Corps' purposes under the Proposed Rule. (p. 3)

Agency Response: **The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. The delineation manuals used in the field to draw jurisdictional boundaries around areas that meet the regulatory definitions of wetlands are also outside the scope of this rule.**

14.591 The Proposed Rule's definition of wetland seems very broad and does not seem to be consistent with detailed Corps guidance (Corps Wetland Delineation Manual) on classification of wetlands (hydric soils, vegetation, water). Please explain this inconsistency. (p. 6)

Agency Response: **See response immediately above.**

[84] Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each. The federal government tries a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

Orange County Public Works, Orange County, California (Doc. #14994)

14.592 Definitions are "daisy chained" to multiple other definitions resulting in a convoluted definition, which expands jurisdictional waters. The definition of "adjacent" references "neighboring" which references "floodplain" and "riparian area." This results in an expansive and unwarranted definition. It is requested that "adjacent" be constrained to the traditional definition of "bordering" or "contiguous," such that there is a strong hydrologic connection. (p. 3)

Agency Response: See Agencies' Summary Response, and Compendiums for Adjacent Water, Legal Analysis and Scientific Evidence Supporting the Rule. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

The agencies modified the definition of "neighboring" to address concerns through the use of bright lines and distance limits. The term "riparian area" was removed from the final rule. While the term "floodplain" is still used within the rule, the preamble clarifies that the agencies are referring to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding).

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring." See the TSD for the Section I on Statute, Regulations and Case Law: Legal Issues and Section VII on Adjacent Waters.

Southern Illinois Power Cooperative (Doc. #15486)

14.593 The rule does not provide clarity and indeed creates confusion. Definitions of numerous key terms and concepts, like "uplands," "floodplain," "shallow subsurface connection," "waters," and "waste treatment," are unclear. (p. 9)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "floodplain," "shallow subsurface connection," "waters," and "waste treatment."

West Bay Sanitary District, Novato Sanitary District, West County Wastewater District, Union Sanitary District and West Valley (Doc. #16610)

14.594 Waters of the United States, or waters of the US. means the following relatively permanent, standing or flowing bodies of water: (a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" as used in 33 U.S.C. §1362(7) means:

(1) All traditionally or potentially navigable waters ~~which~~ that that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters ~~which~~ that that are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(I) through (3) and (5) of this definition;

(5) All waters considered to be a tributary ~~of~~ directly to waters identified in paragraphs (a)(I) through (4) of this definition; and

(6) All ,waters, including wetlands directly abutting, adjacent to a water identified in paragraphs (a)(I) through (5) of this definition-and [85]

~~(7) On a case specific basis, other waters, including 'wetlands, provided that those waters alone, or in combination with other similarly situated '.waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(l) through (3) of this definition.~~ (p. 11)

Agency Response: See Agencies' Summary Response 14.3 and citations therein and the TSD Statute, Regulations, and Caselaw: Legal Issues. Also see Compendiums for Legal Analysis, Adjacency and Tributaries.

Lake County Stormwater Management Commission (Doc. #16893)

14.595 §328(c)(6) - Wetlands: In the proposed rule, "The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

A different definition is contained in the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (EPA/600/R-11/098B): "An area that generally exhibits at least one of the following three attributes (Cowardin et al., 1979): (1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment; (2) contains undrained hydric soil; or (3) contains nonsoil saturated by shallow water for part of the growing season." This is a significant disparity, given that the referenced report is being used as a foundation for "other waters" being included in the proposed definition of WOUS on the basis of a "significant nexus."

[85] Expansion of adjacency beyond "wetlands" has been questioned in case law. See San Francisco Baykeeper v. Cargill Salt Division, 481 F. 3d 700, 705 (2007)(finding that it may not have been "unreasonable for the EPA to view wetlands as a special category subject to CWA jurisdiction that otherwise would not extend beyond navigable waters. We conclude... that the district court erred when it found that the Pond is subject to CWA jurisdiction solely because it is 'adjacent'").) This case also supports the notion that EPA and ACE will be upheld when not extending the CWA's reach. Id. at 707-708.

We support the wetlands definition in the proposed rule and the continuation of the three-parameter approach for the determination of potentially jurisdictional wetlands. (p. 2-3)

Agency Response: The agencies stated in the preamble to the proposed rule that comments were not being sought on the definition of "wetlands," since no changes are being made to the existing definition. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. See also Compendiums for Adjacent Waters and Legal Analysis.

Western States Water Council (Doc. #9842)

14.596 The rule does not adequately define the following key terms: (1) shallow subsurface hydrologic connection; (2) bed and banks; (3) ordinary high water mark; and (4) uplands. Further consultation is needed between your agencies and the states to determine how to define these terms. The WSWC believes that the above-requested state-federal workgroup would provide a suitable forum for your agencies to work in partnership with the states to define these terms. In addition to these terms, further clarification is needed regarding the terms "floodplains" and "riparian" as used in the rule. (p. 6)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See the Preamble Section IV and the Features and Waters Not Jurisdictional for a discussion of shallow subsurface connections.

See summary response 14.3 and the citations therein for discussion of specific terms including "shallow subsurface flow," "bed and banks," "ordinary high water mark," and "upland."

The agencies modified the definition of "neighboring" to address concerns through the use of bright lines and distance limits. The term "riparian area" was removed from the final rule. While the term "floodplain" is still used within the rule, the preamble clarifies that the agencies are referring to the 100 year floodplain (i.e., the area with a one percent annual chance of flooding).

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

As detailed in the Preamble, the agencies sought the input of State and local governments from the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous State and local government organizations

National Lime Association (Doc. #14428.1)

14.597 NLA further believes that the final rule's regulatory text should include an appendix to the regulatory text that not only identifies the various jurisdictional conclusions reached

in the court decisions and guidance cited in the ECOS Memo, but also discusses and, if necessary, reconciles those decisions and guidance with the final rule's regulatory text. The inclusion of such information by the Agencies as an appendix to the regulatory text that is codified would not only locate such information in an accessible, single place, but would also help the Agencies to achieve one of the rulemaking's stated goals of "increase[ing] CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States' protected under the [Clean Water] Act." 79 Fed. Reg. at 22188. If such clarity is indeed to be achieved at the conclusion of this rulemaking, neither the regulated community nor those charged with implementing the regulations should be left having to guess what the terminology in the regulations means and/or how the Agencies' had intended the final rule to be interpreted and applied. (p. 16)

Agency Response: See Agencies' Summary Response. Also the TSD provides the legal, regulatory and science foundation for this rule. This document is a part of the agencies record for the rule.

Santa Clara Valley Water District (Doc. #14776)

14.598 The definitions in paragraph (c) of the Proposed Rule are broad enough to include waters that would be excluded from the Proposed Rule by paragraph (b). For example, groundwater would be excluded by paragraph (b)(5)(vi), but waters with a "shallow subsurface hydrologic connection" to a water of the United States is included within the definition of a "neighboring" water by paragraph (c)(2). Yet some groundwater does have a shallow subsurface hydrologic connection to waters of the United States. While paragraph (b) would except certain waters from the definition of waters of the United States, "notwithstanding whether they meet the terms of paragraphs (a)(1) through (7)" (79 Fed. Reg. 22263), this point could stand to be clarified in paragraph (c).

Paragraph (c) should be amended as follows to add the underlined language: "(c) Definitions. The following definitions apply: except that they do not apply to waters that meet the terms of any of the subparagraphs of paragraph (b) of this section-" (p. 8-9)

Agency Response: See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See Preamble at Section IV.I and the Features and Waters Not Jurisdictional for a discussion of exclusions to include groundwater and considerations of the connections between groundwater and surface waters.

Association of American Pesticide Control Officials (Doc. #14940)

14.599 EPA has failed to define criteria for the concepts of: "to, over or near"; "direct discharge" related to release of materials from mechanical equipment; and "non-point source" related to time-of-travel or mechanism of transport through the environment. The significance of these terms has a direct impact on the implementation of CWA and FIFRA water quality protection, permitting and regulatory enforcement programs. (p. 2)

Agency Response: **This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. See also Implementation Compendium for a discussion of implementation.**

Colorado River Water Conservation District (Doc. #15070)

14.600 Clear definitions of key terms are either absent or lacking in clarity. A clear understanding of terms such as "uplands," "tributaries," " flood plain," "similarly situated waters," "in the region," " 'small' when referring to ' small ornamental waters ' ," and " gullies and rills," is key to understanding and evaluating the proposed rule. (p. 4)

Agency Response: **See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "tributaries," "floodplain," "similarly situated," "in the region," and "gullies and rills." See also Features and Waters Not Jurisdictional Compendium

Association of Metropolitan Water Agencies et al. (Doc. #15157)

14.601 In addition to clarifying the definitions of "adjacent," "tributary," and "wetland," EPA must provide clear definitions of all key words and phrases in the rule, including: "neighboring," "bordering," "aggregation," "in the region," and "similarly situated." It is also confusing when the proposed rule creates terms that are used differently in other regulatory contexts and/or are ill-defined in describing WOTUS. An example is use of the words "floodplain" and "riparian area" to define adjacency. (p. 3)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "adjacent," "tributary," "wetland," "neighboring," "bordering," "in the region," and "similarly situated."

See Adjacent Waters Compendium for a detailed discussion on floodplains and the revised definition of "neighboring."

Eastern Municipal Water District (Doc. #15409)

14.602 Other terms used throughout the rule require better definition, particularly because of their significance in California and the arid west. Terms such as "ephemeral," "intermittent," "perennial," "gullies," "rills," "non-wetland swales," and "uplands" determine jurisdiction yet have no clear definition in the proposed rule. (p. 6)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of terms including "ephemeral," "intermittent," "perennial," "gullies," "rills," "non-wetland swales," and "upland."

Aqua America, Inc. (Doc. #15529)

14.603 There are a number of key words in the proposed rule (e.g. "adjacent", "tributary", "wetland", "neighboring", "bordering", "aggregation", "in the region", "similarly situated", and most importantly "significant nexus") that must be clearly defined in order to remove any ambiguity. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "adjacent," "tributary," "wetland," "neighboring," "bordering," "in the region," "similarly situated," and "significant nexus."

Discussion of aggregation of waters is addressed in the Preamble at Section III.

San Luis & Delta-Mendota Water Authority (Doc. #15645)

14.604 The agencies have proposed several new definitions (including but not limited to, "tributary", "adjacent", "neighboring", "significant nexus", "other waters", "similarly situated") in determining what is to be considered "waters of the U.S." that are ambiguous and reliant upon subjective decision-making. These definitions must be redrafted to provide precise, bounded, clear, and meaningful descriptions to provide the clarity intended and allow for effective implementation rather than lengthy litigation. (p. 3)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.**

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "adjacent," "neighboring," "significant nexus," "similarly situated." See also Implementation Compendium.

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

14.605 Recognizing that the definitions of "tributary," "neighboring," "riparian area," and "floodplain" are problematic and ambiguous, EPA and the Corps and have asked for comments on those definitions.[86] Unless the Proposed Rule is withdrawn, to avoid the ambiguity that such newly defined terms would cause, AECT requests that EPA and the Corps modify the Proposed Rules to assert CWA jurisdiction only if there is a relatively permanent or ordinary presence of water, as set forth by the plurality of the U.S. Supreme Court in Rapanos[87] (p. 9)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "tributary," "neighboring," "riparian area," and "floodplain."

See preamble Section III for further explanation and clarity on how to conduct significant nexus analysis and the Technical Support Document Sections I and II for further discussion on the legal basis for the approach to jurisdiction and the significant nexus analysis.

Xcel Energy (Doc. #18023)

14.606 The agencies should define critical terms and concepts that are used throughout the Proposed Rule but are undefined, including but not limited to: uplands, shallow subsurface connection, waste treatment, and ditch. The Proposed Rule also leaves undefined important concepts such as perennial, ephemeral, and intermittent when evaluating flows relating to whether specific watercourses would be jurisdictional or not. The agencies should define these key concepts. The definitions of these terms and others throughout the Proposed Rule are often influenced by regional characteristics, so the definitions for all terms should be expanded to include regionally-appropriate considerations. (p. 8)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "shallow subsurface connection," "waste treatment," "ditch," "perennial," "ephemeral," and "intermittent."

[86] 79 Fed.Reg. 22203, 22208-09.

[87] See the discussion below regarding the discussion by the plurality of the U.S . Supreme Court in Rapanos regarding the requirement that a relatively permanent or ordinary presence of water as a trigger for CWA jurisdiction.

After considering the best available science and the public comments, the agencies reasonably determined not to incorporate regional approaches into the final rule. The agencies believe that, given the wide geologic, hydrologic, and biologic variability across the country, any attempt to introduce regional approaches in the final rule would cause confusion and detract from the agencies' goal of providing clarity. Nevertheless, the final rule takes into account regional variation in a number of ways. For example, (a)(7) identifies five subcategories of waters in specific regions that will be considered similarly situated by rule in the single point of entry watershed when conducting a case-specific significant nexus analysis. The final rule, while providing clear guidance, also incorporates sufficient flexibility to account for regional variability. Further, in implementing the rule, the agencies intend to use their longstanding practices and regional manuals for the identification of waters, which also take into account regional variation. These resources include both the Regional Delineation Supplements and the Regional OHMW Manuals. Nothing in this rule restricts the ability of states to more broadly protect state waters.

The Nature Conservancy (Doc. #17453)

14.607 The rule would benefit from a definition for the term "waters" (or water bodies) in the rule. The term "waters" (as opposed to the term "waters of the United States",) has not been defined and has led to much confusion about what types of water bodies are covered. We note that the term "wetlands" has long had a definition (and supporting guidance) that has helped to minimize such confusion. Such a definition should be consistent with the definition of tributaries under the rule, but should also include other water bodies such as lakes, ponds, and oxbows. (p. 3)

Agency Response: See Agencies' Summary Response. In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

In response to the request for a definition of "waters," the preamble explains that, "The agencies use the term "water" and "waters" in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."

Western Landowners Alliance (Doc. #15380)

14.608 The agencies should evaluate whether adding the same definitional text for "Waters of the US" to eleven sections of Code may need to be further refined for some of those individual sections. For example, 40 CRF 302.3 does not have a WOTUS element, but defines "environment" as "any other surface water, groundwater, drinking water supply. within the US". It is unclear how the new definition would be integrated. Also 40 CRF

401 has a definition of "navigable waters" as "navigable waters of the U.S. Simply placing the new definition in would seem to create circular logic in the result. (p. 1)

Agency Response: This is a definitional rule that clarifies the scope of "waters of the United States" in the Clean Water Act and affects those Clean Water Act regulations which specifically reference "waters of the United States" and are listed within the Federal Register Notice. The regulations not covered by this definitional rule are outside the scope of this rule making.

Common Sense Nebraska (Doc. #14607)

14.609 The failure of EPA to define legally significant terms and phrases and the use of broad and ambiguous terminology when defining others leaves us without the ability to provide meaningful comments on the proposed rule. The ability to provide meaningful commentary is an essential requirement under the APA and EPA must withdraw the proposed rule, provide the necessary legal definitions and reintroduce the rule in order to satisfy this statutory obligation. (p. 3)

Agency Response: See summary response 14.3 and the citations therein for discussion of specific terms. See also Compendium for Process Concerns and Administrative Requirements

Eastern Municipal Water District (Doc. #15544)

14.610 Other terms used throughout the rule require better definition, particularly because of their significance in California and the arid west. Terms such as "ephemeral," "intermittent," "perennial," "gullies," "rills," "non-wetland swales," and "uplands" determine jurisdiction yet have no clear definition in the proposed rule. (p. 6)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "ephemeral," "intermittent," "perennial," "gullies," "rills," "non-wetland swales," and "upland."

House of Representatives, Congress of The United States (Doc. #1375)

14.611 The proposed rule appears to fail in clarifying key terms that will significantly shape the scope of the rule including "uplands," "significant nexus" and "adjacent." Without having a clear and predictable definition for these key terms, the entire scope of the rule is called into question. (p. 1)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for discussion of specific terms including "upland," "significant nexus," and "adjacent."

Wetland Science Applications, Inc. (Doc. #4958)

14.612 Since the debate on significant nexus is most important relative to ephemeral and intermittent streams, those terms and perennial streams should be defined in the final rule - yet no definitions are proposed. The preamble to the Proposed Rule discusses ephemeral, intermittent and perennial streams – as does the Connectivity Study – yet those terms have never been defined for jurisdictional purposes. Even the Supreme Court is inclined in its opinions to differentiate between stream categories. This being the case, it is past time that these terms are defined in the regulation. (p. 4)

Agency Response: See Agencies' Summary Response and Preamble at Section IV.F and the Tributary Compendium.

14.613 It is nice that after using the term tributary for about 4 decades that a definition is finally proposed. Any addition of GOOD definitions is appreciated. Unfortunately, the definitions as proposed are severely lacking as discussed below. If the term waterbody is to be used for any aspect of the program, it should be defined in 33 CFR Part 328 – not just for NWPs. (p. 7)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters.

See summary response 14.3 and the citations therein for further discussion of specific definitions including "tributary."

14.4 SUPPLEMENTAL COMMENTS FOR MISCELLANEOUS

Specific Comments

Joseph Kelly (Doc. #2008))

14.614 Nassau Creek flows south to north through Calaveras County, California into New Hogan Dam Reservoir. Previous discussions with the Army Corps of Engineers provided me with information that Nassau Creek is federal waters.

Within the Federal Register I Vol. 79, No 76 I Monday, April 21, 2014 I Proposed Rules, page 22200, States administer approved CWA section 404 programs for waters of the United States within the State, except those waters remaining under the Corps jurisdiction pursuant to CWA section 404 (g)(1) as identified in a Memorandum of Agreement between the State and the Corps. 40CFR233.14;40 CFR.70(c)(2); 40 CFR 233. 71(d)(2).

Page 22201, E. Impoundments: Impoundments are jurisdictional because as a legal matter an impoundment of a "water of the United States" remains a "water of the United States" and because scientific literature demonstrates that impoundments continue to

significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters.

Page 22201, F. Tributaries: 1. What is a "tributary" for purposes of the proposed regulation?

The proposed rule defines "tributary" as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33CFR328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).

The crux of the Clean Water Act, FEMA, State of California, Calaveras County, Nassau Creek issue. Page 22193: The proposed section (b) excludes specified waters and features from the definition of "waters of the United States." Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a), even if they would otherwise satisfy the regulatory definition. Those waters and features that would not be "waters of the United States" are: artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins or rice growing.

The term dry land gives cause to believe dry land does not include the creation of lakes or ponds created by excavating a known water flowing creek. An excavation creating a illegal water retention facility obstruction in Nassau Creek that causes flooding upstream. Flooding that is injurious to the public health, safety and general welfare of the citizenry. Flooding that is contrary to E. Impoundments and F. Tributaries. Flooding that causes financial impact, loss of property value and potentially places "waters of the United States" as a threat of a "taking" of private property. When considering the concept of "taking" private property, the matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. The existing agency regulations provide that impoundments of "waters of the United States" remain "waters of the United States" and the agencies do not propose any substantive revisions to that component of the regulation, page 22201.

Returning to the Memorandum of Agreement between the State and the Corps, States administer approved CWA section 404 program for "water of the United States" within the State, except those waters remaining under the Corps jurisdiction identified in the Memorandum of Agreement.

The illegal water retention facility obstruction in Nassau Creek has been in the jurisdiction of the California Water Resources Control Board since February 2006 without resolution, flooding by "waters of the United States" and the manifestation of a "taking" of private property continues. Even though a EPA Water: Outreach & Communication document: What About Takings? Discusses the Fifth Amendment to the Constitution of the United States of America, Legal Background and Current Status, the document does not discuss Arkansas Game and Fish Commission v. United States, the Supreme Court of the United States decision December 4, 2012. There is sufficient documentation to realize that seasonally recurring flooding can constitute takings. The Court has also ruled that takings temporary in duration can be compensable.

Should the Memorandum of Agreement between the Corps and the State of California be reviewed, revised to provide a continual State of California administrative time line of information and action provided to the Corps?

Should the Corps be more aware of what is happening in, with and to the "waters of the United States? Which government, United States of America, State of California or Calaveras County is primarily accountable and responsible for the inaction and long delay of no resolution? All are knowledgeable of the flooding issue. Since December 31, 2006, Nassau Creek has flooded 6 out of 7 years with other years being issues of trespass. No resolution in sight.

Should a discussion and possible Memorandum of Agreement between the Corps, State of California, the counties and cities, specifically in this case, Calaveras County, to provide all government agencies involved in administration of accountability and responsibility of flooding, floodplain management, regulatory process responsibility from the 1968 passage of the National Flood Insurance Act, which created the National Flood Insurance Program that provided three basic components: identification of flood hazards, flood insurance and floodplain management guidance; forward to the State of California's Cobey~Alquist Floodplain Management Act: California Water Code Section 8400-8401, 8401(c) The primary responsibility for the planning, adoption, and enforcement of land use regulations to accomplish flood plain management rests with local levels of government. 8401(d) It is the policy of this state to encourage local levels of government to plan land use regulations to accomplish flood plain management and to provide state assistance and guidance therefor as appropriate. Within the discussion a defining of jurisdictional boundaries and enforcement responsibility extending beyond the realm of pre 1914 and post 1914 water rights to include construction permit enforcement of after the fact realization of a illegal water retention facility and obstruction; that took place after the National Environmental Policy Act (1969), the California Environmental Quality Act (1970) and Clean Water Act (1972) were all signed into law. A discussion and examination of the issues to determine those government agencies participation and role as primary enforcement to the area. I would add that FEMA should be included in the discussion and Memorandum of Agreement process. (p. 1 – 4)

Agency Response: **This is a definitional rule that does not establish any regulatory requirements. These comments raise issues outside the scope of this rule making.**

14.615 Addendum:

Another concern is the violation of United States of America Land Patent Rights. In this particular instance: United States to Joseph Marre, Certificate No. 6840 which was paid in full in accordance to the provisions of the Act of Congress of the 24th of April1820 for the North half of the North East Quarter of Section thirty three and the West half of the North West quarter of Section thirty four, in township three North of Range twelve East in the district of lands subject to sale at Stockton, California. The United States of America passed complete ownership to Joseph Marre, and to his heirs and assigns forever: subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts. This appears to be a irrevocable recorded document. All the

properties and property owners involved in the Nassau Creek illegal water retention facility obstruction are subject to Certificate No. 6840 water rights ownership with due process.

A nine year old complaint exists with the California State Water Resources Control Board. SWRCB is attempting to legalize a illegal water retention facility obstruction in Nassau Creek, using a Water Appropriation Permit Application for 40 acre feet of water storage on three properties with the request of only one property owner and without written approval of the other two property owners. The draft Right To Divert And Use Water permit did not discuss any guaranteed cure to stop the flooding caused by the facility. The draft permit did not discuss as built engineered plans to disclose any flaws or a upstream basin study.

Will the Army Corps of Engineers and I or the Environmental Protection Agency offer assistance to California's State Water Resources Control Board to move this long overdue process to a conclusion? According to a SWRCB situation response to California Assemblyman Bigelow's office: staff is reviewing whether the permit complies with public trust requirements. (p. 4 – 5)

Agency Response: **This is a definitional rule with no regulatory requirements. The issues described above are not within the scope of this rule and are not addressed.**

Anonymous (Doc. #3300.1)

14.616 Section 404

Case 1 – Still Branch Regional Reservoir

In 1993 the City of Griffin started planning for its long term water supply, eventually called the Still Branch Regional Reservoir, a 4.1 billion gallon off steam storage facility. It is common knowledge that the process of planning, permitting, and constructing a reservoir is laborious and time consuming. In 2002, the project finally was awarded its 404 Permit. Prior to any construction, the process of obtaining approval cost the city over 1.75 million dollars and an additional $275,000 million dollars for mitigation. Beyond the costs, it was a monumental task to get federal agencies to talk to one another to move forward with the project. The initial meetings with GAEPD, COE, and USEPA started in late 1998 and did not come to conclusion until late 2001. The short of it is that USFWS and USEPA went back and forth over in-stream conditions, endangered species, and historical issues. Agencies did not even talk to one another for months on end. Finally in mid-2001 the City of Griffin and GAEPD sought congressional intervention to get everyone to finalize the project and the COE issue the permit and the withdrawal Permit.

The proposed rule of the Waters of the United States raises several concerns. Federal agencies are already understaffed. Communications are slow at best because of process management. If local governments are tasked with a requirement for an individual permit, it could take years to rehabilitate or restore a ditch if the project is subject to an individual permit the backlog of requests that this proposed rule would create. The potential of application costs, mitigation costs, avoidance costs, and minimization costs will be significantly more than 2.7% as stated Economic Analysis in the proposed rule. (p. 2)

Agency Response: **As stated in the preamble, 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. 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. Nothing in the rule changes the permitting requirements in the CWA and as such, the 404 permitting process is outside the scope of the rule.**

14.617 **Case 2 – Oakhill Cemetery BMP**

In 2012, the City of Griffin sought to construct a stormwater BMP and restoration project on what we thought was a ditch which flows only under wet weather conditions. The short of it is that the COE deemed it to be a Water of the United States, and JD was required. Two redesigns and minimization efforts, and two years later, 2014 the project has started. If the proposed rule is adopted, local governments will have to spend a significant amount of funds and time obtaining COE approval for permitting to correct stormwater conveyance systems, more importantly the potential lawsuits for failure to perform in a timely manner when private properties and adjacent properties could be affected negatively. This particular ditch was eroding an industrial business building; fortunately we were not challenged. Ditches as defined in the proposed rule which are subject to the CWA would be expanded thus the process to address local stormwater management controls would be subject additional length of the project and unnecessary additional funds allocated to the project. (p. 2)

Agency Response: **See Agencies' Summary Response 14.1 for the Miscellaneous Compendium, the Ditches Compendium and the Waters Not Jurisdictional Compendium. In the final rule, certain stormwater control features created in dry land are excluded from the definition of "waters of the United States".**

North Dakota Water Resource Districts Association (Doc. #5596)

14.618 The agencies use the term "confined surface connection" to mean a "permanent, intermittent or ephemeral surface connection through directional flowpaths such as ... a ditch." The agencies use the illustrative example of a fill-and-spill situation, where wetlands fill and spill downstream through such a ditch to a Water. The agencies assert "water does not have to be continually present in the confined surface connection" to establish Federal jurisdiction over the water in either the wetland or the ditch. Such fill-and-spill situations are common in ND, particularly in Prairie Pothole region and this overreach of federal authority would directly impact thousands of farmers across the state. In regards to the agencies' request for comment on whether a particular water is connected through confined surface connection to a Water, the Association recommends the agencies take no jurisdiction or establish a clear distance limitation. (p. 2 – 3)

Agency Response: **See Agencies' Summary Response 14.1 for the Miscellaneous Compendium, the Compendiums for Tributaries and Adjacent Waters, Other Waters, Preamble Section IV.H., and the Technical Support Document section II.B. Prairie potholes are not jurisdictional by rule, but they are "similarly situated" by**

rule, and therefore must be considered in combination with other prairie potholes in the same single point of entry watershed for the purposes of a significant nexus analysis.

Washington State Grange (Doc. #6942.2)

14.619 WSG is concerned that the drafting of the proposed rule and interpretive policy, read together, will also discourage the implementation of good conservation practices. It is not clear how a producer "qualifies" for an exemption. There is no qualification test today. There is simply an exemption from permit requirements.

It is also unclear what happens to conservation practices that are not clearly covered by the 56 listed conservation activities listed, or what the regulatory impact might be on producers. WSG is concerned that NRCS conservation standards and practices, which are truly voluntary today, will effectively become mandatory "Ag Practices Act" standards used to determine if a producer qualifies for the protections provided by the CWA express exemptions. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within section 404(f)(1) are not affected by this rule and are outside the scope of the rule making

K. Buhmeyer (Doc. #9232)

14.620 Please include statements about the monitoring and identification of antibiotic resistance of the Aeromonas group of bacteria in specific watersheds. (Such as the Chattahoochee in Georgia) (p. 1)

Agency Response: This request is outside of the scope of the rulemaking. This is a definitional rule with no regulatory requirements.

John Ford Ranch (Doc. #9512)

14.621 Your agencies have exempted 56 farming and ranching practices from the rule as long as they meet the specific Natural Resource Conservation Service (NRCS) standards; any deviation from these standards can result in fines of up to $37,500 per day. According to the EPA, the 56 exempted practices, including grazing, were chosen because they have the potential of discharge if they are done in the "Waters of the U.S.". This definitely makes grazing a discharge activity, and cattle producers would now be required to obtain a permit to graze unless they have an NRCS grazing plan. How will the discharge of the various wild animals be addressed when they defecate in the "Waters of the U.S." ? (i.e. elk, deer, bear, pigs, and any other wild animals?) NRCS was created to help farmers on a voluntary basis, but this rule would make NRCS a regulatory agency, adding more costs, delays and burdens to the farmers' and ranchers' lives. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within section 404(f)(1) are not affected by this rulemaking.

Snohomish County Department of Public Works, WA (Doc. #10749)

14.622 Snohomish County believes this was an unintended consequence of the proposed definition of waters of the United States. Our recommended solution is to amend the proposed definition to include municipal separate storm sewer systems under the exemption given to waste treatment systems, as follows:

40 CFR 230 3

(t) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (s)(l) through (7) of this section-

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act, and infrastructure that is part of municipal separate storm sewer systems as defined in 40 CFR 122.26(b)(8). (p. 2)

Agency Response: The agencies have included an exemption in the final rule at (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are constructed in dry land. See Preamble Section IV.I and the Features and Waters Not Jurisdictional Compendium for additional information.

Anonymous (Doc. #11464)

14.623 This comment/request is in response to your WOTUS web site statement "Notice or permit not needed for certain NRCS practices". "Farmers and producers will be able to undertake the specific conservation practices without notification or permitting by ensuring that practices benefit water quality and are in accordance with Natural Resources Conservation Service standards."

The following should be clarified in the regulation.

1) Does this statement apply to land owners with NRCS contracts for conservation practices only? Does this statement apply to all farmers and ranchers in the country, regardless of their connection with USDA-NRCS farm bill programs?

2) Which government agency will be responsible for determining whether or not practices benefit water quality, and meet NRCS practice standards? Will this be the USDA-NRCS?

The interpretive rule states that the EPA, Army, and USDA will enter into a memorandum of agreement to determine which USDA-NRCS practices will be exempt under the section 404(f)(1)(a) rule. What if the 3 agencies can't agree on the practices to be put on the exempt list? (p. 1)

Agency Response: This is a definitional rule that does not establish any regulatory requirements, and comments related to permitting requirements/exemptions are outside the scope of the rule making. For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory permit exemptions within the CWA are not affected by this rulemaking.

J. Courtwright (Doc. #11652)

14.624 The EPA's proposed rule may greatly expand the number of streams protected under the Clean Water Act in arid regions such as Arizona; however, with increasing water need and increasing frequency and duration of droughts in these arid regions it is important to protect what little water exists in these regions. Even in humid regions, intermittent streams are extremely important for the chemical, physical, and biological integrity of the nation's waters, and in both arid and humid regions of the United States, these streams are particularly important for native salmonids (Erman & Hawthorne, 1976; May & Lee, 2004; Wigington et al., 2006; Courtwright & May, 2013) and other migratory and endemic fishes (e.g. Labbe & Fausch, 2000; Davey & Kelly, 2007). Other countries, including Australia and some regions of Europe, already explicitly provide protection and regulatory oversight for intermittent and ephemeral streams, and I urge the EPA to codify this proposed rule so that US citizens can also benefit from the improvements that this would provide for the chemical, physical, and biological integrity of our nation's waters. (p. 2)

Agency Response: **See Agencies' Summary Response 14.1. Ephemeral, intermittent, and perennial streams that meet the definition of "tributary" in paragraph (c)(3) of the rule are jurisdictional waters. See Preamble at Section IV.F, TDS at Section VII, and the Tributary Compendium for a discussion.**

Missouri Agribusiness Association (Doc. #13025)

14.625 EPA should reflect upon the Missouri experience. There was much science considered regarding the issue of classified streams and uses. The MDNR's Regulatory Impact Report (RIR) for the water classification rulemaking states that the centerpiece of the use designation proposal includes all rivers, streams and intermittent streams spatially represented by the 1:100,000 scale. MDNR rejected 1:24,000 because "at the 1:24,000 scale an additional 73,720 miles of stream would need monitoring. *If the current annual percentage of waters monitored is extended to the 1:24,000 scale NHD, annual monitoring costs would increase to $24.9 million. Ultimately, the enhanced 1:100,000 scale NHD proposal was advanced through the stakeholder group into the proposed rule because of the following: (1) certainty of aquatic communities on the spatial extent of the enhanced 1:100,000 scale NHD due to data and information contained in Missouri's Aquatic Gap project and data collected by the department and MDC, (2) an aquatic habitat protection UAA protocol would be available to add or remove waters from the rule, and (3) support from the regulated community that the proposal represents an appropriate extent for extending "fishable/swimmable" protections required by Section 101(a) of the CWA. Under the CWA, "fishable/swimmable" uses must be extended to all waters of the United States (WOTUS). From the standpoint of the proposed rule's application of CWA Section 101(a) use designations to an enhanced 1:100,000 scale NHD, there is some uncertainty and an assumption that aquatic habitat and recreational uses are attainable at this spatial scale. "*

In an October 22, 2014 letter from EPA Region 7, EPA took actions regarding Missouri's WQS submittal. EPA actually approved much of the submittal. In the letter, EPA did note that Missouri has designated none of its waters for ephemeral aquatic habitat. and that as part of the state's next comprehensive (triennial) WQS review, Missouri would need to

complete the necessary UAAs and adopt numeric criteria supportive of these uses consistent with 40 CFR § 131.11.

Missouri scientifically documented that establishing the existence of aquatic communities at the 1:24,000K scale is uncertain, however, third party citizen lawsuits continued to push to expand the list of protected waters, as shown below. Presented here are slides from a Missouri Coalition for the Environment presentation depicting small ephemeral streams in backyards in the St. Louis area which MCE seeks to protect. The Coalition filed a lawsuit against EPA because EPA did not assign proper "fishable - swimmable" uses to all of Missouri's waters. In 2012, a district court ruled that Missouri's submissions of water quality standards did not meet the requirements of the CWA. (p. 7-8)

Agency Response: **This is a definitional rule that does not establish any regulatory requirements and comments regarding water quality standards are beyond the scope of the rule. For information on how small ephemeral streams are treated under the rule, see the Compendiums for Tributaries and Features and Waters Not Jurisdictional.**

Tamara Choat (Doc. #13701)

14.626 If the proposed rule cannot be dropped, the following concerns and recommendations should be addressed.

(…) 5. Due to inadequate input from landowners, we request the agency to immediately withdraw the Interpretive Rule that limits the Sec. 404 "normal farming, silviculture and ranching" exemption to 56 NRCS practices. (p. 1)

Agency Response: **For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. This is a definitional rule that does not establish any regulatory requirements, and comments related to permitting requirements/exemptions are outside the scope of the rule making.**

Arizona Game and Fish Department (Doc. #15197)

14.627 3. CWA Section 404(f)(1)(A) exempts from 404 permit requirements certain discharges associated with agricultural conservation practices and upland soil and water conservation practices. Simultaneously with issuing the proposed Rule, EPA and ACOE issued an Interpretive Rule that identifies 56 agricultural conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that additionally qualify for exemption from Section 404 permit requirements, such as Wetland Restoration (657); Wetland Creation (658) and Wetland Enhancement (659) (http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm).

The Interpretive Rule states that EPA, the Army and USDA intend to enter into a Memorandum of Agreement to develop and implement a process for identifying these NRCS agricultural conservation services and activities that would qualify under the 404 permit exemption in Section 404(0(1)(A).

The Department urges EPA and ACOE to expand this Interpretive Rule to encompass conservation activities in WUS conducted by state agencies with primary jurisdiction

over fish and wildlife resources. These activities, which are designed to protect and enhance water quality and benefit fish and wildlife, are "essentially the same character as named" by Congress for exemption from regulation under Section 404(f)(1)(A). No need exists under Section 404 to regulate these activities. Without this clear exemption, the Department faces unnecessary regulatory uncertainty over whether such environmentally-beneficial activities will require a 404 permit. (p. 2 – 3)

Agency Response: For more information about the withdrawn Interpretive Rule, see the summary responses for Topic 14, Section 14.2. This is a definitional rule that does not establish any regulatory requirements, and comments related to permitting requirements/exemptions are outside the scope of the rule making.

Beaver Water District (Doc. #15405)

14.628 The Corps and EPA should revisit the Interpretive Rule regarding the applicability of the exemption from permitting under CWA section 404(f)(1)(A) for certain agricultural conservation practices, which was issued on March 25, 2014, in conjunction with the proposed WOTUS rule. As stated in the Interpretative Rule, section 404(f)(1)(A) does not provide an automatic exemption for all discharges related to farming, silvicultural, or ranching practices. The fifty-six (56) Natural Resource Conservation Service (NRCS) conservation practices listed as being exempt from permitting under CWA section 404(f)(1)(A), however, go well beyond what is contemplated by the statute and include such things as Abandoned Mine Land Reclamation. It is important for the protection of drinking water sources that the list of exempted "agricultural" discharges not be overly broad. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory permit exemptions within the CWA are not affected by this rulemaking. The final rule includes a clarified exclusion under paragraph (b)(4)(E) 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 Preamble Section IV.I and the Features and Waters Not Jurisdictional Compendium for a discussion.

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

14.629 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(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. 4)

Agency Response: The final rule clarifies that the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as

"adjacent For more information about ephemeral tributaries see summary response in Topic 8, section 8.1.1, and for discussion of exclusions for ditches, see summary response in Topic 6, section 6.2. The rule does not change the regulatory requirements specific to any CWA program, including the CWA § 402 NPDES program. For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2.

Center for Environmental Law & Policy (Doc. #15431)

14.630 1. Washingtonians use groundwater as a necessity for a variety of uses

Over 60% of Washington State residents get their drinking water from groundwater. It is also used extensively for irrigation, agriculture, and industry.[88] Groundwater is a source of water that maintains streamflow and lake and reservoir levels.[89] During periods of low streamflow or low lake water levels the slow discharge of groundwater often helps maintain minimum water levels.[90] For example, the Duckabush River in Washington receives the majority of its flow amount from groundwater contribution, showing the intrinsic connection between groundwater and surface water.[91]

2. Washington's groundwater supply faces additional challenges due to climate change

Climate change is a threat to the hydrological status quo nationwide and will have a detrimental effect on reserves of water in the Pacific Northwest-reserves that are relied on for ecological, economic, and recreational uses. Global climate models predict an increase in Pacific Northwest temperature of 5.3° F by the 2080s with a modest increase in total regional precipitation of between 1-2% percent in the same time period.[92] The increase in precipitation is expected to be in the context of wetter autumns and winters, but drier summers.[93] These changes will have a significant effect on the hydrology of Washington and the greater Pacific Northwest, reducing total availability of water in inland areas and shifting the timing of water availability in coastal areas.[94] While the projected increase in total precipitation might initially warrant optimism about our water future, the increase in annual temperature is expected to shift the timing of annual streamflow in both coastal and inland Washington State by reducing the number of

[88] See WASHINGTON STATE DEPARTMENT OF ECOLOGY, Ground Water Quality Information, http://www.ecy.wa.gov/programs/Wq/grndwtr/index.html.
[89] WASHINGTON STATE DEPARTMENT OF ECOLOGY, Functions and Values of Wetlands, http://www.ecy.wa.gov/programs/sea/wetlands/functions.html
[90] Id.
[91] See U.S. GEOLOGICAL SURVEY ,Ground Water and Surface Water, A Single Resource, Circular 1139, Fig. B-2 at 13, available at: http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf.
http://cses.washington.edu/db/pdf/wacciach3pswater645.pdf (describing the impact of climate change on water management in the coastal Puget Sound Region).
[92] PHILIP MOTE & ERIC SALATHÉ, Future Climate in the Pacific Northwest (2009), http://cses.washington.edu/db/pdf/wacciach1scenarios642.pdf
[93] Id.
[94] See VANO, ET AL., Climate Change Impacts on Water Management and Irrigated Agriculture in the Yakima River Basin, Washington, USA (2009), http://cses.washington.edu/db/pdf/wacciach3yakima646.pdf (describing the impact of climate change on water management in the inland Yakima River Basin); See VANO, ET AL., Climate Change Impacts on Water Management in the Puget Sound Region, Washington, USA (2009),

snowfall events, a change that will disrupt current patterns of water use.[95] Projected increases in average annual temperature are expected to shift peak river flow from late spring to winter as more precipitation flows directly to streams during storm events and the amount of water stored as snow in higher elevations declines. April 1 snowpack is projected to decrease by 28% across Washington State by the 2020s, and by 59% by the 2080s.[96] Much of the state's water supplies are dependent on seasonal snowmelt to recharge groundwater and maintain summer and fall streamflow, so these changes may have negative impacts on energy production and agriculture - two significant drivers of Washington's economy. The reduction in availability of water in summer and fall is predicted to result in shortages of water supply to users in Eastern Washington. The Yakima basin reservoir system that provides groundwater to an area rich in agriculture will be less likely able to supply water to all users. Under the current regime, water shortages in the basin are expected to occur in 32% of the years in the 2020s and 77% of the years in the 2080s, compared to a historic average during 1970-2005 when shortages occurred only 14% of years.[97] This lack of available irrigation water could result in a loss of 16% of the apple and cherry production in the area by the 2080s, valued at $70 million.[98]

Because groundwater contributes significantly to streamflow during times of low precipitation, changes in the timing of Washington's snowmelt will increase the reliance on existing groundwater reserves to maintain streamflow and wildlife habitat. Summer and autumn snowmelt typically reduces the temperature of the region's surface waters, maintaining conditions favorable to freshwater salmon habitat.[99] Climate change will likely increase stream temperatures, reducing the quality and extent of habitat. Researchers project that the duration of thermal stress periods will at least double and potentially quadruple by the 2080s, with the greatest increases in thermal stress being in the Interior Columbia River Basin and the Lake Washington Ship Canal. It is essential that our groundwater resources be managed carefully-with careful protection of both water quantity and quality-because the predicted changes will pit competing interests in the agriculture, energy, and conservation sectors against each other as demands for a limited resource increase.

3. Groundwater is essential to Washington's economic growth

The availability of clean groundwater is crucial to the state's economy. Washington's Columbia Plateau region, home to nearly 1.3 million people, generates an estimated $6 billion per- year through agriculture that relies on reserves of uncontaminated

[95] See generally THE CLIMATE IMPACTS GROUP, UNIVERSITY OF WASHINGTON, The Washington Climate Change Impacts Assessment, Evaluating Washington's Future in a Changing Climate Executive Summary (2009), http://cses.washington.edu/db/pdf/wacciaexecsummary638.pdf.
[96] ELSNER, ET AL,. Implications of 21st Century Climate Change for the Hydrology of Washington State (2009), http://cses.washington.edu/db/pdf/wacciach3hydrology644.pdf.
[97] VANO, ET AL., Climate Change Impacts on Water Management and Irrigated Agriculture in the Yakima River Basin, Washington, USA (2009), http://cses.washington.edu/db/pdf/wacciach3yakima646.pdf
[98] Id
[99] Id. 52 MANTUA, ET AL., Impacts of Climate Change on Key Aspects of Freshwater Salmon Habitat in Washington State

groundwater for irrigation.[100] Reductions in usable groundwater stores can have devastating long-term effects on local farmers dependent on them for irrigation, and the contamination of water sources used for drinking water is a major public health issue. Cleaning up contaminated aquifers is costly and is often paid for by state and federal taxpayers.

4. Groundwater in Washington remains susceptible to many forms of pollution

Washington State has relatively strong regulations of groundwater that exceed federal statutory protections, yet still has a variety of groundwater quality issues.[101] The U.S. Geological Survey issued a report in May 2010 documenting the results of sampling public water wells across the country, including wells in Washington State, that found more than one in five wells sampled contained contaminants at concentrations greater than human health benchmarks.[102] A brief survey of three groundwater contamination problems in Washington demonstrates the breadth of ongoing threats to groundwater quality, even in a strongly regulated state.

(a) Hanford Site

Decades of production of plutonium for nuclear weapons at the Hanford Site between 1943 and 1987 left a legacy of radioactive and chemical contamination across a ~1500 square kilometer site near the Columbia River that approximately 11,000 employees are working to clean up today.[103] The plutonium producing reactors at the Hanford Site generated hundreds of billions of gallons of liquid waste containing both radioactive and chemical pollutants. These liquid wastes were disposed of by pouring them directly onto the ground or into trenches and holding ponds. So much wastewater was dumped that it raised the water table about 75 feet and created aboveground lakes.[104] Higher-level liquid radioactive waste generated in the process of extracting plutonium from uranium fuel rods was put into underground storage tanks, many of which have since leaked. 177 aging tanks, which contain 56 million gallons of highly toxic and radioactive waste, are of particular concern because at least 67 of the tanks have collectively leaked about one

[100] DANIEL T. SNYDER & JONATHAN V. HAYNES, Groundwater Conditions During 2009 and Changes in Groundwater Levels from 1984 to 2009, Columbia Plateau Regional Aquifer System, Washington, Oregon, and Idaho (2010), available at: http://pubs.usgs.gov/sir/2010/5040/; A. M. IBEKWE, Quantification of Survival of Escherichia coliO157:H7 on Plants Affected by Contaminated Irrigation Water (2006) Engineering in Life Sciences, v6 n6 at 566-572 (December, 2006) (discussing the survival of E. coli bacteria on plants irrigated with contaminated water.); A. SBODIO, ET AL., Modified Moore Swab Optimization and Validation in Capturing E. Coli O157:H7 and Salmonella Enterica in Large Volume Field Samples of Irrigation Water, Food Research International, v51 n2 at 654-662 (2013) (describing testing methods for determining whether irrigation water is contaminated with E. coli bacteria.).

[101] See WASHINGTON STATE DEPT. OF ECOLOGY, Growth Management Act Information, http://www.ecy.wa.gov/programs/Wq/grndwtr/cara/gma.html (providing an overview of Washington's Growth Management Act and its Critical Aquifer Recharge Area designations).

[102] FUTUREWISE, As Groundwater Issues Increase Across State, Futurewise Wins for Water Quality in Grays Harbor,Walla Walla, and Yakima Counties, http://futurewise.org/resources/news/groundwaternews

[103] U.S. DEPT. OF ENERGY – HANFORD, Hanford Cleanup, http://www.hanford.gov/page.cfm/HanfordCleanup

[104] WASHINGTON STATE DEPT. OF ECOLOGY, Nuclear Waste Projects Hanford, http://www.ecy.wa.gov/programs/nwp/groundwater.htm

million gallons of high-level radioactive waste into the soil and continue to do so.[105] As a result, the site's groundwater is widely contaminated with underground plumes of contaminants covering nearly 200 square kilometers reported in 2013, some have reached the Columbia River nearby.[106] Known contaminants, some at concentrations over 1000 times the drinking water standards, include; carbon-14, carbon tetrachloride, chromium, hexavalent chromium, cyanide, iodine-129, strontium-90, technetium-99, trichloroethene, tritium, and uranium.[107] To prevent any more contamination from reaching the Columbia River several strategies are being used including; various types of underground barriers, "pump and treat" facilities, and "biostimulation." The yearly average cleanup budget for the Hanford Site is two billion dollars. To date, the cleanup has cost about forty billion dollars and the estimated remaining costs are at least one hundred and ten billion dollars more.

(b) Yakima Valley Nitrates

In the lower Yakima Valley, located in eastern Washington State, 12% of the wells that have been tested do not meet drinking water quality standards for nitrates.[108] Approximately 20% of the wells have elevated levels of nitrates, many above the background level for the area. Additionally, elevated levels of arsenic and ammonia have been found in the area's groundwater, as well as contamination with coliform bacteria.[109] Increased awareness of groundwater contamination in private wells prompted the Washington State Department of Ecology to work with the Environmental Protection Agency, the Washington State Department of Agriculture, the Washington State Department of Health, and Yakima County to address the challenges related to regional groundwater contamination. An example of how important groundwater issues are to the state, in November 2011 the Washington State Department of Ecology designated the Lower Yakima Valley as a Groundwater Management Area (GWMA) and put aside approximately $300,000 in start-up funding for the GWMA. As the letter indicates, the state was under tight budgetary constraints and this start-up funding was "a testament to Ecology's commitment to finding solutions to this problem." In a Consent Order issued by EPA to dairy farmers in response to nitrate contamination of groundwater, the EPA acknowledged a hydrological connection in the Yakima Valley between shallow alluvial

[105] U.S. DEPT. OF ENERGY – HANFORD, Hanford Cleanup, http://www.hanford.gov/page.cfm/HanfordCleanup; OREGON DEPT. OF ENERGY, Frequently Asked Questions (FAQ's) about Hanford at 5, http://www.oregon.gov/energy/NUCSAF/docs/FAQs_for_Nuclear_Safety-Hanford.pdf.

[106] U.S. DEPT. OF ENERGY, Hanford Site Groundwater Monitoring Report for 2013, Figure ES.16 Hanford Sitewide Plume Areas, http://www.hanford.gov/c.cfm/sgrp/GWRep13/html/gw13_Start-PDF.htm

[107] U.S. DEPT. OF ENERGY, Hanford Site Groundwater Monitoring Report for 2013, Table ES.1- Overview of the River Corridor Groundwater Interest Areas Contaminant Concentrations, Table ES.2-Overview of Central Plateau Groundwater Interest Areas Contaminant Concentrations, http://www.hanford.gov/c.cfm/sgrp/GWRep13/html/gw13_Start-PDF.htm

[108] WASHINGTON STATE DEPT. OF ECOLOGY, Growth Management Act Information, http://www.ecy.wa.gov/programs/Wq/grndwtr/cara/gma.html

[109] See RON SELL & L. KNUTSON, Quality of Ground Water in Private Wells in the Lower Yakima Valley, 2001-02 (2002), available at: https://fortress.wa.gov/ecy/publications/publications/0210074.pdf (reporting the results of water quality tests administered in 249 privately owned wells in the lower Yakima Valley, "one of the most intensely irrigated and diverse agricultural areas in the United States.")

aquifers and underlying basalt groundwater aquifers, and that the subsurface flow of water through both levels tend to follow the same routes to the Yakima River streambed.

(c) Puget Sound

The Puget Sound was designated by Congress as an estuary of national significance and given priority status in the 1987 amendments to the Clean Water Act as part of the National Estuary Program.[110] The Puget Sound Partnership is a state agency tasked with finding ways to address the complex and competing issues causing the Puget Sound to be degraded by human activity. The Partnership has identified pollution from failing septic tanks as one of the biggest threats to the health of the Puget Sound.[111] An estimated 4.5 million residents live in the Puget Sound region and their combined impacts result in an estimated 14 million pounds of toxic chemicals being discharged to the waters annually.[112] This pollution is responsible for destruction of salmon runs, the closure of over 7,000 acres of beaches for shellfish harvest, and diminishing aquatic habitats.[113] The partial annual value of ecosystem services of the Puget Sound Basin has been estimated to be between $9.7 billion and $83 billion.[114] While that value encompasses 23 categories of ecosystem services and goods, not only groundwater, sufficient clean groundwater is essential to ecosystem health. The cumulative effects of septic systems in introducing pollutants to groundwater and subsequently to the Puget Sound cannot be ignored when 67 percent of Washington State's entire population of nearly 7 million residents lives within the 12 counties bordering the Sound.78 For example, the area surrounding Olympia, the state capital, consists of three interconnected cities. In the Olympia-Lacey-Tumwater area alone there are an estimated 5,530 properties operating septic systems classified as "high risk" of groundwater pollution due to their age or design.79 (p. 6-10)

Agency Response: The agencies have never interpreted groundwater to be a "Water of the United States." See Features and Waters Not Jurisdictional Compendium.

Sierra Club, Cumberland Chapter (Doc. #15466)

14.631 In Kentucky, CWA Section 402 permitting (NPDES) is administrated by the Kentucky Division of Water, which is mandated to protect all waters of the Commonwealth, without regard for "connectivity" or "significant nexus." This means that the proposed rule will have no impact on the current NPDES/KPDES program. (p 4)

[110] See U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10, Lower Yakima Valley Groundwater, http://yosemite.epa.gov/r10/water.nsf/gwpu/lyakimagw (documenting the work of local, state, and federal agencies working with dairies in the area to address sources of nitrate contamination in groundwater).
[111] PUGET SOUND PARTNERSHIP, Strategic Initiatives, http://www.psp.wa.gov/action_agenda_strategic_initiatives.php
[112] PEOPLE FOR PUGET SOUND, The Problem of Polluted Runoff in Puget Sound, http://pugetsound.org/education/polluted-runoff
[113] Id; PUGET SOUND PARTNERSHIP, Strategic Initiatives, http://www.psp.wa.gov/action_agenda_strategic_initiatives.php
[114] EARTH ECONOMICS, Valuing the Puget Sound, Revealing Our Best Investments at 47(2010), available at: http://www.eartheconomics.org/FileLibrary/file/Reports/Puget%20Sound%20and%20Watersheds/Puget%20Sound%20Russell/Valuing%20the%20Puget%20Sound%20Basin%20v1.0.pdf.

Agency Response: **The EPA recognizes that states maintain the authority to more broadly protect state waters.**

Countrymark Cooperative Holding Corporation, LLC; Countrymark Refining and Logistics, LLC (Doc. #15656)

14.632 (7) The term gully means an erosion feature on the land snowmelt that is deeper than it is wide and is created by rainwater and snowmelt. (p. 16)

Agency Response: **The final rule does not provide a regulatory definition for "gully," See summary response 14.3: Terms suggested for definition.**

14.633 (8) The term rill means an erosion feature on the land created by the overland flow of rainwater and snowmelt. (p. 16)

Agency Response: **The final rule does not provide a regulatory definition for "rill," See summary response 14.3: Terms suggested for definition.**

14.634 The term swale means a low-lying area of land on which water collects, as a result of rainfall or snowmelt (p. 16)

Agency Response: **The final rule does not provide a regulatory definition for "swale," The agencies note certain swales may be wetlands. Only non-wetland swales are excluded. See summary response 14.3: Terms suggested for definition, the Preamble Section IV.I, and the Features and Waters Not Jurisdictional Compendium.**

14.635 Headwaters means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States at the point on the river or stream at which the average annual flow is less than five cubic feet per second. This point may be estimated from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For steams that are dry for long periods of the year, the point where headwaters begin may be established as the point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.[115] (p. 16-17)

Agency Response: **While the final rule does not include the term "headwaters", the great majority of tributaries as defined by the rule are headwater streams. See Tributaries Compendium.**

14.636 The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. The term does not include artificial lakes or ponds created by excavating and/or diking dry land.[116] (p. 17)

[115] 33 eFR 330.2(dl .
[116] 33 eFR 323.2(bl

Agency Response: **In response to the request for a definition of "waters," the preamble explains that, "The agencies use the term "water" and "waters" in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features." The agencies did not define "lake" separately. See Agencies' Summary Response 14.3 Terms Suggested for Definition for a discussion of this.**

Ruby Valley Conservation District, Montana (Doc. #16477)

14.637 Due to inadequate input from landowners, we request the interpretive rule which limits the sec. 404 "normal farming, silviculture and ranching" exemption to 56 NRCS practices be withdrawn. If this rule is not withdrawn, we suggest that local conservation districts be allowed to adopt conservation practices which would be in addition to the 56 NRCS practices. This approach will protect farmers and ranchers while at the same time protecting clean water. (p. 1)

Agency Response: **For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within the CWA are not affected by this rule and are outside the scope of the rulemaking.**

Pershing County Water Conservation District (Doc. #16519)

14.638 Words such as "converted cropland," "uplands," and "traditional," are not specifically defined. While we can assume that the irrigation canals and ditches within the District may fall under these exemptions, without express definitions of these exemptions, the District runs the risk of having the EPA define them how they see fit and exercise jurisdiction how they see fit. (p. 4)

Agency Response: **"Prior converted cropland" has been excluded from the definition of "waters of the United States" since 1992 and is defined by the USDA and NRCS at 7 CFR § 12.2 and in §514.30 of the National Food Security Act Manual, Fifth Edition, November 2010. The agencies will continue to implement this exclusion consistent with current policy and practice. For further discussion of PCC see summary response 7.2 in the Features/Waters Not-Jurisdictional Compendium.**

In response to comments regarding the definition of "upland," the rule no longer includes the term "upland" and revisions have been made to the exclusions listed in paragraph (b) in order to improve clarity. The rationale for the deletion of "upland" is in the preamble at Section V.I.

While the agencies considered other requests for definitions, the agencies reasonably concluded that the rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. The agencies also

concluded that attempting to add new definitions for some terms, such as "traditional", would actually introduce confusion. Preamble, IV.

See summary response 14.3: Terms suggested for definition.

D. Gillham (Doc. #16906)

14.639 A. Provide a way for the list of 56 normal agricultural practices to be updated with practices that are missed or new future practices. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within section 404(f)(1) are not affected by this rule and are outside the scope of the rule making.

Young Farmers and Ranchers Committee, American Farm Bureau Federation (Doc. #16850)

14.640 Second, to qualify for the "normal farming and ranching" exemptions, the activity has to be part of an "ongoing/established" farming or ranching operation. Under the Agencies' historical interpretation, that means the operations must have been ongoing at the same location since 1977 to benefit from the exemption. Any newer operation would require a section 404 permit just to move dirt, at least until it becomes an "established" operation. This limitation is most onerous for younger farmers and ranchers who were clearly not farming and ranching before 1977.

Third, as a result of the "Interpretive Rule" published at the same time as the proposed rule, the exemptions are now tied to mandatory compliance with what used to be voluntary Natural Resources Conservation Service (NRCS) standards. Farmers who qualify for the exemption previously could undertake these practices without the need for compliance with any specific standards. Now, unless the activities comply with NRCS standards, the exemption is inapplicable and a section 404 permit would be required.

The narrow "normal farming and ranching" exemption does not protect farmers and ranchers from the potentially devastating impact of this expansion of federal regulatory jurisdiction. It will not protect farmers and ranchers—younger farmers and ranchers in particular—or other landowners from new restrictions or prohibitions that will come from new 402 and 404 permit requirements, new water quality standards and "total maximum daily loads" for ditches, ephemeral drains and other features that the Agencies now plan to sweep into federal jurisdiction. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory permit exemptions within section CWA are not affected by this rulemaking and are outside the scope. The agencies recognize the vital role of farmers and have made changes in the definition of "adjacent" and provided additional ditch exclusions in response to their comments.. See Preamble Section IV.G and IV.I for a discussion of adjacent waters and excluded waters respectively. Also see the Adjacent Waters Compendium and the summary responses in Topic 6, sections 6.0 and 6.2 for a discussion of this topics. Finally, the rule is a definitional rule that addresses the

scope of the Clean Water Act nationwide, and does not change the regulatory requirements of any CWA program.

South Carolina Chamber of Commerce (Doc. #17368)

14.641 Additionally, there is no definition for the term "waters" which leaves open the possibility for both uncertainty and complexity in application of the term. Of specific concern to our members is the potential for industrial holding ponds or components thereof, such as stormwater treatment ponds, cooling water ponds or wastewater treatment ponds, to fall within the jurisdiction of this program. We believe that the definition of waters should be such that man-made structures used for commercial or industrial purposes are clearly excluded. (p. 2)

Agency Response: See summary response 14.3: Terms suggested for definition. In addition, the final rule includes revised and expanded exclusions in paragraph (b), including exclusions for certain stormwater control features, certain artificial ponds including cooling ponds, and wastewater treatment systems, including treatment ponds designed to meet the requirements of the Clean Water Act, provided these features are constructed in dry land. See summary responses for Topic 7: Features and Waters Not Jurisdictional, for further discussion of the exclusions.

Middle Snake Regional Water Resource Commission (Doc. #17380)

14.642 The NRCS has always been a trusted resource for our farmers and ranchers, but we believe the adoption of this regulation will place the NRCS in an adversarial role for the first time in their history. This will put future conservation projects at risk which benefits no one. When you say there is no impact to the farm community, you are wrong. (p. 2)

Agency Response: For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within section 404(f)(1) are not affected by this rulemaking and are outside the scope of the rule making.

Anonymous (Doc. #18955)

14.643 Suggested language for inclusion is provided below:

Added to PART 328DEFINITION OF WATERS OF THE UNITED STATES 328.3 (c) Definitions (and other similar sections)

Fully-constructed Stormwater Control Measures. The term fully-constructed stormwater control measures (SCMs) means man-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. SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or natural wetlands, ditches constructed at the location of natural streams or creeks, or stormwater channels constructed at the location of natural rivers) shall not be considered fully-constructed SCMs. Natural lakes,

natural ponds, and natural wetlands with stormwater conveyance pipes discharging to them and constructed outlets shall not be considered fully-constructed SCMs. SCMs that are subject to the ebb and flow of the tide shall not be considered fully-constructed SCMs. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. Additionally, the final rule provides an exclusion for certain stormwater control features created in dry land in paragraph (b) of the rule. See Preamble Section IV.I and the Features/Waters Not Jurisdictional Compendium for additional discussion.**

14.644 Added to PART 328 DEFINITION OF WATERS OF THE UNITED STATES 328.3 (b) The following are not waters of the United States notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section - (5) The following features: (and other similar sections)

(viii) Fully-constructed stormwater control measures. (p. 1)

Agency Response: **In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. Additionally, the final rule provides an exclusion for certain stormwater control features in paragraph (b) of the rule. See Preamble Section IV.I and the Features and Waters Not Jurisdictional Compendium for additional discussion.**

City of Olathe Kansas (Doc. #18982)

14.645 Applying Clean Water Act authority to ephemeral streams will present difficult regulatory challenges. EPA needs to clarify whether or not it would require states and local governments to regulate row crop agriculture along ephemeral streams. Small ephemeral channels are dominated by non-point sources of pollution in the uplands. In many watersheds, agricultural activities are responsible for pollutant loading to ephemeral streams. Most agricultural activities, except confined animal feeding operations (CAFOs), are exempt from Clean Water Act regulation. (p. 2)

Agency Response: **As discussed in the preamble, the rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. See also the Tributaries Compendium. The regulation of non-point source pollution is outside the scope of this rule. This rule is a definitional rule; it does not establish any regulatory requirements of any CWA program.**

K. Miles (Doc. #19129)

14.646 This comment/question is related to the Principles and Guidelines. Why have the Principles and Guidelines not been followed in planning Federal water resource project plans, specifically the analysis of the benefits and costs?

I am recommending that EPA jurisdiction of the CWA begins at the point where the natural formation of "bed and bank" of a drainage area in question can be clearly identified.

I am also recommending that the point of EPA jurisdiction shall begin in natural drains found to possess the hydrology to support intermittent flows. This demarcated point needs to be referenced on U.S. Geological Survey maps and colored in blue for a common reference to the intermittent frequency of the flows at that point. (p. 8)

Agency Response: In response to comments, the agencies have revised the rule by removing or modifying some terms that caused confusion and the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-lines to identify jurisdictional waters. See also the Tributaries Compendium. Additionally, the agencies prepared a revised Economic Analysis for the final rule. See the Economic Analysis of the EPA-Army Clean Water Rule and the Cost/Benefits Compendium for additional information.

United States Senate (Doc. #19309)

14.647 Meanwhile, farmers and ranchers who must endure uncertain weather and volatile markets to ensure America is food secure have expressed their concern to me about the regulatory burden and uncertainty created by this proposed rule. A field with a low spot that has standing water during a rainy week and happens to be located near a ditch does not warrant CWA regulation from a legal or a commonsense perspective. The Corps and EPA have responded to these concerns by saying that they are exempting dozens of conservation field next to the ditch, described above, could, under this proposed rule, be sued under practices, but these "exemptions" are extremely limited. The farmer with the low spot in the field next to the ditch, described above, could, under this proposed rule, be sued under Section 402 of the CWA. This farmer would face the risk of litigation costs for the use of everyday weed control and fertilizer applications, among other essential farming activities.

Section 402 is only one of many CWA violations with which agriculture producers would have to comply, and penalties under the CWA for noncompliance can add up to $37,500 a day per violation. Under this proposed rule, farmers and ranchers would have to be concerned about incurring such financially untenable penalties while carrying out activities essential to their operations, such as plowing, planting, and fence building on land that is far from a “navigable water.” (p. 2)

Agency Response: The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. Furthermore, the Interpretive Rule has been withdrawn. For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2.

The statutory permit exemptions within the CWA are not affected by this rulemaking. , and furthermore, under the final rule, classifies waters subject to the activities Congress exempted under Section 404(f)(1) as are not jurisdictional by rule as "adjacent." As these waters may be considered jurisdictional under a case specific evaluation. See Preamble Sections III.C and IV.H. Finally, the final rule contains a revised and expanded exclusion for ditches. See summary response in Topic 6.2: Excluded ditches for further discussion about these exclusions.

Goehring Vineyards, Inc. (Doc. #19464)

14.648 The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps's 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. 14)

Agency Response: The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. Furthermore, the Interpretive Rule has been withdrawn. For more information about the withdrawn Interpretive Rule, and other concerns related to agriculture and ongoing and normal farming, see the summary responses for Topic 14, Section 14.2 and 14.2.2. The statutory exemptions within section 404(f)(1) are not affected by this rulemaking, and furthermore, under the final rule classifies waters subject to the activities Congress exempted under Section 404(f)(1) are as not jurisdictional by rule as "adjacent." Although they may be jurisdictional under a case specific evaluation. Finally, the final rule contains a revised and expanded exclusion for ditches. See summary response in Topic 6.2: Excluded ditches for further discussion about these exclusions.

Des Moines Water Works (Doc. #19663)

14.649 **NRCS Conservation Standards**

Des Moines Water Works provided comments on the Interpretive Rule for more than 50 USDA –NRCS practice standards and recommended that all standards be reviewed and amended prior to implementation to ensure the standard does in fact improve water quality. Many of the NRCS practice standards claim water quality improvement, when in fact there is minimal or no water quality improvement achieved. For example, when crop

producers began installing tile drainage on their land, the water quality improvement was a reduction in sediment transport. However, since that time we have learned that there are unintended consequences from tile drainage – the expeditious transport of contaminants to our rivers, lakes and streams. Tile drainage circumvents nature's natural process of removing contaminants and transports water soluble nitrate and other contaminants directly to a water body. The tile drainage standard should reflect both the pros and cons of tile drainage. In its current state it is misleading and gives crop producers a false perception about tile draining their land. Any discharge of a contaminant from a pipe (agricultural drainage tile or drainage district) and transported away from its point of origin must be regulated before water quality will improve. (p. 3)

Agency Response: **The Interpretive Rule has been withdrawn, and the NRCS conservation practices are outside the scope of the rule. For more information about the withdrawn Interpretive Rule, see the summary response for 14.2.**

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 TSD, 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 B; Floodplain GIS Maps, Chariton County Missouri (Doc. #14986, p. 14-15)

Case studies of potential impacts of proposed rule (Doc. #14527, p. 6)

City of Copperas Cove - Legislative Issues; Examples of Drainage Facilities that are in Jeopardy of becoming Waters of the US (Doc. #14118.1, p. 2-5)

Colorado Prairie Isolated Waters Example (Doc. #14412, p. 61)

Current EPA Regulated Area (Examples 1 and 2); Proposed EPA Regulated Area (Examples 1 and 2). (Doc. #18864, p. 35-38)

EPA and ACOE Guidance Re Id of Waters Protected by the Clean Water Act. 76 Fed Reg 24,479 (Monday May 2, 2011) (Doc. #14420, p. 12-20)

Examples of Reduction of MS4 Service Area in Palm Beach County (Doc. #13218, p. 4-5)

Existing and Proposed WOTUS Areas for Charlotte County Florida (Doc. #13061, p. 4-5)

Existing / Proposed Mapping (Doc. #16527.1, p. 1-4)

Example 1 Current and Proposed EPA regulated area – an oil and gas producing area in Kentucky (Doc. #16527.1, p. 1-2)

Example 2 Current and Proposed EPA regulated area – an oil and gas producing area in Kentucky (Doc. #16527.1, p. 3-4)

Figure 1.a: Happy Canyon Creek Grandview Estates, USGS Topographical Map (Doc. #8145, p. 40)

Figure 1.b: Happy Canyon Creek Grandview Estates, Aerial Site Map (Doc. #8145, p. 41)

Figure 2.a: Kinney Creek at the Pinery, USGS Topographical Map (Doc. #8145, p. 42)

Figure 2.b: Kinney Creek at the Pinery, Aerial Site Map (Doc. #8145, p. 43)

Figure 3.a: Lake Gulch Road and Castlewood Canyon Road, USGS Topographical Map (Doc. #8145, p. 44)

Figure 3.b: Lake Gulch Road and Castlewood Canyon Road, Aerial Site Map (Doc. #8145, p. 45)

Figure 4.a: Upper Lake Gulch Road, USGS Topographical Map (Doc. #8145, p. 46)

Figure 4.b: Upper Lake Gulch Road, Aerial Site Map (Doc. #8145, p. 47)

Figure 5.a: Upper Lake Gulch Road and Interstate 25, USGS Topographical Map (Doc. #8145, p. 48)

Figure 5.b: Upper Lake Gulch Road and Interstate 25, Aerial Site Map (Doc. #8145, p. 49)

Figure 6.a: South Perry Park Road and Tall Horse Trail, USGS Topographical Map (Doc. #8145, p. 50)

Figure 6.b: South Perry Park Road and Tall Horse Trail, Aerial Site Map (Doc. #8145, p. 51)

Figure 7.a: Watertown Road and Rampart Range Road, USGS Topographical Map (Doc. #8145, p. 52)

Figure 7.b: Watertown Road and Rampart Range Road, Aerial Site Map (Doc. #8145, p. 53)

Iowa County Maps (99 Counties); NHD Flowlines (Doc. 15633.2-15633.12)

Generalized Depth to Groundwater [Nebraska] (Doc. #11855, p. 14)

Map of Current WoTUS Areas - Jefferson Parish (Doc. #14574.2)

Map showing intermittent channels of the Big Lost River, Little Lost River, and Birch Creek on the INL Site (Doc. #16448, p. 9)

Map of Current and Proposed WoTUS Areas - Jefferson Parish (Doc. #14574.4)

Map of Proposed WoTUS Areas - Jefferson Parish (Doc. #14574.3)

Map of Streams and Waterbodies in Nevada submitted by EPA to the House of Reps Committee on Science, Space and Technology (Doc. #13596, p. 56)

Nebraska Drainage Basins (Doc. #11855, p. 15)

Photos (Bodies of water in ND) (Doc. #12721.1, p. 1)

Photo (Occasional Flooding) (Doc. #5573.2, p. 1)

Potential Mine Site in Arizona (Doc. #14412, p. 59)

The Hermosa Mine Proposal: Potential Impacts to Patagonia's Water Supply. Prepared by Pete Dronkers, Southwest Circuit Rider for Earthworks, with assistance from the Patagonia Area Resource Alliance, October 2014 (Doc. #166394.6, p. 1-45)

West Field Team 4 – Resource Assessment (Doc. #6918.1, p, 14-17)

Wright Water Engineers, Inc. Figures (Doc. #8145)

In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. HW has not verified the references, or the validity of hyperlinks.

ACOE. 2010. Regional Supplement to the Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0) 9Doc. #10260, p. 34)

Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 5 U.S.C. § 553(b)(3)(A); 177 F.3d 1030, 1034 (D.C. Cir. 1999). (Doc. #12979, p. 12)

Beeri, O., and Phillips, R. L. 2007. "Tracking palustrine water seasonal and annual variability in agricultural wetland landscapes using Landsat from 1997 to 2005." Global Change Biology, 13(4), 897-912. (Doc. #15130, p. 6)

Breedlove, Dennis, & Associates, Inc. (BDA) Environmental Consultants:
Figure 2.1.1-1 Approved Jurisdictional Wetlands for Area No. 1, Florida (Doc. #10260, p. 22)
Figure 2.1.1-2 Approved Jurisdictional Wetlands in Relation to the 100-Year Floodplain for Area No. 1, Florida (Doc. #10260, p. 23)
Figure 2.1.1-3 Approved Jurisdictional Wetlands in Relation to the Proposed Riparian Area for Area No. 1, Florida (Doc. #10260, p. 25)
Figure 2.1.2-1 Approved Wetlands for Area No. 2, Florida (Doc. #10260, p. 28)
Figure 2.1.2-2 Approved Wetlands in Relation to the 100-Year Floodplain for Area No. 2, Florida (Doc. #10260, p. 29)
Figure 2.1.2-3 Approved Wetlands in Relation to the Proposed Riparian Area for Area No. 2, Florida (Doc. #10260, p. 31)
Figure 2.2.1-1 Potential Jurisdictional Wetlands for Watershed Area A, Florida (Doc. #10260, p. 37)
Figure 2.2.1-2 Potential Jurisdictional Wetlands for Watershed Area A Relative to the 100-Year Floodplain, Florida (Doc. #10260, p. 38)
Figure 2.2.1-3 Potential Jurisdictional Wetlands for Watershed Area A Relative to the Proposed Riparian Area, Florida (Doc. #10260, p. 39)
Figure 2.2.2-1 Potential Jurisdictional Wetlands for Watershed Area B, Florida (Doc. #10260, p. 41)

Figure 2.2.2-2 Potential Jurisdictional Wetlands for Watershed Area B Relative to the 100- Year Floodplain, Florida (Doc. #10260, p. 42)
Figure 2.2.2-3 Potential Jurisdictional Wetlands for Watershed Area B Relative to the Proposed Riparian Area, Florida (Doc. #10260, p. 44)

Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010) (Doc. #8377.1, p. 2)

Cavanaugh, M.L., S.A. Kurc, and R.L. Scott, 2011. Evapotranspiration partitioning in semiarid shrubland ecosystems: a two-site evaluation of soil moisture control on transpiration. Ecohydrology 4(5): 671-681. (Doc. #14135.1, p. 12)

Central Florida Water Initiative, Overview of the Central Florida Water Initiative, website: http://cfwiwater.com (Doc. #15069, p. 5)

Central Florida Water Initiative, Regional Water Supply Plan. 2014 (April 2014). Available at: http://cfwiwater.com/pdfs/CFWI_RWSP_FinalDraft_Vol1.pdf (Doc. #15069, p. 5)

Chevron U.SA. v. Natural Res. Def. Council. 1984. 467 U.S. 837 at p. 842. (Doc. #15625, p. 5)

City of Colorado Springs v. Climax Molybdenum Co., 587 F.3d 1071, 1074 (10th Cir. 2009). (Doc. #14414, p. 20)

Cochran, Sen. Thad et al.Letter to EPA Adm'r Gina McCarthy et al.. Oct. 23, 2014. available at http://www.cochran.senate.gov/public/_cache/files/dfd0b876-aa10-4f83-b348-e5dc24c5c004/WOTUS-Ag-Interpretive-Rule-Letter.pdf. (Doc. #12979, p. 12)

Copland, Claudia CRS Report, "EPA and the Army Corps' Proposed Rule to Define 'Waters of the United States'" . March 27, 2014. (Doc. #12349, p. 8)

Courtwright, J. & May, C.L. (2013) Importance of terrestrial subsidies for native brook trout in Appalachian intermittent streams. *Freshwater Biology*, 58, 2423–2438. (Doc. #11652, p. 2)

Cowardin et al., 1979 (Doc. #16893, p. 2)

Dairy Environmental Handbook: Best Management Practices for Dairy Producers" http://www.nmpf.org/publications/dairy_handbook (Doc. #15436.1, p. 3)

Davey, A.J.H. & Kelly, D.J. (2007) Fish community responses to drying disturbances in an intermittent stream: a landscape perspective. *Freshwater Biology*, 52, 1719-1733. (Doc. #11652, p. 2)

Deyton, E. B., Schwartz, J. S., Robinson, R. B., Neff, K. J., Moore, S. E., & Kulp, M. A. 2009. "Characterizing episodic stream acidity during stormflows in the Great Smoky

Mountains National Park." Water, Air, and Soil Pollution 196(1-4), 3-18. (Doc. #15130, p. 6)

Dodd, K. 1992. Biological diversity of a temporary pond herpetofauna in north Florida sandhills. Biodiversity and Conservation 1:125-142. (Doc. #15545, p. 5)

Earth Economics. 2010. Valuing the Puget Sound, Revealing Our Best Investments at, available at http://www.eartheconomics.org/FileLibrary/file/Reports/Puget%20Sound%20and%20Watersheds/Puget%20Sound%20Russell/Valuing%20the%20Puget%20Sound%20Basin%20v1.0.pdf. (Doc. #15431, p. 10)

Elsner, et al,. 2009. Implications of 21st Century Climate Change for the Hydrology of Washington State, available at http://cses.washington.edu/db/pdf/wacciach3hydrology644.pdf (Doc. #15431, p. 7)

Environmental Law Institute (ELI) study titled, "State Constraints. 2013. State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act" (Doc. #14114, p. 4)

Erman, D.C. & Hawthorne, V.M. (1976) The quantitative importance of an intermittent stream in the spawning of rainbow trout. *Transactions of the American Fisheries Society*, 105, 675-681. (Doc. #11652, p. 2)

Esri, DigitalGlobe, GeoEye, i-cubed, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community); Aerial Photography; • USFWS NWI. 2014 (Doc. #10260, p. 33)

FEMA 100-Year Floodplain Data.1996. Flood Insurance maps (Doc. #10260, p. 33)

FEMA Flood Insurance maps. 1996. (Doc. #10260, p. 35)

FDEP; Karst systems (based on Closed Topographic Depression [2004] GIS data available from the FDEP) (Doc. #10260, p. 33)

FDEP; Closed Topographic Depression [2004] GIS data available from the FDEP (Doc. #10260, p. 35)

Florida Department of Environmental Protection, Regional Water Supply Planning, website: http://www.dep.state.fl.us/water/waterpolicy/rwsp.htm (Doc. #15069, p. 5)

Forbes, M. G., et al..2012., "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," Wetlands 32(4): 705 (Doc. #0866, p. 2)

Futurewise. Undated. As Groundwater Issues Increase Across State, Futurewise Wins for Water Quality in Grays Harbor, Walla Walla, and Yakima Counties, available at http://futurewise.org/resources/news/groundwaternews (Doc. #15431, p. 8)

Gibbons, J.W., C.T. Winne, D.E. Scott, J.D. Willson, X. Glaudas, K.M. Andrews, B.D. Todd, L.A. Fedewa, L. Wilkinson, R.N. Tsaliagos, S.J. Harper, J.L. Greene, T.D. Tuberville, B.S. Metts, M.E. Dorcas, J.P. Nestor, C.A. Young, T. Akre, R.N. Reed, K.A. Buhlmann, J. Norman, D.A. Croshaw, C. Hagen, and B.B. Rothermel. 2006. Remarkable amphibian biomass and abundance in an isolated wetland: implications for wetland conservation. Conservation Biology 20:1457-1465. (Doc. #15545, p. 5)

Graham, John D., and Broughel, James. June 4, 2014. "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," Harvard Journal of Law and Public Policy: Federalist Edition 1, no. 1 (June 4, 2014): 30–54 (Doc. #12754, p. 5)

Graham, John D. Graham and Liu, Cory R. Srping 2014. "Regulatory and Quasi-Regulatory Activity without OMB and Benefit-Cost Review," Harvard Journal of Law and Public Policy 37, no. 2. (Doc. #12754, p. 5)

Gonzales v. Oregon, 546 U.S. 243. 2006. (Doc. #8377.1, p. 2)

Hobbs, A., 2014. Septic Systems Threaten Water Quality Throughout Thurston County, THE OLYMPIAN (Sept. 28, 2014), available at http://www.theolympian.com/2014/09/28/3339776_septic-systems-threaten-water.html?rh=1 (Doc. #15431, p. 10)

Ibekwe, A. M. 2006. Quantification of Survival of Escherichia coliO157:H7 on Plants Affected by Contaminated Irrigation Water. Engineering in Life Sciences, v6 n6 at 566-572 (December, 2006) (Doc. #15431, p. 8)

INDUS; October. 2013. http://science.edgeboss.net/sst2014/documents/epa/wyoming2013.pdf; Prepared by Corporation under contract with U.S. Environmental Protection Agency Office of Water – Washington, DC.(Doc. #16441, p. 7)

Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 280-283. 1958. (Doc. #14414, p. 19)

Jefferson Parish Map of Areas Affected by the Current WoTUS Regulations (Doc. #16459.3, p. 1)

Kansas Water Quality Standards (April 27, 2005 and updates through July 1, 2011 (Doc. #14408, p. 9)

Kansas Department of Health and Environment; Current Kansas Classified Streams in WOTUS, (Doc. #14424, p. 16)

Kelly David Burke. May 19, 2014. EPA Targets Couple's Private Pond in Wyoming, Threatens Huge Fines•, PCtxNEWS.com , http://www.foxnews.com/politics/2014/05/19/feds- target-private-pond/. (Doc. #1512, p. 2)

Labbe, T.R. & Fausch, K.D. (2000) Dynamics of intermittent stream habitat regulate persistence of a threatened fish at multiple scales. *Ecological Applications*, 10, 1774-1791. (Doc. #11652, p. 2)

Letter from Ted Sturdevant, Director, Washington State Dept. of Ecology to Kevin Bouchey, Yakima County Commissioner (Nov. 15, 2011) available at http://www.ecy.wa.gov/programs/wq/grndwtr/YakimaGWMACvrLtr.pdf (Doc. #15431, p. 9)

Loehman, R. 2009. "Understanding the science of climate change: Talking points - impacts to prairie potholes and grasslands." Natural Resource Report NPS/NRPC/NRR—2009/138. National Park Service, Fort Collins, Colorado. (Doc. #15130, p. 6)

Mantua, et al., 2009. Impacts of Climate Change on Key Aspects of Freshwater Salmon Habitat in Washington State, available at http://cses.washington.edu/db/pdf/wacciach6salmon649.pdf (Doc. #15431, p. 7)

Maricopa-Stanfield Irrig. & Drainage Dist. v. United States, 158 F.3d 428, 430-431 (9th Cir. 1998); United States v. 0.59 Acres of Land, 109 F.3d 1493, 1495 (9th Cir. 1997). (Doc. #14414, p. 20)

May, C.L. & Lee, D.C. (2004) The relationship between in-channel sediment storage, pool depth, and summer survival of juvenile salmonids in Oregon Coast Range streams. *North American Journal of Fisheries Management*, 24, 761-774. (Doc. #11652, p. 2)

McLaughlin, D.L., D. A. Kaplan, and M. J. Cohen. 2014. A significant nexus: geographically isolated wetlands influence landscape hydrology, Water Resour. Res., 50,doi:10.1002/2013WR015002 (Doc. #15545, p. 7)

Mendelson, Nina A. and Wiener, Jonathan B. Spring 2014. "Responding to Agency Avoidance of OIRA," Harvard Journal of Law and Public Policy 37, no. 2, 447–521 (Doc. #12754, p. 5)

Means, R. 2008. Management Strategies for Florida's Ephemeral Ponds and Pond-Breeding Amphibians. Final Report, available at http://www.coastalplains.org/pdf/Final%20Report%202008.pdf (last visited November 1 3, 2014). (Doc. #15545, p. 5)

Metropolitan Water District v. Marquardt, 59 Cal.2d 159, 171-173. 1963. (Doc. #14414, p. 19)

Mote, P. and Salathé, E. 2009. Future Climate in the Pacific Northwest, available at http://cses.washington.edu/db/pdf/wacciach1scenarios642.pdf (Doc. #15431, p. 6)

National Association of Home Builders, Testimony before the Subcommittee on Water Resources and Environment. June 11, 2014.. http://transportation.house.gov/uploadedfiles/2014-06-11-kelly.pdf . (Last visited Sept. 11, 2014). (Doc. #10952, p. 3)

NACD comments on the Interpretive Rule. June 13, 2014. http://www.nacdnet.org/dmdocuments/NACD-Comment-Letter-IR-6-13-14.pdf. (Doc. #12349, p. 2)

Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE). February 25, 2005. Joint Guidance Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985 (Doc. #10260, p. 26)

Nevada v. United States, 463 U.S. 110, 115-116. 1983. (Doc. #14414, p. 19)

NRCS STATSGO2 General Soil Map of the United States . 2006. (Doc. #10260, p. 33)

Natural Resources Conservation Service. "Conservation Practices." http://www.nrcs.usdagov/wps/portal/nrcs/delailfull/national/technical/references/?cid=nrc s 143 026H49. (Doc. #13024, p. 16)

New Mexico Environment Department. September 9, 2014. "WQCC Draft 2014-2016 State of New Mexico CWA Section 303(d)l305(b) Integrated Report ." Available at : http//www nmenv.state.nm.us/swqb/303d-305b120l4-2016/ (Doc. #13024, p. 16)

Oregon Dept. Of Energy, Frequently Asked Questions (FAQ's) about Hanford at 5, available at http://www.oregon.gov/energy/NUCSAF/docs/FAQs_for_Nuclear_Safety-Hanford.pdf (Doc. #15431, p. 9)

PADEP. 2014. Pennsylvania Integrated Water Quality Monitoring and Assessment Report , (Doc. #15167, p.7)

Pendley, William Perry. May 2, 2014. EPA Out of Touch, Out of Control in Wyoming, WASHINGTON TI1v1F.s), http;//www.washingtontimes.com/news/2014/may/2/pendley-earth-to-epa/. (Doc. #1512, p. 2)

People For Puget Sound, The Problem of Polluted Runoff in Puget Sound, available at http://pugetsound.org/education/polluted-runoff (Doc. #15431, p. 10)

Puget Sound Partnership, About the Puget Sound Partnership, available at http://www.psp.wa.gov/aboutthepartnership.php (Doc. #15431, p. 10)

Puget Sound Partnership, Strategic Initiatives, available at http://www.psp.wa.gov/action_agenda_strategic_initiatives.php (Doc. #15431, p. 10)

Puget Sound Partnership, Strategic Initiatives, http://www.psp.wa.gov/action_agenda_strategic_initiatives.php (Doc. #15431, p. 10)

Rawhide Wash Gage Data (Doc. #17159, p. 8)

San Francisco Baykeeper v. Cargill Salt Division, 481 F. 3d 700, 705 (2007) (Doc. #16610, p. 11)

Sbodio, A., et al., 2013. Modified Moore Swab Optimization and Validation in Capturing E. Coli O157:H7 and Salmonella Enterica in Large Volume Field Samples of Irrigation Water, Food Research International, v51 n2 at 654-662 (Doc. #15431, p. 8)

Schramm, A and R. Loehman. 2010. "Understanding the science of climate change: talking points - impacts to the Great Lakes." Natural Resource Report NPS/NRPC/CCRP/NRR—2010/247. National Park Service, Fort Collins, Colorado. (Doc. #15130, p. 5)

Sell, R. and Knutson, L., Quality of Ground Water in Private Wells in the Lower Yakima Valley, 2001-02 (2002), available at: https://fortress.wa.gov/ecy/publications/publications/0210074.pdf (Doc. #15431, p. 9)

Sheibley et al. 2014 (Doc. #15130, p. 6)

Snyder, D. T., and Haynes, J. V., 2010. Groundwater Conditions During 2009 and Changes in Groundwater Levels from 1984 to 2009, Columbia Plateau Regional Aquifer System, Washington, Oregon, and Idaho, available at http://pubs.usgs.gov/sir/2010/5040 (Doc. #15431, p. 8)

South Florida Water Management District (SFWMD). 2008. Land Cover Classification, (Doc. #10260, p. 33)

South Florida Water Management District, Dispersed Water Management, website: http://www.sfwmd.gov/portal/page/portal/xweb%20protecting%20and%20restoring/water%20storage%20programs#dwm (Doc. #15069, p. 5)

SPA-2007-636-ABQ, SPA-2007-00677-ABQ, SPA-2007-442-ABQ, SPA-2007-3540-ABQ, SPA-2008-54-AQB (research was conducted only for 2007 and 2008 and is not comprehensive) (Doc. #15346, p. 3)

Sunding, David, "Review of the 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States"(May 15, 2014) http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule/. (Doc. #12349, p. 8)

Taylor, W.R., Director, Office of Environmental Policy and Compliance. (Febuary, 5, 2008).

"Bureau of Reclamation Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabell (FR Vol. 72, No. 110, June 8, 2007)," at pp. 1-2, attached to letter from W.R. Taylor, Director, Office of Environmental Policy and Compliance, United States Department of the Interior, Office of the Secretary, to D.M. Downing, U.S. EPA, "RE: Environmental Protection Agency and the U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After Rapanos (Docket Number: EPA-HQ-OW-2007-0282)"; downloaded Sept. 10,2014, from http://www.fws.gov /habitatconservation/rapanos carabell/DOI comments on post Rapanos Guidance.pdf (hereafter "BOR 2008 Guidance Comments").(Doc. #19461, p. 6)

The Climate Impacts Group, University Of Washington. 2009. The Washington Climate Change Impacts Assessment, Evaluating Washington's Future in a Changing Climate Executive Summary, available at http://cses.washington.edu/db/pdf/wacciaexecsummary638.pdf (Doc. #15431, p. 7)

The Protecting America's Waters Workgroup of the Local Government Advisory Committee (LGAC). and The Water Environment Federation. November 6, 2014 webinar titled "Viewpoints: Potential Impacts of Waters of the U.S. Rulemaking on Stormwater Infrastructure" (Doc. #16665, p. 1)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 728-736. 1950. (Doc. #14414, p. 19)

United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 98-100. 1982. (Doc. #14414, p. 19)

USDA NRCS Hydric and Predominately Hydric Soils, Web Soil Survey accessed October 2014 (Doc. #10260, p. 33)

U.S. Dept. Of Energy – Hanford, Hanford Cleanup, available at http://www.hanford.gov/page.cfm/HanfordCleanup (Doc. #15431, p. 8-9)

U.S. Dept. Of Energy, Hanford Site Groundwater Monitoring Report for 2013, Figure ES.16 Hanford Sitewide Plume Areas, available at http://www.hanford.gov/c.cfm/sgrp/GWRep13/html/gw13_Start-PDF.htm (Doc. #15431, p. 9)

U.S. Dept. Of Energy, Hanford Site Groundwater Monitoring Report for 2013, Table ES.1-Overview of the River Corridor Groundwater Interest Areas Contaminant Concentrations, Table ES.2-Overview of Central Plateau Groundwater Interest Areas Contaminant Concentrations, available at http://www.hanford.gov/c.cfm/sgrp/GWRep13/html/gw13_Start-PDF.htm (Doc. #15431, p. 9)

U.S. Environmental Protection Agency, Region 10, Lower Yakima Valley Groundwater, available at http://yosemite.epa.gov/r10/water.nsf/gwpu/lyakimagw (Doc. #15431, p. 9)

U.S. Environmental Protection Agency, Region 10, Administrative Order on Consent, Docket No. SDWA- 10-2013-0080, available at http://www.epa.gov/region10/pdf/sites/yakimagw/consent_order_yakima_valley_dairies_march2013.pdf (Doc. #15431, p. 10)

U.S. Geological Survey, Ground Water and Surface Water, A Single Resource, Circular 1139, Fig. B-2 at 13, available at: http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf (Doc. #15431, p. 6)

USGS; The extent of the Surficial Aquifer System (based on the USGS Principal Aquifers of Florida [2003] GIS data layer (Doc. #10260, p. 33)

USGS NHD 1:24,000 Scale Flowline Data. December 2012 (Doc. #10260, p. 33)

USGS Watershed Boundary Dataset accessed in October 2014 (to include sub-watershed12-digit HUC) (Doc. #10260, p. 33)

Vano, et al., Climate Change Impacts on Water Management and Irrigated Agriculture in the Yakima River Basin, Washington, USA (2009), available at http://cses.washington.edu/db/pdf/wacciach3yakima646.pdf (Doc. #15431, p. 7)

Vano et al., 2009. Climate Change Impacts on Water Management and Irrigated Agriculture in the Yakima River Basin, Washington, USA, http://cses.washington.edu/db/pdf/wacciach3yakima646.pdf (Doc. #15431, p. 7)

Vano, et al., 2009. Climate Change Impacts on Water Management in the Puget Sound Region, Washington, USA, http://cses.washington.edu/db/pdf/wacciach3pswater645.pdf (Doc. #15431, p. 7)

Washington State Department of Ecology, Functions and Values of Wetlands, available at http://www.ecy.wa.gov/programs/sea/wetlands/functions.html (Doc. #15431, p. 6)

Washington State Department of Ecology, Ground Water Quality Information, available at http://www.ecy.wa.gov/programs/Wq/grndwtr/index.html (Doc. #15431, p. 6)

Washington State Department of Ecology, Growth Management Act Information, available at http://www.ecy.wa.gov/programs/Wq/grndwtr/cara/gma.html (Doc. #15431, p. 8-9)

Washington State Department of Ecology, Nuclear Waste Projects Hanford, available at http://www.ecy.wa.gov/programs/nwp/groundwater.htm (Doc. #15431, p. 8)

Washington State Department of Ecology, Threats to Puget Sound, available at http://www.ecy.wa.gov/puget_sound/threats.html (Doc. #15431, p. 10)

Western Regional Climate Center, http ://www.wrcc.dli.edu/climatedata/cliimtables/ci tycompppt (Doc. #15026, p. 3)

Wigington, P.J., Ebersole, J.L., Colvin M.E., Leibowitz, S.G., Miller, B., Hansen, B., et al. (2006) Coho salmon dependence on intermittent streams. *Frontiers in Ecology and the Environment*, 4, 513-518. (Doc. #11652, p. 2)

Wilcox, B.P., et al. 2011. "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," Wetlands 31: 451-458 (Doc. #0866, p. 2)

Wood, M.L., House, P.K., and Pearthree, P.A. 1999. Historical Geomorphology and Hydrology of the Santa Cruz River. Arizona Geological Survey Open-File Report 99-13. (Doc. #14135.1, p. 12)

Wyoming Watersheds and Riparian Zones; Q. Skinner, K. Crane, J. Hiller, J. D. Rodgers; 2000 (Doc. #16441, p. 7)

ftp://nhdftp.usgs.gov/DataSets/Staged/States/FileGDB/HighResolution/ (Doc. #16441, p. 7)

http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf. (Doc. #13271, p. 28)

http://nmenv.state.nm.us/swqb/303d-305b/2014-2016/ (Doc. #13024, p. 16)

http://publiclands.org/visitorcenter/exhibits.php?e=Lands&s=Killpecke (Doc. #16528.1, p. 8)

http://science.edgeboss.net/sst2014/documents/epa/national2013.pdf (Doc. #15023, p. 10)

http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm (Doc. 14197, p. 2)

http://www.dcnr.state.paus/forestry/recreation/Boating/index.html (Doc. #15167, p. 6)

http://www.nrcs.usdagov/wps/portal/nrcs/dclailfull/national/techncal/references/?cid=nrcs143_026849 (Doc. #13024, p. 16)

www.gicinc.org_PDFs_Nelson_Stewardship_Guide.pdf (Doc. #13893, p. 2)

www.tinyurl.com/EPAwaters (Doc. #14968, p. 24)