Clean Water Rule Comment Compendium
Topic 1: General Comments

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 general matters including state and tribal authorities 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.

In this compendium, where otherwise not marked, responses by the Agencies are in bold text.

TOPIC 1. GENERAL COMMENTS 13
AGENCY SUMMARY RESPONSE 13
SPECIFIC COMMENTS 23
Committee on Space, Science and Technology (Doc. #16386) 23
Kansas House of Representatives Committee on Energy & Environment (Doc. #4903) 24
Kansas Senate Committee on Natural Resources (Doc. #4904) 25
Attorney General of Texas (Doc. #5143.2) 25
Rural County Representatives of California (Doc. #5537) 25
Johnson County and Eastern Sheridan County, Wyoming (Doc. #6191) 26
Tennessee Department of Environment and Conservation (Doc. #15135) 26
State of Alaska (Doc. #19465) 26
Travis County, Texas (Doc. #4876) 26
Damascus Township Board of Supervisors (Doc. #5481) 27
County of El Dorado, California (Doc. #5483) 27
St. Johns County Board of County Commissioners (Doc. #5598) 27
New Hanover County, North Carolina (Doc. #5609) 28
City of Thornton (Doc. #7328.2) 28
Murray County Board of Commissioners (Doc. #7528.1) 28
Iowa Department of Agriculture and Land Stewardship - State Soil Conservation Committee (Doc. #7642) 29
Beaver County Commission (Doc. #9667) 30
White Pine County, Board of County Commissioners (Doc. #9975) 30
Office of the City Attorneys, City of Newport News, Virginia (Doc. #10956) 31
Board of Commissioners of Carbon County, Utah (Doc. #12738) 31
Elko County Board of Commissioners, Nevada (Doc. #12755) 31
Big Horn County Commission (Doc. #13599) 31
Campbell County Conservation District (Doc. #13630) 32
Florida League of Cities, Inc. (Doc. #14466) 32
Marion County Board of County Commissioners (Doc. #14979) 32
Sierra Club Iowa Chapter (Doc. #15446) 33
Terrebonne Levee and Conservation District (Doc. #16365) 33
Meeteetse Conservation District (Doc. #16383) 34
Amador County Board of Supervisors (Doc. #17450) 34
California State Association of Counties (Doc. #9692) 35
Florida Association of Counties (Doc. #10193 35
Colorado Stormwater Council (Doc. #12981) 35
Golf Course Superintendents Association of America et al. (Doc. #14902) 36
American Foundry Society (Doc. #15148) 37
Automotive Recyclers Association (Doc. #15343) 37
Dow Chemical Company (Doc. #15408) 38
Association of Nebraska Ethanol Producers (Doc. #15512) 39
Federal Water Quality Coalition (Doc. #15822.1) 39
Louisiana Landowners Association (Doc. #16490) 40
Water Advocacy Coalition (Doc. #17921.1) 41
American Society of Civil Engineers (Doc. #19572) 43

Minnkota Power Cooperative, Inc. (Doc. #19607) 43
Houma-Terrebonne Chamber of Commerce (Doc. #19624) 44
Shiels Engineering, Inc. (Doc. #13558) 45
O'Neil LLP (Doc. #14651) 45
Home Builders Association of Tennessee (Doc. #16849) 45
CEMEX (Doc. #19470) 46
South Carolina Forest Association (Doc. #6855) 46
American Petroleum Institute (Doc. #15115) 46
American Gas Association (Doc. #16173) 47
Georgetown Sand & Gravel (Doc. #19566) 47
D. Warnock (Doc. #0984) 47
Washington Cattlemen's Association (Doc. #3723) 48
Montana Wool Growers Association (Doc. #5843) 48
Cattle Empire (Doc. #8416) 49
Alameda County Cattlewomen (Doc. #8674) 49
Bayless and Berkalew Co. (Doc. #12967) 51
Indiana State Poultry Association (Doc. #13028.1) 52
Iowa Corn Growers Association (Doc. #13269) 52
Delaware Council of Farm Organizations (Doc. #12345) 53
Western Growers Association (Doc. #14130) 54
Kansas Agriculture Alliance (Doc. #14424) 55
Missouri Soybean Association (Doc. #14986) 56
Jefferson Mining District (Doc. #15706) 56
Loup Basin Reclamation District, Farwell Irrigation District, Sargent Irrigation District, Nebraska (Doc. #16474) 57
Wilkin County Farm Bureau (Doc. #19489) 57
Ohio Pork Council (Doc. #19554) 58
Chicken & Egg Association of Minnesota (Doc. #19584) 59
Iowa Poultry Association (Doc. #19589) 59
Clearwater Watershed District; et al. (Doc. #9560.1) 60
Westlands Water District (Doc. #14414) 60
Santa Clara Valley Water District (Doc. #14476) 61
The Fertilizer Institute (Doc. #14915) 62
Utility Water Act Group (Doc. #15016) 62
Colorado River Water Conservation District (Doc. #15070) 62
San Diego County Water Authority, California (Doc. #15089) 62
Association of Metropolitan Water Agencies et al. (Doc. #15157) 64
Pennsylvania Independent Oil and Gas Association (Doc. #15167) 64
Interstate Council on Water Policy (Doc. #15397) 64
Association of Fish and Wildlife Agencies (Doc. #15399) 66
Eastern Municipal Water District (Doc. #15409) 66
Oregon Water Resources Congress (Doc. #15488) 66
Lower Arkansas Valley Water Conservancy District (Doc. #15767) 66
Association of Electronic Companies of Texas, Inc. (Doc. #16433) 67
Texas Water Development Board (Doc. #16563) 67
Alliant Energy Corporate Services, Inc. (Doc. #18791) 68

Associated Industries of Florida (Doc. #19325) 68
Texas Conservative Coalition (Doc. #14528) 68
Black Hills Regional Multiple Use Coalition (Doc. #14920) 69
Guardians of the Range (Doc. #14960) 70
Black Warrior Riverkeeper, Inc. (Doc. #15090) 70
Hackensack Riverkeeper, Hudson Riverkeeper, Milwaukee Riverkeeper, NY/NJ Baykeeper and Raritan Riverkeeper (Doc. #15360) 71
Green Dining Alliance (Doc. #15700) 71
Red River Valley Association (Doc. #16432) 72
Connecticut River Watershed Council (Doc. #16456) 72
Save the Illinois River, Inc. (Doc. #16462) 72
Arkansas Wildlife Federation (Doc. #16493) 73
Greater Fort Bend Economic Development Council (Doc. #18009) 73
Coalition for the Delaware River Watershed (Doc. #18832) 73
Cache La Poudre Water Users Association (Doc. #18904) 74
Upper Mississippi, Illinois, & Missouri Rivers Association (Doc. #19563) 76
The Property Which Water Occupies (Doc. #8610) 76
K. Mantay (Doc. #15192.1) 78
O'NEIL LLP (Doc. #16559) 78

1.1. COMMENTS ON STATE/TRIBAL AUTHORITY 79

AGENCY SUMMARY RESPONSE 79
SPECIFIC COMMENTS 88
Committee on Space, Science and Technology (Doc. #16386) 88
Secretary of Energy & Environment, State of Oklahoma (Doc. #2038) 90
Barona Band of Mission Indians (Doc. #2476) 91
Attorney General of Texas (Doc. #5143.2) 92
North Dakota Water Resource Districts Association (Doc. #5596) 94
Pennsylvania Department of Transportation (Doc. #6258.1) 94
Illinois House of Representatives (Doc. #7978) 94
Pennsylvania Department of Environmental Protection, Office of Water Management (Doc. #7985) 95
West Virginia Attorney General, et al. (Doc. #7988) 98
State of Iowa (Doc. #8377) 98
Navajo Nation Environmental Protection Agency (Doc. #10117) 103
Washington State Senate (Doc. #10871) 104
New York State Attorney General (Doc. #10940) 104
Illinois State Senate, Jacksonville, IL (Doc. #11995) 105
Utah State Senate et al. (Doc. #12338) 107
Kansas Water Authority (Doc. #12350) 108
Department of Justice, State of Montana (Doc. #13625) 109
Wyoming Association of Conservation Districts (Doc. #14068) 109
Commonwealth Pennsylvania Department of Agriculture (Doc. #14465) 113
State of Wyoming (Doc. #14584) 113
Maine Department of Environmental Protection (Doc. #14624) 116
State of Oklahoma (Doc. #14625) 117
Western Governors Association (Doc. #14645) 117

Arizona State Land Department (Doc. #14973) 122
San Carlos Apache Tribe (Doc. #15067) 123
Arizona Department of Environmental Quality, et al. (Doc. #15096) 124
Wisconsin Department of Natural Resource (Doc. #15141) 126
Louisiana Department of Environmental Quality (Doc. #15164) 127
Sealaska Corporation (Doc. #15356) 127
North Dakota Office of the Governor, et al. (Doc. #15365) 128
State of Florida (Doc. #15429) 129
New Mexico Environment Department (Doc. #16552) 130
Office of the Governor, State of Montana (Doc. #16694) 131
Arizona State Senate (Doc. #16895) 131
State of South Dakota (Doc. #16925) 132
Arizona House of Representative (Doc. #17041) 132
Nebraska State Legislature (Doc. #19315) 133
State of Alaska (Doc. #19465) 133
Western Governors Association (Doc. #19654) 134
Kittson County Board of Commissioners (Doc. #1022.1) 135
Catawba County Board of Commissioners, North Carolina (Doc. #1763) 135
Board of County Commissioners, Huerfano County (Doc. #1771) 136
County of Elk (Doc. #2727) 136
Sheridan County Commission (Doc. #3271) 136
Sweet Grass Conservation District (Doc. #3310) 137
Wayne County Commissioners (Doc. #4226) 137
Lincoln County Conservation District, Washington (Doc. #4236.2) 138
Bonner County Board of Commissioners (Doc. #4879) 138
Consolidated Drainage District #1, Mississippi County, MO (Doc. #6254) 138
Texas Soil and Water Conservation District #343 (Doc. #6793) 139
White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936.1) 139
Murray County Board of Commissioners (Doc. #7528.1) 140
Kosciusko County (Doc. #7623) 140
Upper Colorado River Authority (Doc. #7966) 140
Southeast Texas Groundwater Conservation District (Doc. #8142) 141
Southeast Texas Groundwater Conservation District (Doc. #8419.1) 142
City of Portland, Maine (Doc. #8659) 142
Beaver County Commission (Doc. #9667) 142
Pike Peak Area Council of Governments (Doc. #9732) 145
Custer County Commission (Doc. #10186) 146
Dayton Valley Conservation District (Doc. #10198) 146
Elk County Commissioners (Doc. #10941) 147
Sanpete County, Manti, Utah (Doc. #11978) 147
Board of County Commissioners, Churchill County, Nevada (Doc. #12260) 147
Mesa County, Colorado Board of County Commissioners (Doc. #12713) 148
City of Palo Alto, California (Doc. #12714) 148
Uintah County, Utah (Doc. #12720) 149
Wibaux County Commissioners, Wibaux, Montana (Doc. #12732) 149

Whitman County Commissioners, Colfax, WA (Doc. #12860) 150
Flathead County Board of Commissioners (Doc. #13072) 150
Mille Lacs County Board of Commissioners (Doc. #13198) 151
Carson Water Subconservancy District, Carson City, NV (Doc. #13573) 152
Big Horn County Commission (Doc. #13599) 152
Brown County (Doc. #13603) 153
Lipan-Kickapoo Water Conservation District, Vancourt, Texas (Doc. #13617) 153
Maricopa County Board of Supervisors (Doc. #14132.1) 154
The Board of County Commissioners of Otero County New Mexico (Doc. #14321) 155
Natural Resources, Clearwater, FL (Doc. #14426.1) 155
Cassia County, Idaho Board of Commissioners (Doc. #14972) 156
National Association of Counties (Doc. #15081) 156
Board of County Commissioners, Richardson, Nebraska (Doc. #15082) 157
Central Platte Natural Resources District (Doc. #15477) 157
City of Portland, Maine (Doc. #15582) 159
Beaverhead County Commissioners (Doc. #16892) 159
Board of Supervisors, Broadwater Conservation District, Montana (Doc. #18819) 159
Quay County, New Mexico (Doc. #19558) 160
Central Flyway Council (Doc. #5578) 163
Pike County (IL) Republican Central Committee, Pike County Republican Party, Illinois (Doc. #7984) 163
Washington State Association of Counties (Doc. #9976) 163
Nebraska Association of Resources Districts (Doc. #11855) 164
National Association of Conservation Districts (Doc. #12349) 165
California Central Valley Flood Control Association (Doc. #12858) 166
County Commissioners Association of Pennsylvania (Doc. #14579) 167
North Carolina Department of Environment and Natural Resources (Doc. #14984) 168
Kansas Natural Resource Coalition (Doc. #15009) 169
Oklahoma Municipal League (Doc. #16526) 169
Michigan Association of Conservation Districts (Doc. #16583) 170
Montana Association of Conservation Districts (Doc. #18628) 171
U.S. Chamber of Commerce (Doc. #14115) 171
Indiana Farm Bureau et al. (Doc. #14119) 173
Georgia Chamber of Commerce (Doc. #14430) 174
California Building Industry Association et al. (Doc. #14523) 175
Resource Development Council for Alaska, Inc. (Doc. #14649) 179
National Association of Convenience Stores, et al. (Doc. #15242) 180
Atlantic Legal Foundation (Doc. #15253) 180
Landmark Legal Foundation (Doc. #15364) 181
National Association for Surface Finishing (Doc. #15398) 181
National Association of Manufacturers (Doc. #15410) 181
Texas Chemical Council (Doc. #15433) 182
United States Steel Corporation (Doc. #15450) 182

CLUB 20 (Doc. #15519) 183
FMC Corporation (Doc. #15533) 184
Business Council of Alabama (Doc. #15538) 185
Minnesota Chamber of Commerce (Doc. #16473) 185
Water Advocacy Coalition (Doc. #17921.1) 186
Virginia Manufacturers Association (Doc. #18821) 188
Georgia Association of Manufacturers (Doc. #18896) 189
Western States Land Commissioners Association (Doc. #19453) 190
Minnkota Power Cooperative, Inc. (Doc. #19607) 192
Houma-Terrebonne Chamber of Commerce (Doc. #19624) 193
Volusia County Association for Responsible Development (Doc. #1440) 193
Southern Nevada Home Builders Association (Doc. #3251) 194
Coalition of Real Estate Associations (Doc. #5058.2) 195
Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1) 197
Home Builders Association of Michigan (Doc. #7994) 198
Webber Land & Development Corporation (Doc. #10944) 198
DreamTech Homes, Ltd. (Doc. #11012) 199
Scott County Development Corporation (Doc. #11542) 199
Building Industry Association of Washington (Doc. #13622) 200
El Dorado Holdings, Inc. (Doc. #14285) 201
Associated General Contractors of America (Doc. #14602) 202
Commercial Real Estate Development Association (Doc. #14621) 202
Vulcan Materials Company (Doc. #14642) 203
Maryland Chapters of NAIOP (Doc. #15837) 204
Building Industry Association of Greater Louisville (Doc. #16449) 205
Texas Association of Builders (Doc. #16516) 205
Home Builders Association of Tennessee (Doc. #16849) 205
Maryland State Builders Association (Doc. #17021) 207
Home Builders Association of Mississippi (Doc. #19504) 208
National Association of Home Builders (Doc. #19540) 209
Home Builders Association of Tennessee (Doc. #19581) 212
National Stone, Sand and Gravel Association (Doc. #14412) 214
Lyman-Richey Corporation (Doc. #14420) 215
Railroad Commission of Texas (Doc. #14547) 217
Tennessee Mining Association (Doc. #14582) 217
Waterton Global Mining Company (Doc. #14784) 219
Alaska Miners Association (Doc. #15027) 220
Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228) 221
Halliburton Energy Services, Inc. (Doc. #15509) 222
American Gas Association (Doc. #16173) 222
ConocoPhillips (Doc. #16346) 222
Pennsylvania Aggregates and Concrete Association (Doc. #16353) 223
Interstate Mining Compact Commission (Doc. #16514) 224
Iron County Commission, Iron County (Doc. #17033) 225

Petroleum Association of Wyoming (Doc. #18815) 226
Snyder Associated Companies, Inc (Doc. #18825) 228
Greybull Valley Irrigation District (Doc. #1438) 229
Washington Cattlemen's Association (Doc. #3723) 229
Wheatland Irrigation District (Doc. #5176) 230
Oregon Cattlemen's Association (Doc. #5273.1) 231
Pike and Scott County Farm Bureaus (Doc. #5519) 232
Colorado Livestock Association (Doc. #7930) 232
Coon Run Levee and Drainage District (Doc. #8366) 233
Cattle Empire (Doc. #8416) 233
Ventura County Coalition of Labor Agriculture and Business (Doc. #8662) 234
Michigan Farm Bureau, Lansing, Michigan (Doc. #10196) 234
Montana Farm Bureau Federation (Doc. #12715) 236
Nebraska Cattlemen (Doc. #13018.1) 236
Iowa Corn Growers Association (Doc. #13269) 237
PennAg Industries Association (Doc. #13594) 239
Sugar Cane Growers Cooperative of Florida (Doc. #14283) 239
Kansas Agriculture Alliance (Doc. #14424) 240
Mississippi Farm Bureau Federation (Doc. #14464) 240
North Dakota Soybean Growers Association (Doc. #14594) 241
The Mosiac Company (Doc. #14640) 242
Chilton Ranch, LLC (Doc. #14724) 243
Great Plains Canola Association (Doc. #14725) 243
Farm Credit Illinois (Doc. #14767) 244
Washington Farm Bureau (Doc. #14783) 244
Monarch-Chesterfield Levee District, St. Louis, Missouri (Doc. #14904) 245
Kansas Cooperative Council (Doc. #14938) 246
Tennessee Farm Bureau Federation (Doc. #14978) 247
Oregon Forest Industries Council (Doc. #15028) 248
Colorado Cattlemen's Association (Doc. #15068) 248
Florida Fruit & Vegetable Association (Doc. #15069) 249
Oklahoma Cattlemen's Association (Doc. #15176) 249
Great Lakes Timber Professionals Association (Doc. #15219) 250
Missouri Farm Bureau Federation (Doc. #15224) 250
Beet Sugar Development Foundation (Doc. #15368) 251
Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (Doc. #15440) 251
Iberia Parish Farm Bureau (Doc. #15585) 252
Riverport Levee District (Doc. #15655) 253
Wisconsin Farm Bureau Federation (Doc. #16166) 253
Wisconsin County Forests Association (Doc. #16341) 254
Kansas Corn Growers Association (Doc. #16398) 254
Lake DeSmet Conservation District (Doc. #16441) 255
Western Landowners Alliance (Doc. #16553) 255
Ohio Farm Bureau Federation (Doc. #16609) 256
Montana Water Resources Association, (Doc. #16889) 257

Montana Stockgrowers Association (Doc. #16937) 257
Greenfields Irrigation District (Doc. #17022) 257
Iowa Soybean Association (Doc. #17175) 258
Earth City Levee District (Doc. #18910) 258
Iowa Poultry Association (Doc. #19589) 259
New Mexico Cattle Growers Association et al. (Doc. #19595) 259
Clearwater County Highway Department, Minnesota (Doc. #1762) 260
Minnesota County Engineers Association (Doc. #6996.2) 261
New Salem Township (Doc. #8365) 261
North Dakota Soybean Growers Association (Doc. #14121) 261
Texas Farm Bureau (Doc. #14129) 262
Union Pacific Railroad Company (Doc. #15254) 262
Southern Illinois Power Cooperative (Doc. #15486) 263
National Association of Clean Water Agencies (Doc. #15505) 263
Western States Water Council (Doc. #9842) 264
Duke Energy (Doc. #13029) 264
San Juan Water Commission (Doc. #13057) 265
Florida Power & Light Company (Doc. #13615) 265
Nebraska Public Power District (Doc. #15126) 268
Association of Fish and Wildlife Agencies (Doc. #15399) 268
Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407) .. 269
Washington County Water Conservancy District (Doc. #15536) 269
Massachusetts Water Resources Authority (Doc. #15546) 271
Irrigation & Electrical Districts' Association (Doc. #15832) 271
Association of Electronic Companies of Texas, Inc. (Doc. #16433) 272
Battelle Energy Alliance, LLC (Doc. #16448) 273
American Public Gas Association (Doc. #18862) 274
Hickory Underground Water District 1, Texas (Doc. #18928) 274
National Agricultural Aviation Association (Doc. #19497) 275
Environmental Council of the States (Doc. #15543) 276
The Nature Conservancy (Doc. #17453) 277
Association of State Floodplain Managers, Inc. (Doc. #19452) 278
Southeastern Legal Foundation (Doc. #16592) 279
Protect Americans Now, Board of Directors (Doc. #12726) 280
Colorado Wastewater Utility Council (Doc. #13614) 281
Edison Electric Institute (Doc. #15032) 282
Texas Agricultural Land Trust (Doc. #15188.1) 283
Texas Agricultural Land Trust (Doc. #15188.2) 283
Delaware Riverkeeper Network (Doc #15383) 284
Sierra Club, Cumberland Chapter (Doc. #15466) 285
Citizen's Advisory Commission on Federal Areas, State of Alaska (Doc. #16414) 286
Ruby Valley Conservation District, Montana (Doc. #16477) 287
Montana Land and Water Alliance, Inc. (Doc. #18890) 287
New Mexico State University, The Linebery Policy Center for Natural Resource Management (Doc. #7336.2) 287

University of Missouri (Doc. #7942.1) 288
John Wood Community College (Doc. #11770) 289
Water Environment Federation Member Association Governmental Affairs (GA) Committees Representing EPA Region 7 (Doc. #15185) 289
Water Environment Federation (Doc. #16584) 290
American Legislative Exchange Council (Doc. #19468) 290
John Barrasso et al., Congress of the United States (Doc. #4901) 291
Patrick E. Murphy, Member of Congress, Congress of the United States, House of Representatives (Doc. #15371.1) 291
United States Senate (Doc. #19301) 292
Wetland Science Applications, Inc. (Doc. #4958.2) 292
The Property Which Water Occupies (Doc. #8610) 293
1.1.1. 404 Assumption 294
AGENCY SUMMARY RESPONSE 294
SPECIFIC COMMENTS 295
Michigan Department of Environmental Quality (Doc. #5462) 295
New Mexico Department of Agriculture (Doc. #13024) 297
Board of Commissioners of Carbon County, Utah (Doc. #12738) 297
Landmark Legal Foundation (Doc. #15364) 298
USA Rice Federation (Doc. #13998) 299
Tennessee Farm Bureau Federation (Doc. #14978) 299
Environmental Council of the States (Doc. #15543) 300
Association of State Floodplain Managers, Inc. (Doc. #19452) 300
The Association of State Wetland Managers (Doc. #14131) 302
Florida Department of Agriculture and Consumer Services (Doc. #10260) 302
Association of Clean Water Administrators (Doc. #13069) 303
1.1.2. Water Supply and Allocation 304
AGENCY SUMMARY RESPONSE 304
SPECIFIC COMMENTS 305
Arizona Game and Fish Department (Doc. #15197) 305
City of Palo Alto, California (Doc. #12714) 306
Energy Producing States Coalition (Doc. #11552) 306
Western Urban Water Coalition (Doc. #15178) 306
Washington State Water Resources Association (Doc. #16543) 307
Alameda County Cattlewomen (Doc. #8674) 307
Relief Ditch Company (Doc. #11977) 308
Kentucky Farm Bureau (Doc. #14567.1) 308
Western Governors Association (Doc. #14645) 308
Association of Metropolitan Water Agencies et al. (Doc. #15157) 308
Western Resource Advocates (Doc. #16460) 309
Ducks Unlimited (Doc. #11014) 309
1.1.3. Property Rights 310
AGENCY SUMMARY RESPONSE 310
SPECIFIC COMMENTS 310
Mike Holmes, Representative, Alabama State House D-31 (Doc. #1151) 310
Richard F. Colburn, The Senate of Maryland (Doc. #4870) 310

Attorney General of Texas (Doc. #5143.2) 310
State of Tennessee, House of Representatives (Doc. #5597) 311
Wyoming House of Representatives (Doc. #14308) 311
Anonymous (Doc. #1371) 311
Kimble County Commissioners' Court, Kimble County, Texas (Doc. #4534) 311
Warrick County Board of Commissioners, Boonville, IN (Doc. #5145) 311
Sierra Soil and Water Conservation District (Doc. #5593) 312
Owyhee County Board of Commissioners (Doc. #12725) 312
Board of Commissioners of Carbon County, Utah (Doc. #12738) 312
Pocahontas County, IA (Doc. #13666) 312
Chaves Soil & Water Conservation District, New Mexico (Doc. #13953) 313
Pima Natural Resource Conservation District (Doc. #14720) 313
Republican River Water Conservation District (Doc. #15621) 313
Pike County Economic Development Corporation (Doc. #5460) 313
Landmark Legal Foundation (Doc. #15364) 314
Louisiana Landowners Association (Doc. #16490) 314
Western States Land Commissioners Association (Doc. #19453) 314
Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1) 314
Home Builders Association of Michigan (Doc. #7994) 315
DreamTech Homes, Ltd. (Doc. #11012) 315
Building Industry Association of Washington (Doc. #13622) 315
Washington Cattlemen's Association (Doc. #3723) 315
Alameda County Cattlewomen (Doc. #8674) 316
Michigan Farm Bureau, Lansing, Michigan (Doc. #10196) 316
Missouri Soybean Association (Doc. #14986) 317
Oklahoma Cattlemen's Association (Doc. #15176) 317
Jensen Livestock and Land LLC (Doc. #15540) 317
Top O' The Mount Farm (Doc. #15833) 317
Mohave Livestock Association & Mohave County Farm Bureau (Doc. #15859) 318
Florida Crystals Corporation (Doc. #16652) 318
The 9-12 Association, Inc. (Doc. #5556) 318
Nebraska Water Resources Association (Doc. #13565) 318
Citizen's Advisory Commission on Federal Areas, State of Alaska (Doc. #16414) 319
U. S. House of Representatives (Doc. #3097) 319
United States Senate (Doc. #3536) 320
Congress of the United States, Senate Committee on Environment and Public Works et al. (Doc. #16564) 320
United States Senator (Doc. #18022) 320
The Property Which Water Occupies (Doc. #8610) 320

1.2. SUPPLEMENTAL GENERAL COMMENTS 323

AGENCY SUMMARY RESPONSE 323
SPECIFIC COMMENTS 324
Eric W. Nagle (Doc. #0009.1) 324

John Ford Ranch (Doc. #9512) 325
Spring-Green Lawn Care Corp. (Doc. #10544) 326
J. Courtwright (Doc. #11652) 327
Weld County (Doc. #12343) 327
M. Seelinger (Doc. #12879) 327
Todd Wilkinson (Doc. #13443) 328
Tamara Choat (Doc. #13701) 328
M. Smith (Doc. #14022) 329
Plumas County Board of Supervisors (Doc. #14071) 329
Patti Buck (Doc. #14825) 330
Erika Brotzman (Doc. #15010) 330
The Heritage Foundation (Doc. #15055) 332
SD1 (Doc. #15139) 334
William Schock (Doc. #15394) 335
Vulcan Materials Company (Doc. #16566) 336
San Luis & Delta-Mendota Water Authority (Doc. #15645) 336
B. Price (Doc. #16381) 336
L. L. Hughes (Doc. #16687) 336
Cook County, Minnesota, Board of Commissioners (Doc. #17004) 336
K. G. Oertel (Doc. #17317) 338
W. Stevens (Doc. #17663) 339
John Whittingham (Doc. #18426) 339
R.D. Primrose (Doc. #18799) 340
J. Dillard (Doc. #18907) 341
Anonymous (Doc. #18947) 342
Kevin and Nicole Keegan (Doc. #19128) 343
K. Miles (Doc. #19129) 343
Alcona Conservation District (Doc. #19345) 344
City of Morgan City, Louisiana (Doc. #19346) 344
United States House of Representatives (Doc. #19348) 345
Western States Water Council (Doc. #19349) 346
Jil Tracy, State Representative 94th District (Doc. #19518) 346
M. Sedlock (Doc. #19524) 347
Chairman, Broadwater County Commissioner, Broadwater County Commissioners, Broadwater County, Montana (Doc. #20489) 352
Flood Control Water Agency, Santa Barbara County Public Works Department, Santa Barbara County, California (Doc. #20491) 352
Empire District Electric Company (Doc. #20501) 353
Michigan House of Representatives (Doc. #20504) 353
ATTACHMENTS AND REFERENCES 353

Topic 1. GENERAL COMMENTS

Agency Summary Response

In this final rule, EPA and the Corps clarify the scope of "waters of the United States" that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute. This rule makes the process of identifying waters[1] protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and to complement statutes that protect the navigability of waters, such as the Rivers and Harbors Act. 33 U.S.C. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements only apply with respect to discharges of pollutants to the covered water. In the absence of a discharge of a pollutant, the CWA does not impose permitting restrictions on the use of such water.

Additionally, Congress has exempted (certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of "waters of the United States" to make it clear that this rule does not add any additional permitting requirements on agriculture. The rule

[1] 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, identifiable by the water contained in these aquatic systems or by their chemical, physical, and biological indicators. The agencies use the terms "waters" and "water bodies" interchangeably in the preamble.

also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2.

Finally, 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. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of covered ephemeral and intermittent tributaries jurisdictional under this rule 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.

The jurisdictional scope of the CWA is "navigable waters," defined in section 502(7) of the statute as "waters of the United States, including the territorial seas." The term "navigable waters" is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program,[2] the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. However, while there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision.[3] Existing regulations (last codified in 1986) define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 122.2.[4]

However, the Supreme Court has issued three decisions that provide critical context and guidance in determining the appropriate scope of "waters of the United States" covered by the

[2] While section 311 uses the phrase "navigable waters of the United States," EPA has interpreted it to have the same breadth as the phrase "navigable waters" used elsewhere in section 311, and in other sections of the CWA. *See United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of "waters of the United States" in 40 CFR part 112 to ensure that the language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution & Response; Non –Transportation-Related Onshore & Offshore Facilities*, 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F.Supp. 2d 165 (D. D.C. 2008). However, EPA interprets "navigable waters of the United States" in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as "navigable waters" in CWA section 502(7).

[3] For example, the CWA section 402 (33 U.S.C. § 1342) program regulates discharges of pollutants from "point sources" to "waters of the United States," whether these pollutants reach jurisdictional waters directly or indirectly. The plurality opinion in *Rapanos* noted that "there is no reason to suppose that our construction today significantly affects the enforcement of §1342. . . . The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. at 743.

[4] There are numerous regulations that utilize the definition of "waters of the United States" and each is codified consistent with its place in a particular section of the Code of Federal Regulations. For simplicity, throughout the preamble the agencies refer to the rule as organized into (a), (b), (c) provisions and intend the reference to encompass the appropriate cites in each section of the Code of Federal Regulations. For example, a reference to (a)(1) is a reference to all instances in the CFR identified as subject to this rule that state "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."

CWA. In *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id*. at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation's waters "incorporated a broad, systemic view of the goal of maintaining and improving water quality …. Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 132-33 (*citing* Senate Report 92-414).

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. Although the *SWANCC* decision did not call into question earlier decisions upholding the CWA's coverage of wetlands or other waters "adjacent" to traditional navigable waters, it created uncertainty with regard to the jurisdiction of other waters and wetlands that, in many instances, may play an important role in protecting the integrity of the nation's waters. The majority opinion in *SWANCC* introduced the concept that it was a "significant nexus" that informed the Court's reading of CWA jurisdiction over waters that are not navigable in fact.

Five years later, in *Rapanos* v. *United States*, 547 U.S. 715 (2006) (*Rapanos*), all Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. In addition, Justice Kennedy's opinion indicated that the critical factor in determining the CWA's coverage is whether a water has a "significant nexus" to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water, referring back to the Court's decision in *SWANCC*. Justice Kennedy's concurrence in *Rapanos* stated that to constitute a "water of the United States" covered by the CWA, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759 (Kennedy, J., concurring in the judgment) (*citing SWANCC*, 531 U.S. at 167, 172). Justice Kennedy concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780.

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion and applicable science. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The science demonstrates that the protection of upstream waters is critical to maintaining the integrity of the downstream waters. The upstream waters identified in the rule as jurisdictional function as integral parts of the aquatic environment, and if these waters are polluted or destroyed, there is a significant effect downstream.

The "significant nexus" standard articulated and refined in these Supreme Court opinions is the touchstone for the agencies' interpretation of the CWA's jurisdictional scope. In response

to these opinions, the agencies issued guidance in 2003 (post-*SWANCC*) and 2008 (post-*Rapanos*). However, these two guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in *Rapanos* underscores the importance of this rulemaking effort.[5] 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 agencies proposed a rule clarifying the scope of waters of the United States in April, 2014, and solicited comments for over 200 days. This final rule reflects the over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others. The agencies sought comment on a number of approaches to specific jurisdictional questions, and many of these commenters and stakeholders urged EPA to improve upon the April 2014 proposal, by providing more bright line boundaries simplifying definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities.

The agencies' interpretation of the CWA's scope in this final rule is guided by the best available peer-reviewed science – particularly as that science informs the determinations as to which waters have a "significant nexus" with traditional navigable waters, interstate waters, or the territorial seas.

The relevant science on the relationship and downstream effects of waters has advanced considerably in recent years. A comprehensive report prepared by the EPA's Office of Research and Development entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"[6] (hereafter the Science Report) synthesizes the peer-reviewed science.

[5] Chief Justice Roberts' concurrence in *Rapanos* emphasized that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Id*. at 758. Chief Justice Roberts made clear that, if the agencies had undertaken such a rulemaking, "the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority." *Id.*

[6] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, D.C.: U.S. Environmental Protection Agency, (2015)). http://www.epa.gov/ncea

The Science Report provides much of the technical basis for this rule. The Science Report is based on a review of more than 1,200 peer-reviewed publications. 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. The Science Report and the SAB review confirmed that:

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.

The Science Report and the SAB review also confirmed that:

- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.
- Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
- Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.

Although these conclusions play a critical role in informing the agencies' interpretation of the CWA's scope, the agencies' interpretive task in this rule – determining which waters have a "significant nexus" – requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate.

Major Rule Provisions

In this final rule, the agencies define "waters of the United States" to include eight categories of jurisdictional waters. The rule maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The rule reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule recognizes jurisdiction for three basic categories: waters that are jurisdictional in all instances, waters that are excluded from

jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.

Decisions about waters in each of these categories are based on the law, peer-reviewed science, and the agencies' technical expertise, and were informed by public comments. This rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream waters. The agencies have greatly reduced the extent of waters subject to this individual review by carefully incorporating the scientific literature and by utilizing agency expertise and experience to characterize the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters. The result of applying this scientific analysis is that the agencies can more effectively focus the rule on identifying waters that are clearly covered by the CWA and those that are clearly not covered, making the rule easier to understand, consistent, and environmentally more protective.

The jurisdictional categories reflect the current state of the best available science, and are based upon the law and Supreme Court decisions. The agencies will continue a transparent review of the science, and learn from on-going experience and expertise as the agencies implement the rule. If evolving science and the agencies' experience lead to a need for action to alter the jurisdictional categories, any such action will be conducted as part of a rule-making process.

The first three types of jurisdictional waters, traditional navigable waters, interstate waters, and the territorial seas, are jurisdictional by rule in all cases. The fourth type of water, impoundments of jurisdictional waters, is also jurisdictional by rule in all cases. The next two types of waters, "tributaries" and "adjacent" waters, are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. For waters that are jurisdictional by rule, no additional analysis is required.

The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region. Justice Kennedy acknowledged the agencies could establish more specific regulations or establish a significant nexus on a case-by-case basis, *Rapanos* at 782, and for these waters the agencies will continue to assess significant nexus on a case-specific basis.

The major elements of the final rule are briefly summarized here.

Traditional Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments of Jurisdictional Waters

Consistent with existing regulations and the April 2014 proposed rule, the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule.

Tributaries

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized

by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The rule concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries," as defined, are jurisdictional by rule.

The rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. The agencies identify functions in the definition of "significant nexus" at paragraph (c)(5) characteristic of a water functioning as a tributary. Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. These jurisdictional by rule waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further, the rule explicitly excludes erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark.

Adjacent Waters

The agencies determined that "adjacent" waters, as defined in the rule, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. Under this final rule, "adjacent" means bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are "adjacent" to that stream or river. "Adjacent" waters include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. However, it is important to note that "adjacent" waters do not include waters that are subject to established normal farming, silviculture, and ranching activities under Section 404(f).

The final rule establishes a definition of "neighboring" for purposes of determining adjacency. In the rule, the agencies identify three circumstances under which waters would be "neighboring" and therefore "waters of the United States":

(1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the rule.
(2) Waters located in whole or in part in the 100-year floodplain that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule ("floodplain waters").

(3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

The agencies emphasize that the rule has defined as adjacent waters those waters that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the chemical, physical or biological integrity of those waters. The agencies also emphasize that the rule does not cover "adjacent waters" that are otherwise excluded. Further, the agencies recognize the establishment of "bright line" boundaries in the rule for adjacency does not in any way restrict states from considering state specific information and concerns, as well as emerging science to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level.

"Adjacent" waters as defined are jurisdictional by rule. The agencies recognize that there are individual waters outside of the "neighboring" boundaries stated above where the science may demonstrate through a case-specific analysis that there exists a significant nexus to a downstream traditional navigable water, interstate water, or the territorial seas. However, these waters are not determined jurisdictional by rule and will be evaluated through a case-specific analysis. The strength of the science and the significance of the nexus will be established on a case-specific basis as described below.

Case-Specific Significant Nexus

The rule identifies particular waters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a "water of the United States." This category of case-specific waters is based upon available science and the law, and in response to public comments that encouraged the agencies to ensure more consistent determinations and reduce the complexity of conducting jurisdictional determinations. Consistent with the significant nexus standard articulated in the Supreme Court opinions, waters are "waters of the United States" if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together.

In this final rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters. These five types of waters are Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. Consistent with Justice Kennedy's opinion in *Rapanos*, the agencies determined that such waters should be analyzed "in combination" (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

The final rule also provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high

tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. The science available today does not establish that waters beyond those defined as "adjacent" should be jurisdictional as a category under the CWA, but the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters.

In circumstances where waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark are subject to a case-specific significant nexus analysis and such waters may be evaluated as "similarly situated," it must be first demonstrated that these waters function alike and are sufficiently close to function together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A "similarly situated" analysis is conducted where it is determined that there is a likelihood that there are waters that function together to affect downstream water integrity. To provide greater clarity and transparency in determining what functions will be considered in determining what constitutes a significant nexus, the final rule lists specific functions that the agencies will consider.

In establishing both the 100-year floodplain and the 4,000 foot "bright line" boundaries for these case-specific significant nexus determinations in the rule, the agencies are carefully applying the available science. Consistent with the CWA, the agencies will work with the states in connection with the prevention, reduction and elimination of pollution from state waters. The agencies will work with states to more closely evaluate state-specific circumstances that may be present within their borders and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.

Exclusions

All existing exclusions from the definition of "waters of the United States" are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.

Prior converted cropland and waste treatment systems have been excluded from the definition of "waters of the United States" definition since 1992 and 1979 respectively, and continue to be excluded. Ministerial changes are made for purposes of clarity, but these two exclusions remain substantively and operationally unchanged. The agencies add exclusions for waters and features previously identified as generally exempt (e.g., exclusion for certain ditches that are not located in or drain wetlands) in preamble language from *Federal Register* notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction, including ephemeral ditches that are not a relocated tributary or excavated in a tributary, and intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in

public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed in dry land to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect the agencies' current practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

Role of States and Tribes Under the Clean Water Act

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA.
Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404. Forty-six states and the U.S. Virgin Islands are authorized to administer the NPDES program under section 402, while two states administer the section 404 program. The CWA identifies the waters over which states may assume permitting jurisdiction. *See* CWA section 404(g)(1). 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). 80 FR 13439 (Mar. 16, 2015). Additional CWA programs that utilize the definition of "waters of the United States" and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load (TMDL) programs under section 303, and the section 401 state water quality certification process.

States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402

and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Specific Comments

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

1.1 Provide documentation of all tribes that have spoken out in support of this rule. (p. 13)

Agency Response: In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal issues and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies began consultation with federally-recognized Indian tribes on the Clean Water Rule defining waters of the U.S. in October 2011. The consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued, in stages, over a four year period, until the close of the public comment period on November 14, 2014. EPA invited tribes to provide written input on the rulemaking throughout both the tribal consultation process and public comment period.

EPA specifically consulted with tribal officials to gain an understanding of, and to address, the tribal implications of the proposed rule. In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from three tribes during the initial consultation period.

EPA continued to provide status updates to the National Tribal Water Council and the National Tribal Caucus during 2012 through 2014. The final consultation event was completed on October 23, 2014 as a national teleconference with the Office of Water's Deputy Assistant Administrator. Ultimately, EPA received an additional 23 letters from tribes/tribal affiliations by the completion of the consultation period. The comments indicate that Tribes, overall, support increased clarity of waters protected by the Clean Water Act, but some express concern with the consultation process and the burden of any expanded jurisdiction. The feedback received through consultation and written comments have been incorporated in today's rule.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

1.2 EPA claims this new Waters of the US rule only brings an additional three percent of waters under its authority and that existing exemptions will remain in place. Can you commit to me that EPA will not eventually attempt to use the rulemaking process to once again expand your authority, up to and including eliminating current exemptions for common agriculture practices? (p. 17)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

1.3 In an op-ed in the Huffington Post, Administrator McCarthy states that "some may think that this rule will broaden the reach of EPA regulations - but that's simply not the case." At the same time, EPA has also tried to dissuade fears about any overreach by claiming this expands the scope of covered waters by "only" 3.2 percent. Does the rule expand what the EPA will regulate or not? (p. 17)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

1.4 It seems like EPA wants to have it both ways. On one hand you are saying that no new waters are being regulated. On the other hand you are saying these changes are going to have huge benefits to the environment.

a. Which is it?

b. What in the current guidance do you feel is not sufficiently protective of water compared with the proposed rule?

c. If you are not really changing anything why are we all here today? Why go to all the expense of this rulemaking? (p. 19)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Kansas House of Representatives Committee on Energy & Environment (Doc. #4903)

1.5 Perhaps your Agency has forgotten its place as an Agency under the Executive branch of government, which is to carry out - that is, Execute - Congressional actions that should yield net benefit for the American people. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

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

1.6 Beyond the shrill tone and defensive nature of the Q&A document, I observe it does not contain references, citations, or associated documentation supportive of the expansive claims it purports. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Attorney General of Texas (Doc. #5143.2)

1.7 The State of Texas urges that the proposed rulemaking "Definition of 'Waters of the United States ' Under the Clean Water Act" be withdrawn, as it unlawfully seeks to convey a potentially boundless amount of water and landscape jurisdiction to the federal government. The proposed rule is contrary to Congress's objective in passing the Clean Water Act, inconsistent with U.S. Supreme Court precedent, and devoid of the cooperative federalism that is a hallmark of our federal pollution control laws. Further, the proposed rule is without adequate scientific and economic justification and, if finalized, would erode private property rights and have devastating effects on the landowners of Texas. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Rural County Representatives of California (Doc. #5537)

1.8 The CWA identifies state and local governments as partners in enforcing and implementing the Act, yet your agencies have proposed a rule that imposes all costs and responsibilities on these other partners. In Congressional testimony, the U.S. Environmental Protection Agency (EPA) representatives have been unable to name any public interests your agencies engaged with during development of the rule, which not only violates the spirit of the CWA, but also underscores the inadequate analysis of local impacts that will result from this rule. If your agencies decide to move forward with a change to the definition of "Waters of the U.S.," we strongly urge you to redraft the proposed rule and fully engage local and state governments in a meaningful process to draft the new rule. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule.

This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

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

1.9 The definition, as proposed is, in my estimate, violative of the commerce clause of the United States Constitution, as well as the framework and goals of the CWA, congressional intent in passage of the CWA, and Supreme Court Rulings. Each of the foregoing places a limit on federal jurisdiction over the nation's water. The rule as proposed is violative of that limit. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Tennessee Department of Environment and Conservation (Doc. #15135)

1.10 In the proposed rule, news releases, fact sheets, public speeches and public service announcements, the agencies have emphasized that the proposal will serve to protect vitally important waters. First, this assumes the fact that those waters may not already be adequately protected by the states. EPA and the Corps should explain why they believe these waters need additional protection by the federal government. (p. 31)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

State of Alaska (Doc. #19465)

1.11 Because the proposed rule would sweep up nearly all waters and wetlands located throughout the United States under a variety of CWA provisions, not just the Section 404 program, it is likely to lead to a significant increase in citizen suits against the federal agencies, states, and public and private entities. EPA and the Corps fail to address this potential. If anything about the rule is certain, it is that it will result in an enormous proliferation of citizen suits, facilitating litigation that will likely be driven in large part by political agendas, rather than supported by any credible science. (p. 6)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Travis County, Texas (Doc. #4876)

1.12 Travis county supports this rule making because it more explicitly defines the scope of "waters of the United States" and establishes dearer and more transparent standards in federal rules, rather than maintaining an overreliance on staff interpretation and judgment during the permitting processes. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Damascus Township Board of Supervisors (Doc. #5481)

1.13 Under current Federal, State, and Local land use policies, there has been a large increase in water bodies classed as having high value or exceptional value in terms of water quality. Wayne County leads the state of Pennsylvania exceptional value waters quite frankly, we have more than met our responsibility to protect water quality. Additional rules and regulation are not needed. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

County of El Dorado, California (Doc. #5483)

1.14 We echo the Western Governors' Association and Western States Water Council concerns regarding the minimal amount of state consultation that has taken place as this proposed rule change has been developed. This is of particular importance since states are responsible for enforcing provisions of the Clean Water Act. A proactive dialogue should take place between the Agencies and states related to the extent of regulation within the 'Other Waters' category of Waters of the United States. This consultation would provide a more robust review of the regulatory options than the one-sided submission of comment letters, engaging stakeholders in a more meaningful way. It would also assist with ensuring that the eventual regulatory framework adopted for 'Other Waters' is better understood and accepted by the states. (p. 1)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

St. Johns County Board of County Commissioners (Doc. #5598)

1.15 Key terms used by the "waters of the U.S." definition including, tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed are inadequately explained. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

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

1.16 New Hanover County is an urbanized, coastal county in North Carolina that is regulated by local, state and federal stormwater management ordinances. These ordinances need to work in harmony to promote the health, safety and general welfare and to safeguard the natural and man-made resources of New Hanover County by regulating the quality and quantity of stormwater runoff. Due to the location of New Hanover County within the relatively flat topography of the Cape Fear River Basin, proper management of stormwater is required. New Hanover County mitigates drainage issues to the greatest extent practicable and ensures the overall drainage system continues to be able to handle stormwater runoff. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

City of Thornton (Doc. #7328.2)

1.17 The proposed rule purports not to broaden coverage of the CWA or cover any new types of waters. Instead of simplifying CWA application, the proposed rule will increase the regulatory burden on water providers. Under the current rule, the burden of proof on jurisdictional determination falls on the USEPA and the Corps. Under the proposed new definitions, the burden of proof will be shifted to the local entity. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, does establish a binding definition of "waters of the United States."

Murray County Board of Commissioners (Doc. #7528.1)

1.18 We support a unified approach by all of federal agencies in recognition of each agency's wetland delineations, determinations, and mitigation requirements.

One of the greatest generators of distrust within the regulated community is failure of each agency of the federal government to recognize and support each other's wetland determinations and mitigation requirements. In Minnesota, local government units and landowners often deal with the Natural Resources Conservation Service under the provisions of the Food Security Act of 1985, the U.S. Fish and Wildlife Service under the National Wildlife Refuge System Administration and Duck Stamp Acts, and the U.S. EPA and Army Corps under the Clean Water Act. While the laws administered by each agency are different and have different objectives, I each agency uses the Corps of

Engineers Wetlands Delineation Manual of 1987.[7] The lack of communication, understanding, and agreement between the federal agencies on wetland delineation determinations adds time, cost, and undue burdens to the permitting process of each project. In Minnesota, it is common practice for the Army Corps to be the last agency to issue its wetland determination. It is evident that the internal policy of the office in our state is to "wait and see" what the other agencies do before issuing its own determination and delineation. In addition, projects that require wetland mitigation and replacement are often delayed by years due to lack of communication and agreement between the agencies on mitigation ratios and requirements. Each agency issues a different mitigation requirement which makes it difficult for proponents of public drainage and water quality enhancement projects to plan and keep projects on schedule. Projects are often delayed years by this process and many projects which would improve the quality of water flowing through Minnesota's lakes, streams, and wetlands are abandoned.

A unified approach by all agencies of the federal government to wetland identification, delineation, and mitigation would decrease the burden on the regulatory agencies, save administrative costs to the agencies and the regulated community, and help bring clarity and trust back to the process. (p. 5)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document.**

Iowa Department of Agriculture and Land Stewardship - State Soil Conservation Committee (Doc. #7642)

1.19 Conservation in Iowa is the result of federal, state, and private initiatives that rely on landowners who match public dollars or who take on projects on their own. Private investment far outweighs the public. Continued efforts and investments are desirable as landowner's voluntary efforts to protect the land from devastating weather events and for agricultural production using programs such as P.L. 566, P.L. 534 and state based cost share, have had a positive effect on water quality. In order to not discourage the partnerships needed to attain CWA goals, we request consideration be given to this valuable public/private and government interface in the application of rules. (p. 1)

The final rule recognizes and reflects the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The agencies do not believe the rule will affect the partnerships the commenter mentions.

[7] Prior to 1986, no manual existed for government agency reference to delineate wetlands. In 1987, the U.S. Army Corps of Engineers and in 1988, the U.S. Environmental Protection Agency, released their own versions of delineation manuals, each relying on the presently used parameters of (1) vegetation, (2) soils, and (3) hydrology to establish wetland boundaries. After several years of field-testing, a 1989 revised manual was released and agreed to by all four federal agencies: the NRCS, the Corps, the EPA, and the U.S. Fish and Wildlife Service. In 1991, public concerns that that 1989 manual resulted in over-delineation of wetlands led to review of the 1989 manual, with revisions proposed in August of 1991. In response to comments received during the public comment period, the EPA responded by withdrawing the proposed manual. In 1992, Congress appropriated funds to commission the National Academy of Science to study wetland delineation. Congress prohibited the Corps from using the 1989 manual during the interim study period. The Corps returned to use of the 1987 manual.

Beaver County Commission (Doc. #9667)

1.20 Reference: Page 22189, column 3: This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b). This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and / neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Discussion: The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA. (p. 8-9)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

1.21 In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited above are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda. Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission creep", which is enabled by not complying with the Executive Orders directives on regulatory planning. (p. 11)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

White Pine County, Board of County Commissioners (Doc. #9975)

1.22 The proposed rule was developed to enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. Developing a final rule to provide the Intended level of certainty and predictability, and minimizing the number of case - specific determinations, will require significant public involvement and engagement. Such involvement and engagement will allow the agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies - particularly on the category of waters known as "other waters." (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium Topic 3 – Adjacent Waters Topic 4 – Other Waters, Topic 5 – Significant Nexus and Topic 8 – Tributaries.

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

1.23 According to the statement made on Page 22195, "the CWA leaves it to the agencies to define the term "waters of the United States" and "the final authority regarding Clean Water Act jurisdiction remain with EPA". While regulations can be written, the CWA does not give the agencies authority to develop definitions that are contrary to law and published judicial determinations limiting the extent of such authority. (p.5)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

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

1.24 We also submit that any determinations leading to non-Congressionally approved federal agency actions that contravene consistency with our county and local plans will be viewed as an agency fiat without Congressional over site and thus an unconstitutional action. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Elko County Board of Commissioners, Nevada (Doc. #12755)

1.25 Elko County will continue to strive to work with the federal government to ensure that we have clean, safe water for generations to come. We hope the federal government will work closely with our county and Nevada leaders to define and implement common-sense environmental regulations that strengthen, not hinder, public safety and growth in our communities. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Big Horn County Commission (Doc. #13599)

1.26 We are a high desert valley that depends on irrigation for our survival. We believe our state DEQ and State Engineers Office do an adequate job of regulating and protecting Wyoming's water. Given the expansive interpretation of federal jurisdiction, the failure to adequately involve state and local governments in regulatory development, the potential for significant impact on Big Horn County and our social economic and cultural way of life, we respectfully request the agencies immediate withdrawal of the proposed rule. We also request the agency to collaboratively establish a clear line of jurisdiction with state and local governments at the table as co-regulators. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

Campbell County Conservation District (Doc. #13630)

1.27 Further, the District suggests that a more appropriate approach to determining jurisdiction is for the EPA to consult with each state to review existing readily available data including hydrology, geology, flow, etc., and develop a concurrence process in which the state and federal agencies jointly determine jurisdictional/non-jurisdictional waters. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Florida League of Cities, Inc. (Doc. #14466)

1.28 Numerous stormwater treatment ponds and collection areas have been toured by EPA officials in South Florida, in particular the West Palm Beach area. The purpose of these visits was to show Stormwater Treatment Areas, which would likely be considered jurisdictional under the proposed rule, that were not jurisdictional prior to the introduction of the new language. The site visits that EPA and ACOE are conducting are admirable, however, a rule as expansive as the one proposed should allow for each state to highlight the areas that are potentially affected, or the 32% of "new" waters that wi11 be considered jurisdictional by EPA's own prognostication.`' To that light, EPA should delay enactment of the rule to meet with individuals and adopt a state by state framework for jurisdictional waters. (p. 5)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

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

1.29 Before moving forward on the proposed rulemaking, Marion County recommends that both agencies evaluate further the consequences of this rule and work with states individually to further quantify the impacts, economically and jurisdictionally. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In particular, regarding economic analysis, see Preamble to Final Rule Section V.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this

rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Sierra Club Iowa Chapter (Doc. #15446)

1.30 We do have one suggestion to improve the proposed rule. The rule itself as proposed says very little. The real meat of the rule is in the preamble, which legally is not part of the rule. The preamble should be incorporated as part of the actual rule. Or at least, the preamble should be adopted as official guidance in implementing the rule. (p. 2)

Agency Response: The agencies have made every attempt to make the regulatory text complete and as clear as possible. The commenter did not provide specific detail as to what preamble text would be necessary to introduce into the regulation to make it clearer to the public. The supporting scientific, policy and legal rationales are contained in the preamble and the technical support document. Preamble language is published in the Federal Register providing additional background and detail regarding the associated rule text.

Terrebonne Levee and Conservation District (Doc. #16365)

1.31 WHEREAS, the proposed rule change referred to as WOTUS will significantly broaden the jurisdiction of the USEPA to include nearly all connections to navigable streams in the Terrebonne Basin and coastal region of Louisiana including ditches, canals, ponds, and floodplains via the Clean Water Act, and

WHEREAS, this proposed rule change challenges the sovereignty of the state of Louisiana to regulate waters under its control, and significantly impacts all agencies responsible for providing services for the health and protection of the citizens of Louisiana, and

WHEREAS, this broadening of jurisdiction will include actions previously completed without the necessity of "Section I0 and 404 permits" including maintenance of drainage systems, agricultural activities, common commercial and industrial actions etc., and WHEREAS, the additional burden to the existing "Section 10 and 404 permit" process by addition of new perm it applications shall severely overload and burden the currently regulatory system (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

Meeteetse Conservation District (Doc. #16383)

1.32 It would behoove the EPA and ACOE and their purpose to not move forward with a strong-arm approach to regulation as it pertains to the quality of the nations water resources. Appropriate consultation with local and state governmental entities that oversee state natural resource programs would go a long way in achieving a WOTUS definition that allows enforcement of the CWA without undue pressures on the farming and ranching communities as well as others. For this proposal to be successful and reasonable, ongoing coordination among local, state and federal agencies is imperative. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Amador County Board of Supervisors (Doc. #17450)

1.33 The CWA also requires the agencies to "co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources" (Sec 101g). As noted earlier, we understand the agencies worked with some local governments previous to this rulemaking in the form of a guidance paper. We appreciate that cooperative approach and request that the agencies again establish such an approach for defining the "waters of the United States" for the purposes of the CWA. (p. 4)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and

extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

California State Association of Counties (Doc. #9692)

1.34 CSAC believes the proposed rule arguably sweeps into its scope not only lands that are wet and, in many cases, without bed and banks, but also associated lowlands and transitional zones between open waters and upland areas. New definitions including the new concept of "a single landscape unit" leave ambiguity about what portion of each watershed is beyond the reach of federal regulators under the CWA. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium Topic 4 – Other Waters, Topic 5 – Significant Nexus, Topic 8 – Tributaries.

Florida Association of Counties (Doc. #10193

1.35 The Agencies contend both through the proposed rule and in presentations since its publication, that the scope of jurisdiction is narrower than that under existing regulations.[8] We believe, conversely, that revising the definition of "waters of the United States" by substituting the phrase "wetlands adjacent to waters" with "other waters, including wetlands, provided that those waters alone, or in combination with similarly situated water, including wetlands, located in the same region, have a significant nexus to a water identified.. . " significantly expands the scope of federal jurisdiction. (p. 3)

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

Colorado Stormwater Council (Doc. #12981)

1.36 Rules drafted by negotiation have been found to be more pragmatic and more easily implemented at an earlier date, thus providing the public with the benefits of the rule while minimizing the negative impact of a poorly conceived or drafted regulation. Refer to Environmental Protection Agency's *Policy 011 Alternative Dispute Resolution, 65 FR 81858 December 18, 2000.*

CSC asks that the Agencies consider conducting a negotiated rulemaking process for the next revised draft of the Proposed Rule. This process will allow representatives of all

[8] *See* 79 Fed. Reg. 76, 22189 (Apr. 21, 2014) (citing 40 CFR 122.2. defining "waters of the United States). Present actions include EPA' s Local Government Advisory Committee meeting, July 10, 2014 in Atlanta , GA. and EPA/NACo (National Association of Counties) teleconference. September 4, 2014.

interests that will be affected by the rule, including, but not limited to, the rulemaking agency, the regulated entities, public-interest groups, and concerned individuals to sit at a table and craft creative solutions to the problem that led to the Agencies determination that a rule is needed. (p. 7)

Agency Response: **EPA chose notice and comment rulemaking with an extensive public process in order to balance the value of extensive public involvement with an efficient process. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.**

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

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

1.37 The definition of WOTUS is utilized by multiple federal and state agencies for regulatory activities. The EPA should meet with stakeholders including associations and federal and state regulatory agencies to fully understand the implications on their programs and revise the rule to avoid unnecessary and costly burdens on landowners, operators and other regulatory entities. (p. 13)

Agency Response: **In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.**

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule.

This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

American Foundry Society (Doc. #15148)

1.38 Despite the assurances from EPA and the Corps that the proposed rule would have no substantive regulatory impact and would reduce the areas that are subject to CWA jurisdiction, maps developed by EPA and the U.S. Geological Survey identify 8.1 million miles of rivers and streams that would be subject to CWA jurisdiction under the revised definition of waters of the U.S. in the proposed rule. This represents a significant increase of more than 130 percent over the 2009 estimate of 3.5 million miles subject to CWA jurisdiction that EPA provided in a previous report to Congress. Furthermore, some states have reported an even greater increase of areas that would be subject to CWA jurisdiction under the proposed definition of waters of the U.S. This increase is a direct result of the expanded definition that includes ephemeral streams and the land areas that are adjacent to them as "waters of the U.S." subject to CWA jurisdiction.

The proposed rule would assert jurisdictional authority over countless dry creeks, ditches, swales and low spots that are wet only occasionally because it rains. Even worse, the proposed rule attempts to claim authority over remote "wetlands" and other drainage features solely because they are near an ephemeral drainage feature or ditch that are now defined as a water of the U.S. subject to CWA jurisdiction. Such unnecessary expansion of CWA jurisdiction significantly burdens metalcasting operations without providing any meaningful human health or environmental benefits. (p. 3-4)

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

Automotive Recyclers Association (Doc. #15343)

1.39 The rule fails to recognize that the CWA addresses only water quality and attempts to regulate the movement of animals and the storage or flow of water. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

1.40 ARA is very concerned with the agencies proposed replacement of the term "navigable waters" with the phrase "all waters used in commerce..." and with the proposal to codify a definition of "tributary." Rather than streamlining the program and making it easier to understand, these new definitions increase the opportunities for differing interpretations. ARA urges EPA to adopt as its guiding principle the concept that less is more and that simplicity will yield the most compliance. Also, the more complex a program is, the more difficult it is to enforce its provisions. As noted above, enforcement of the current program is far from sufficient. The agencies need to focus their attention on enforcement

of the permits required now, rather than add layers of more requirements that will be difficult to understand and hard to follow. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

1.41 Earlier in the rule, it was noted that the regulation of groundwater fell under the purview of the state permitting authority so how can the agencies also exempt this water type? (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

Dow Chemical Company (Doc. #15408)

1.42 If EPA/USACE indeed intended to clarify jurisdiction in this proposal, the Agencies could have proposed narrowly tailored ancillary definitions that clarify issues such as what represents a true "tributary" or a "significant nexus." Instead, EPA chose to use an approach of writing extremely broad definitions of these and other terms, and then requesting comments on possible exceptions to these definitions. This approach to the proposed rule effectively shifts the burden of proof to the regulated community (relying on a list of exemptions which couldn't possibly address all potential scenarios) to assert and prove that any waters ARE NOT jurisdictional rather than providing regulatory clarification on what waters are jurisdictional. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, does establish a binding definition of "waters of the United States."

Association of Nebraska Ethanol Producers (Doc. #15512)

1.43 Assuming that USEPA's assertions are in fact true, it begs the question as to why a regulatory change to the WOTUS definition is even needed and what would be accomplished by the rule change that is not already authorized by the existing WOTUS rule.

Presumably, USEPA and those state/local agencies which implement the Clean Water Act are already authorized to carry out the requirements of the Act under the existing regulatory definition at 40 CFR 230.3. In the proposed rulemaking, USEPA and the Corps have not sufficiently documented why or how the current regulatory definition for WOTUS is inadequate for the purpose of completing the Clean Water Act obligations of the Agency.

Because the proposed rule is not needed and by USEPA's own admission, will not alter the scope of coverage for jurisdictional waters under the Clean Water Act, the proposed rule should be withdrawn. In short, unless it's broken, there is no compelling reason to "fix" it. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. 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 importance of this rulemaking effort.[9] 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.

Federal Water Quality Coalition (Doc. #15822.1)

1.44 As demonstrated above, the proposed rule lacks statutory, judicial, and record support and the agencies' have failed to meet the requirements of the APA, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders. We therefore urge the agencies to withdraw the proposed rule and develop a new proposal that articulates legitimate legal and technical rationales for regulating water under the Clean Water Act that are consistent with the text, structure, and purpose of the Clean Water Act and Supreme Court precedent, and that reflect reasonable, constrained exercises of federal jurisdiction with deference to state control over land and water resources. The agencies should develop this replacement proposal in dialogue with states and the regulated community, in a search for focused, reasonable positions on what is and is not jurisdictional. One or more workshops for this purpose could be helpful. The agencies

[9] Chief Justice Roberts' concurrence in *Rapanos* emphasized that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Id*. at 758. Chief Justice Roberts made clear that, if the agencies had undertaken such a rulemaking, "the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority." *Id.*

must then make the revised proposal and improved rationales available for public comment.

A reproposal must meet the following principles. First, it must focus on water quality impacts to navigable waters. Second, it must focus on natural water bodies, not water that is in municipal, agricultural or industrial use. Third, it must apply the combined constraints of the agencies' constitutional authority, Congress' expression of limits in the CWA, and the Supreme Court's opinions including the plurality and Justice Kennedy opinions take together in *Rapanos*. Fourth, it must focus on water bodies where a federal presence is truly warranted, allowing states to retain primary jurisdiction over other waters. Fifth, the agencies must follow proper administrative procedures in issuing the proposal and taking public comment, including accurate cost-benefit analysis, consultation with affected stakeholders, and a focus on minimizing regulatory burden. By following these principles, the agencies would be able to promulgate a rule that is both lawful and clear. (p. 63)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document. The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.**

1.45 The agencies claim the authority to identify what waters are "the focus of the CWA." 79 Fed. Reg. at 22218. However, they do not explain what that focus is. We urge the agencies to recognize that the CWA is focused on the protection of the quality of navigable waters and is not focused on the use of land or water. Further, not all water is a water of the United States even if it can convey pollutants to navigable water. To facilitate future decision-making and promote certainty regarding when the CWA does and does not apply, the agencies should articulate the legal and policy rationales for identifying water that is not a "water of the U.S." (p. 66-67)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document.**

Louisiana Landowners Association (Doc. #16490)

1.46 The proposed Definition has been uniformly rejected by individual citizens, large and small business owners, and numerous farm and agricultural groups, both at the national and state levels. Indeed, over 260 Members of the U.S. House of Representatives recently passed a bill that would require the EPA and Corps to withdraw the proposed Definition and to work with "relevant state and local officials" to develop a state and federal consensus for the definition of "waters" jurisdictional to the Act. See H.R.5078, 113th Cong. (2014). On this basis alone, the proposed Definition should be rejected in its current form. Any further expansion of the jurisdictional limits of the EPA and Corps under the Act should be undertaken only pursuant to express congressional authority with consensual participation of pertinent state and local authorities. (p. 3)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout**

the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Water Advocacy Coalition (Doc. #17921.1)

1.47 The Coalition recommends that the agencies withdraw the proposed rule; engage in meaningful dialogue with the regulated community and States about more reasonable, focused, and clear changes to existing regulations; and initiate a replacement advanced notice of proposed rulemaking or notice of proposed rulemaking that reflects those consultations and is supported by science and case law. (p. 13)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

1.48 The proposed rule effectively shifts the burden of the proof to the public to prove that the water or feature at issue *does not* meet the proposed rule's broad "tributary" or "adjacent water" definitions. For example, a landowner who believes a ditch on his property is not a jurisdictional tributary will have to try to prove to the agencies that the ditch qualifies for one of the narrow ditch exemptions. He or she will have to show, through "[h]istorical evidence, such as photographs, prior delineations, or topographic maps," that his or her ditch was excavated wholly in uplands *for its entire length,* drains only uplands, and has less than perennial flow, or that the ditch does not contribute flow to a jurisdictional water. See 79 Fed. Reg. at 22,203. Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. The agencies do not acknowledge the burden this imposes on applicants. Indeed, the agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public. (p. 38)

Agency Response: The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, does establish a binding definition of "waters of the United States."

1.49 Beyond the many legal infirmities addressed above, the proposed rule's categories of "waters of the United States" and associated definitions are overbroad, ambiguous, and not supported by the science. Contrary to the agencies' assertions, the proposed rule will lead to more confusion for regulators and the regulated community, and by no means establish the certainty or predictability the agencies claim. Rather, the rule is deliberately left vague and would still allow sweeping and subjective jurisdictional determinations and the continuation of the case-by-case analysis.[10] For example, even with ditches which are jurisdictional *by rule*, the agencies will have to do a case-by-case examination of each ditch feature to determine whether it qualifies for one of the two ditch exemptions. Case-by-case analysis of minor, insignificant channels and wetlands is what takes so long under the current rule and agency practice under the 2008 *Rapanos* Guidance, and this appears likely to continue and become worse under the proposed rule. If the agencies truly want to create consistency and a reasonable final rule, they must revise these definitions, meet with stakeholders to understand their concerns, gather further scientific evidence, and provide notice and an opportunity for public comment on a more reasonable replacement proposed rule. (p. 38-39)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium Topic 5 – Significant Nexus, Topic 6 – Ditches and Topic 8 – Tributaries. The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

[10] See Rapanos, 547 U.S. at 727 ("The Corps' enforcement practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'") (citing GAO Report 04-297 at 26).

American Society of Civil Engineers (Doc. #19572)

1.50 The Society's diverse members are directly and materially affected by the proposed changes to federal water jurisdiction under the Clean Water Act in their professional practice areas, particularly in the fields of environmental engineering, water resources engineering and water resources planning and management. While ASCE supports a rulemaking by the agencies, we cannot support the proposed rule in its current form. In our comments, we urge review on four major issues; 1) significantly clarify several proposed definitions critical to the rulemaking, 2) exclude or provide guidance on the effect of the proposed rule on municipal separate storm sewer systems, 3) reexamine the rule with a particular eye towards circumstances in the arid West, and 4) consider the impact of the proposed rule on green infrastructure development. (p. 1)

ASCE urges the agencies to go back to the drawing board to clarify many of the proposed definitions, delineate jurisdiction over municipal separate storm sewer systems, dedicate particular attention in the rule to special circumstances in arid regions of the country, and finally, consider the potential impacts to green infrastructure development and recycled water infrastructure. (p. 6)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In addition, see Topic 7: Features and Waters Not Jurisdictional.

1.51 Clarify state jurisdiction under section 404 of the Clean Water Act over isolated, non-navigable intrastate waters and their adjacent wetlands, including vernal pools, playas, and prairie potholes, considering recent Supreme Court decisions and other jurisdiction based on environmental and wildlife considerations under regulations promulgated by the Department of the Interior or the Environmental Protection Agency (EPA) (p. 6)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium 5 – Significant Nexus.

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

1.52 In its place, the Agencies should enlist input from the States and regulated community (including the public comments submitted for this Proposed Rule) to develop a clear and reasonable Proposed Rule. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the

agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Houma-Terrebonne Chamber of Commerce (Doc. #19624)

1.53 We respectfully request that you withdraw the proposed rule and then, with sufficient local and state involvement to determine appropriate jurisdictional boundaries, re-propose a more solicitous and carefully tailored approach to protection of these water resources. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document. This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.**

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Shiels Engineering, Inc. (Doc. #13558)

1.54 I recommend that you withdraw this proposed rule and simply leave the evaluation process up to a licensed and certified professional such as myself and others in my firm. As Texas Attorney General and Governor-Elect Greg Abbott stated in his August 11, 2014 letter, "The proposed rule is contrary to Congress's objective in passing the Clean Water Act, inconsistent with U.S. Supreme Court precedent, and devoid of the cooperative federalism that is a hallmark of our federal pollution control laws. Further, the proposed rule is without adequate scientific and economic justification and, if finalized, would erode private property rights and have devastating effects on the landowners of Texas." (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

O'Neil LLP (Doc. #14651)

1.55 The Proposed Rule fails substantially in achieving its stated goal of providing significant additional clarity as to which "waters" are subject the regulation by the EPA and ACOE under the CWA. On almost every level, the Proposed Rule would expand (or could be argued by the EPA or ACOE later as justifying an expansion of) the set of "waters" viewed as jurisdictional, as compared to the most recent agency guidance.

The Proposed Rule should not expand the definition of "waters of the U.S." any further than the limits recognized by the Supreme Court under SWANCC - - unless and until Congress decides to amend the Clean Water Act to more expansively define the categories of areas containing water (on either a continuous, ephemeral, or intermittent basis), compared to the definition currently set forth by Congress under the CWA. The Proposed Rule fails to adhere to this restraint, and thus should be rejected or re-written and re-circulated for public comment after narrowing the categories of "waters" which can be regulated under Section 404 by the Proposed Rule. (p. 1-2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

Home Builders Association of Tennessee (Doc. #16849)

1.56 Many of the defined terms need additional clarification in the regulatory process to better understand the implications of the Propose Rule. In addition to the definition of "tributary," other newly defined terms such as "neighboring," "riparian area," and "floodplain," appear to expand the universe of wetlands. The definition of "adjacent" waters or wetlands must be read in the same context as that described in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) which determined that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent. Since the wetlands themselves are not navigable, the Court took the occasion in that case to read the CWA

broadly to cover such adjacent wetlands physically adjacent to the traditional navigable waters of Saginaw Bay. However, the newly defined terms appear to go much further than that permitted under any of the Supreme Court decisions. (p. 10-11)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document.

CEMEX (Doc. #19470)

1.57 The proposed rule would expand their jurisdiction far beyond the scope of the authority given EPA and Corps under the Clean Water Act. (p. 2)

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

South Carolina Forest Association (Doc. #6855)

1.58 It also appears that EPA outreach on the proposed rule has crossed the line from public education into advocacy which mischaracterizes the rule in an attempt to defend the rule and gain support. This calls into question EPA's ability to objectively review and respond to stakeholder input and consider revisions. (p. 1)

Agency Response: The Agencies have given careful and objective consideration to all comments received on the proposed rule, and the final rule has been modified in several ways in response to public input.

American Petroleum Institute (Doc. #15115)

1.59 The Proposed Rule seeks to assert federal regulatory authority over waters for which the Agencies can find a "significant nexus" with a navigable or interstate water or territorial sea. It would expand federal Clean Water Act jurisdictional requirements to ephemeral drainages, ditches (including roadside, flood control, irrigation, storm water, and agricultural ditches), water bodies in riparian areas or across broad watersheds, industrial ponds, and isolated waters and wetlands not previously regulated as "Waters of the United States" (WOTUS). Beyond the statement that this is a significant expansion of jurisdiction, it is possible to say little more with reasonable accuracy. Within the confines of the Proposed Rule, key terms are either missing or defined so ambiguously that they leave open the possibility for sweeping jurisdictional determinations. If finalized in its current form, the Proposed Rule would leave both regulators and the regulated community vulnerable to significant variations in interpretation and enforcement throughout the country. (p. 50-51)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the

rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

American Gas Association (Doc. #16173)

1.60 AGA contends that the Proposed Rule should be withdrawn because its implementation would increase regulatory uncertainty, and increase costs and timelines, for our member natural gas utilities' projects – without providing clarity on CWA implementation. Several definitions in the Proposed Rule broadly assign categorical jurisdiction to water features, such as "tributary" and "adjacent waters", leaving the door open to arbitrary, subjective interpretations and jurisdictional determinations by regulatory field inspectors and agency staff. This inconsistency and uncertainty among regulators and regulated entities will lead to confusion about when state or federal jurisdiction applies, and increase agency resources and costs devoted to CWA program reviews at the state and federal level, delay consultation decisions and permit approvals, and increase permitting documentation costs. Permittees would bear the burden of demonstrating, on a case-by-case basis, that the Proposed Rule's definitions do not apply to a diverse range of ubiquitous upland features on their project sites. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Response to Comments Compendium Topic 3, Adjacent Waters, Topic 4 Other Waters, Topic 5 Significant Nexus, Topic 8 Tributaries.

Georgetown Sand & Gravel (Doc. #19566)

1.61 The added definitions for many terms including "tributary", "significant nexus", "neighboring", "riparian", etc. cause more confusion than provide clarification. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections II, VII, VIII and IX. See also Response to Comments Compendium Topic 3, Adjacent Waters, Topic 4 Other Waters, Topic 5 Significant Nexus, Topic 8 Tributaries.

D. Warnock (Doc. #0984)

1.62 First, the definition as proposed is illegal based on the Commerce Clause of the U.S. Constitution, the framework and goals of the CWA, Congressional intent and Supreme Court rulings. Each places a limit on federal jurisdiction over the nation's waters. Currently, your proposed rule has practically no limit whatsoever. As an example, you now have included my agricultural ditches into the category of "tributaries?" This is inappropriate. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Compendium Topic 6

– Ditches, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries.

Washington Cattlemen's Association (Doc. #3723)

1.63 The WCA adamantly disagrees with the EPA's interpretation that congressional intent is clear that the agencies have a longstanding interpretation that interstate waters fall within the scope of the CWA. The congressional intent was to keep the scope of the CWA narrow and therefore remain in-line with the limited Commerce Clause authority under the U.S. Constitution. Expanding the CWA to every ditch and puddle across the country is not in-line with Congressional intent, or the Constitution. (p. 3-4)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 2 – Traditional Navigable Waters, Interstate Waters, Territorial Seas, Impoundments, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries.

Montana Wool Growers Association (Doc. #5843)

1.64 The Code of Federal Regulations defines "waters of the United States" for purposes of the Clean Water Act (CWA) in twelve locations: 33 C.F.R. § 328.3; 40 C.F.R. § 110.1; 40 C.F.R. § 112.2; 40 C.F.R. § 116.3; 40 C.F.R. § 117.1; 40 C.F.R. § 122.2; 40 C.F.R. § 230.3(s); 40 C.F.R. § 232.2; 40 C.F.R. § 300.S; 40 C.F.R. Part 300, App. 3; 40 C.F.R. § 302.3; 40 C.F.R. § 401.1 1. These definitions are both redundant and inconsistent among themselves. MWGA asserts that the twelve definitions should be replaced with one definition and appreciates the Agencies' willingness to do so, but MWGA does not agree the Proposed Rule provides the desired clarity. (p. 1)

Agency Response: The agencies agree it is helpful that all programs incorporating the definition of "waters of the United States" use the same definition, and the final rule does so. However, the agencies believe it is clearer to replace existing definitions with the updated uniform definition where a definition currently appears in various programmatic contexts. Regarding the substance of the Final Rule, see Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

1.65 The Proposed Rule is difficult to access. The Preamble and Proposed Rule occupy 88 pages in the Federal Register. The Preamble has a Table of Contents, but the Proposed Rule is not listed. In the print version of t he Federal Register, the Proposed Rule appears at the end of Appendix B "Legal Analysis"; in the online version, a reader must look under "List of Subjects" after Appendix B. Even to a reader who is familiar with agency rulemaking, these headings are inadequate.

The Agencies should provide descriptive headings in the Table of Contents and either publish the Preamble and Proposed Rule as separate documents (referencing t he Preamble in a brief introduction to the Proposed Rule)or publish the Propose Rule with the Preamble included as supporting text in an appendix. (p. 11-12)

Agency Response: **The agencies follow formatting conventions established by the Office of the Federal Register. The agencies made every attempt to make the documents accessible by placing the rulemaking docket available at regs.gov and by providing contact information to assist people in finding the relevant documents. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.**

1.66 The Code of Federal Regulations should include only one definition of WOTUS and specify that the definition applies to the entire CWA. (p.12)

Agency Response: **The agencies agree it is helpful that all programs incorporating the definition of "waters of the United States" use the same definition, and the final rule does so. The existing definitions will be replaced by the updated uniform definition where a definition currently appears in various programmatic contexts.**

Cattle Empire (Doc. #8416)

1.67 Justice Kennedy's concurring opinion has been used by EPA and USACE to determine on a case-by-case basis what "other waters" fall under each agency's jurisdiction since that time. Based on this information in the preamble, we fail to understand to begin with, how or why the agency's decided to use the concurring opinion of a single justice instead of the interpretation by the plurality! The use of this concurring opinion and the "significant nexus" test narrowed the scope of the intended definition of WOTUS as written by Congress in the Clean Water Act. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2 and 3.**

Alameda County Cattlewomen (Doc. #8674)

1.68 The CWA begins by saying it is the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act."[11] This important statement of policy by Congress when it passed the CWA indicates the important role that the states are to play in protecting the quality of our nation's water. Unfortunately, the agencies' proposal completely and utterly obliterates this federal-state partnership by declaring that all waters are federal.

For all the reasons described in these comments above, EPA and the Corps have made it clear that the federal government has jurisdiction over any and all waters. There are no clear limits to their jurisdiction articulated in the proposed rule, violating the words and spirit of the CWA itself. If all waters are now under the jurisdiction of the federal government, what is left for the states? And if nothing is left then why would Congress

[11] 33 U.S.C. § 1251.

take it upon themselves to include language specifically reserving "primary responsibilities" for protecting water quality to the states?

While ACCW assert that the absence of a limit to federal jurisdiction under the proposed rule usurps the federalism principle that underpins the entirety of the CWA, we are extremely concerned about the lack of outreach and involvement of the states, as co-regulators, prior to the proposed rule being published. The agencies have failed to articulate why the proposed rule needed to be proposed in such a rush that the states and the regulated community had zero involvement in its development. ACCW assert that the agencies should withdraw the proposed rule and begin anew with crafting a rule that begins with heavy stakeholder engagement. ACCW further assert that any rule proposed by the agency should recognize and respect the important role that state agencies play in regulating our nation's water quality. That recognition is woefully lacking in this proposed rule. (p. 29)

Agency Response: **State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the

United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. Additional, the agencies have finalized the rule. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 5 Significant Nexus, Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

1.69 The proposed rule places no discernible limit on the federal government's authority over water, violating the CWA as articulated by the Supreme Court in *SWANCC* and *Rapanos*. The exclusions and exemptions in the proposal are unclear and provide the livestock industry with zero certainty, making the proposed rule a real threat to our industry's continued viability. ACCW strongly urge the agencies to reconsider their proposed rule redefining "waters of the U.S." ACCW strongly urge the agencies to withdraw the proposed rule. (p. 30)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments. See also Response to Comments Compendium Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Bayless and Berkalew Co. (Doc. #12967)

1.70 Total lack of State and Local Government involvement in the proposed rule. In Arizona, both state and local agencies have stated publicly that they had no involvement in the proposed rule, nor did agricultural producers as has been stated by the EPA in recent documents. (p. 5)

Agency Response: The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule.

This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Indiana State Poultry Association (Doc. #13028.1)

1.71 Both the regulators and the regulated would benefit from discussions among the federal and state agencies as well as the industries and agriculture community. We all want a clean environment. The government needs to work with us to achieve it. (p. 2)

Agency Response: The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (*Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Iowa Corn Growers Association (Doc. #13269)

1.72 The potential scope of this expansion is much greater than the 3% that EPA estimates. Drainage features found on almost every piece of farm ground in America could now be considered categorically WOTUS, as they all generally contain a bed, bank, and ordinary high water mark even if they are dry a majority of the year. This is a clear increase in jurisdiction and is not acceptable. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Topic 7 – Features and Waters Not Jurisdictional.

Delaware Council of Farm Organizations (Doc. #12345)

1.73 The board of the Delaware Council of Farm Organizations does not feel that this provides clarity or certainty, and we ask that you withdraw the proposed rule. It will only make farming and managing our land more difficult. We urge you to partner more closely with the local and state agencies that are already working every day to ensure good water quality within our own back yards. (p. 1)

Agency Response: State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. Additional, the agencies have finalized the rule. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 7 – Features and

Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Western Growers Association (Doc. #14130)

1.74 Western Growers also believes that the proposed rule should be withdrawn since the EPA and Corps have failed to properly engage and consult with state and local authorities in constructing this proposal. When Congress passed the Clean Water Act in the early 1970's, they clearly envisioned an active cooperation between the states and the federal government.[12] (p. 7)

Agency Response: State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to

[12] 33 U.S.C. § 1251(b). "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. Additional, the agencies have finalized the rule. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Kansas Agriculture Alliance (Doc. #14424)

1.75 Kansas landowners, by working with dedicated state officials with jurisdiction over water and conservation efforts, have developed a level of trust that has transcended gubernatorial administrations and lead to significant improvements in water quality. This has been accomplished through solid state legislation and regulation, applied in a common sense manner under the state's water quality frameworks, which has received EPA approval. The top-down approach outlined in the proposed WOTUS rule will inhibit development of additional partnership activities by interjecting much uncertainty into determining where EPA/Corps jurisdiction ends and state authority begins. (p. 8)

Agency Response: State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. Additional, the agencies have finalized the rule. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Missouri Soybean Association (Doc. #14986)

1.76 The proposed rule was a joint effort of the US EPA and the US Army Corp of Engineers (USACE). It's important to note, that USACE staff do the vast majority jurisdictional determinations under this rule and are an integral part of this process. Of the meetings and outreach events conducted by the EPA, we are unaware of any event in which the USACE was present and engaged. They were certainly not present at any event involving Missouri agricultural stakeholders. It was often stated by EPA and the Corps was invited, but clearly little attempt was made at bringing them to the table. USACE's absence is both puzzling and disappointing, especially considering that most interactions between property owners and regulators will be with the USACE staff as they implement the federal 404 dredge and fill program. The USACE must play a more active and engaged role in the public participation process. (p. 3)

Agency Response: This rule is a joint effort and reflects the conclusions of both agencies. The rule reflects significant input from stakeholders. The agencies are committed to continue working with stakeholders going forward.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Jefferson Mining District (Doc. #15706)

1.77 Nothing relevant to the rule definition; however now clear as mud, regarding the jurisdiction and subsequent authority of Agency is unrelated directly to a commerce use of a water body the identification of which is said to have been established through tests asking whether the water body (1) is subject to the ebb and flow of the tide, (2) connects with a continuous interstate waterway, (3) has navigable capacity, and (4) is actually navigable, and then as determined pursuant to state law and proceedings; not any federal agency.

It should be enough to say here, Agency lacks authority to enlarge this subject matter, notwithstanding that, by this the rule-making effort Agency is exposed in the settled commerce limitation as fabricating confusion, committing fraud and a misappropriation of federal funds. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

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

1.78 The rule proposed by the agencies would expand federal jurisdiction over waters traditionally governed by individuals, localities, or the states. The agencies propose to categorically enlarge the definition of "waters of the United States" to include all tributaries—perennial, intermittent, and ephemeral—of those waters; all waters adjacent to traditionally navigable waters, including floodplains, riparian areas, and groundwater ("waters with a shallow subsurface hydrologic connection . . . to a jurisdictional water"); and other waters with a significant nexus to navigable waters. The effect of this interpretation would potentially place natural features not traditionally considered waters under the purview of the CWA and federal regulators. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 3 – Adjacent Waters, Topic 4 – Other Waters, Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5, Topic 7 – Features and Waters Not Jurisdictional and Topic 8 – Tributaries.

Wilkin County Farm Bureau (Doc. #19489)

1.79 The proposed regulation significantly broadens the scope of CWA jurisdiction beyond Congressional intent and Supreme Court decisions. The proposed rule fails to provide clarity or predictability, and raises practical concerns with how the rule will be implemented. On behalf of Wilkin County Farm Bureau members, these comments request that the agencies withdraw the proposed rule, consult with stakeholders, including Farm Bureau, and work to revise the proposed rule to make it workable and practical. (p. 1)

Agency Response: The agencies have finalized the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII,

VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Response to Comments Compendium Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Ohio Pork Council (Doc. #19554)

1.80 We also request[13] 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: The Agency has finalized the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary

[13] In addition to these comments, we also urge EPA and the Corps to review and consider the numerous points raised in the various comments that have also been submitted by pork producers and other agricultural groups including the National Pork Producers Council's direct comments, the comments of the large agricultural coalition led by the American Farm Bureau Federation, the comments of the Waters Advocacy Coalition, and the US Chamber of Commerce.

response to comments 1, 2, 3, 4, and 5, Topic 7 – Features and Waters Not Jurisdictional, and Topic 13 – Process Concerns and Administrative Procedures.

Chicken & Egg Association of Minnesota (Doc. #19584)

1.81 In seeking comments, the agencies note that "significant resources are being allocated" to determinations by regulators as a result of confusion and uncertainty to the regulated public, and that "significant public involvement and engagement" will be required to provide the intended level of certainty and predictability. We have significant concerns about the agencies expectations relative to these issues. (p. 2)

Agency Response: In the final rule, the agencies are responding to 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. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Iowa Poultry Association (Doc. #19589)

1.82 The Courts have been called upon in the past to restrict the federal agencies from painting the jurisdiction of the CWA with too broad a stroke, this proposed rule that is unclear, ambiguous and ignores all previously court imposed limitations and underlying congressional intent of the CWA is an invitation for additional and massive litigation to determine the applicable scope of the CWA and the agencies authority. (p. 3)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.**

Clearwater Watershed District; et al. (Doc. #9560.1)

1.83 We feel that the agencies continue to consistently release rules on what the agencies want the Clean Water Act to say, but not what Congress intended or what Congress has demonstrated it is not willing to expand the Act to say.[14] (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.**

Westlands Water District (Doc. #14414)

1.84 The Clean Water Act regulates the "discharge of a pollutant" into waters subject to federal jurisdiction, and the phrase "discharge of a pollutant" is defined as the discharge of a pollutant into waters of the United States from any "point source." 33 U.S.C.§§ 402(a), 404, 1362(12), -(16). The Act defines "point source" as including ditches and other conveyances that are part of the nation's water supply, waste treatment, transportation and flood control systems. Thus, the Act regulates these sources at the point of discharge into the waters of the United States, rather than after the discharge into such waters. The Proposed Rule in its current form conflicts with the plain text of the Clean Water Act by providing for federal regulation of point sources even after the discharges. (p. 12)

Agency Response: **The final rule does not establish any new 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. Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The rule concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water,**

[14] As an example of the lack of support for this current proposed rule, in 2007 Representative Oberstar introduced the Clean Water Restoration Act of 2007 (H .R. 2421) to the Transportation and Infrastructure Committee, proposing to define "navigable waters" similar to the U.S. EPA and Army Corps proposed rule here. The proposed bill failed to find enough support to make it out of the Committee.

interstate water, or the territorial seas to establish a significant nexus. "Tributaries," as defined, are jurisdictional by rule.

The rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. The agencies identify functions in the definition of "significant nexus" at paragraph (c)(5) characteristic of a water functioning as a tributary. Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. These jurisdictional by rule waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further, the rule explicitly excludes erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark.

Santa Clara Valley Water District (Doc. #14476)

1.85 The Proposed Rule should not be internally inconsistent, and should not be inconsistent with the regulations and actions applied to wastewater discharges. For example, the Proposed Rule excludes groundwater in many sections (as it should), but groundwater is not excluded when jurisdiction is defined by shallow subsurface hydrologic connections. Neighboring and riparian areas use subsurface hydrologic connections to determine adjacent waters. Erosion features (e.g., gullies, rills, swales, ditches) are excluded, but yet considered connections in different sections of the Proposed Rule. There should not be contradictions in a final rule. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

The Fertilizer Institute (Doc. #14915)

1.86 If these new WOTUS do not have viable aquatic life habitats that support fish or shellfish used for consumption, the exposure route upon which the human health criteria are based does not exist for these waters, and these criteria should not apply to such waters. Finally, carcinogenic human health criteria should not apply in these waters because the duration of exposure does not apply to ephemeral waters. (p. 10)

Agency Response: The final rule does not establish water quality criteria for specific water bodies. 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.

Utility Water Act Group (Doc. #15016)

1.87 None of the three categories of Congress' commerce power supports the breadth of the Proposed Rule. The Proposed Rule would reach numerous features that are not (1) "channels of interstate commerce" or (2) "instrumentalities of interstate commerce," and, indeed, that (3) do not involve substantial effects on interstate commerce. See United States v. Lopez, 514 U.S. 549, 558-59 (1995). Most of the ditches and ponds the proposal would convert to WOTUS have nothing to do with Congress' regulation of interstate, tribal, or foreign commerce. (p. 44)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Compendium Topic 6 – Ditches, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries.

Colorado River Water Conservation District (Doc. #15070)

1.88 Text and tables comparing the current jurisdictional status of waters and wetlands with how would change under the proposed rule would help the reader better understand the proposed rule changes. (p. 3)

Agency Response: Thank you for your suggestion. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United 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 preparing responses to the comments received, the agencies have addressed specific categories of water in greater depth through narratives in individual compendiums.

San Diego County Water Authority, California (Doc. #15089)

1.89 It is important to draw a distinction of which water should be regulated at the Federal level and where it is more appropriate to regulate at the State level. It was not the intent of Congress to bring all planning and development of land and water in the United States under Federal control.

The Clean Water Act Section 102(g) states:

> *"It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."*

There are four key areas of concern to us where the proposed new definition of waters of the United States includes jurisdiction over water supply in a manner that: expands the Federal authority into areas that should be regulated by the States; interferes with the ability of water suppliers to develop, manage and operate water system facilities and water supplies; and impairs the state and local entities' ability to ensure adequate quality and quantity of water to meet water demands for a healthy environment and economy. These areas of concern include: operation and management of local man-made reservoirs that are isolated or lack a significant nexus to waters of the United States within the watershed where they are located; the development of recycled water supplies; development of groundwater storage; the ability to encourage comprehensive watershed management through the use of wetlands treatment systems and green infrastructure to protect water quality in local reservoirs; and the expansion of the definition to include aqueducts, canals, channels and pipelines. (p. 2-3)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. See also Compendium Topic 6 – Ditches, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).**

Association of Metropolitan Water Agencies et al. (Doc. #15157)

1.90 Contemporaneously with publication of the final rule, the EPA and Corps should issue guidance incorporating photographs to illustrate definitions and thereby provide clarity for regulatory staff, regulated entities, and the public. Such guidance can also provide additional clarity to the regulatory text by conveying generally understood conventions for delineating WOTUS. Such conventions can speed and provide nationwide consistency in implementation. (p. 3)

Agency Response: The agencies may later decide that guidance for making case-specific significant nexus determinations would be useful for agency staff and the public. While the agencies may choose to seek public comment on any such guidance, that is not required by the Administrative Procedure Act.

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

1.91 The Proposed Rule would create confusion and uncertainty among the regulated community in Pennsylvania because the terminology and activities regulated under the Proposed Rule would differ from those regulated under Pennsylvania law: For example, since in the 1980's, the PADEP and the Pennsylvania Fish and Boat Commission have defined a stream as having a defined bed, bank and substrate with at least two biotic taxa that require an aquatic habitat for at least part of their life cycle. This definition serves to regulate both perennial and intermittent streams in Pennsylvania. Under the Proposed Rule, the definition of a tributary is broader than the accepted state definition of a stream. Therefore, ephemeral waters would be jurisdictional under federal, but not state regulations. As a further example, Pennsylvania defines both floodways and floodplains and has enacted regulatory requirements for each.[15] Unlike the subjective definition of a floodplain set forth in the Proposed Rule, these Pennsylvania definitions provide "bright line" tests for the boundaries of these features that are ~tied to FEMA mapping, 100-year flood events and/or a specified distance from a stream bank. Therefore, it is possible that an area may be considered to be a floodplain under one regulatory program, but not the other. (p. 12)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 3 – Adjacent Waters, Topic 4 Other Waters, Topic 5 – Significant Nexus, and Topic 8 Tributaries.

Interstate Council on Water Policy (Doc. #15397)

1.92 We believe your agencies need to establish an alternative rulemaking procedure that respects the sovereign and co-regulator status of the states.

[15] Under 25 Pa. Code ~ 166.1, a floodplain is defined as "the 100-year floodway and [hat maximum area of land that is likely to be flooded by a 100-year flood as shown on the floodplain maps approved or promulgated by FEMA," and a floodway is defined as "the channel of the watercourse and those portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year flood. The boundary of the 100-year floodway is as indicated on the maps and flood insurance studies provided by FEMA. In an area where no FEMA maps or studies have defined the boundary of the floodway, it is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet landward from the top of the bank of the stream."

We don't presume that such an alternative will be simple or straight-forward, but we are willing to help design and refine a procedure for any such federal rulemaking that so clearly affects the sovereign authorities, compact and delegated responsibilities, budgets and executive functions of the states. (p. 1)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. Thank you for your suggestion. For the reasons explained in the preamble, the agencies consider the rule to be consistent with the agencies' authority and have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.**

State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the

United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Association of Fish and Wildlife Agencies (Doc. #15399)

1.93 Sufficient amounts of clean water and natural flows are needed to sustain healthy and abundant fish and wildlife populations as well as to support habitat integrity. Indeed, clean water is foundational to species abundance, recovery (if threatened or listed under federal or state endangered species laws) and sustainable, regulated use. Therefore, it is important that your agencies consider and integrate fish and wildlife considerations into the proposed rule, and we encourage you to reach out to state fish and wildlife agencies directly to minimize adverse, unintended consequences. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Topic 5 – Significant Nexus and Topic 9 – Science for a discussion of the consideration of biological connectivity in a significant nexus analysis.

Eastern Municipal Water District (Doc. #15409)

1.94 It is absolutely critical and a fundamental responsibility of the Agencies to clarify in the rule the full regulatory implications of water being designated as waters of the U.S. (p. 6)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Oregon Water Resources Congress (Doc. #15488)

1.95 If the intent of the agencies is to keep intact current CWA definitions and practices, while providing more clarity, we would like to reiterate our request that RGL 07-02 be fully integrated into the current proposed rulemaking, and preclude it from somehow being superseded by adoption of the proposed rule. This guidance was the subject of many years of input and consideration, and provides clarity for our members in regard to permitting, which the rule as currently proposed does not. It is critical for our members that definitions and guidance provided within RGL 07-02 remain effective and intact. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. Regulatory Guidance Letter (RGL) 07-02 provides guidance intended to clarify certain statutory permitting exemptions under CWA § 404(f). The rule does not make any changes to these statutory exemptions.

Lower Arkansas Valley Water Conservancy District (Doc. #15767)

1.96 The statement that "The agencies propose ... no change to the regulatory status of water transfers" appears multiple times in the Preamble of the proposed rule. EPA's Water Transfers Rule exclude s any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal , or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA. The Water Transfers Rule does not define "waters of the United

States," although EPA relied on one of the definitions the agencies propose to change in the proposed rule. In addition to the statements in the Preamble, the final rule should expressly state in the text of the Code of Federal Regulations that it does not change the regulatory status of water transfers. (p. 3)

Agency Response: **The final rule does not change the status of water transfers. See Preamble to the Final Rule.**

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

1.97 AECT requests that the EPA explain whether it has considered the ramifications that the Proposed Rule would have in cases where compliance with any of the EPA' s new, more stringent air emission limitations would impact a land or water feature that would be a WOTUS under the Proposed Rule but not under existing rules. (p. 3)

Agency Response: **This comment is outside the scope of the rule because it relates to air regulation rather than the definition of "waters of the United States" The final rule does not establish any new programmatic 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.**

Texas Water Development Board (Doc. #16563)

1.98 The proposed rule will affect every state differently given the considerable differences in the hydrology, geography, and legal frameworks of the various states. In turn, each state has its own, unique perspective about the substance of the proposed rule, and the degree to which each state may support or oppose the rule and its specific provisions will vary. These differences underscore the need for the EPA and the Corps to conduct substantive consultation with each of the individual states in the development and implementation of this or any other proposed rule regarding CWA jurisdiction. (p. 2)

Agency Response: **In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.**

Alliant Energy Corporate Services, Inc. (Doc. #18791)

1.99 Clarify what "designed to meet Clean Water Act requirements" means. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Associated Industries of Florida (Doc. #19325)

1.100 Before the close of the comment period, the Agencies should work nationally with each interested state to develop a "before and after" comparison of jurisdictional coverage under the rule and explore potential alternatives to the one-size-fits-all approach in the existing rule. If, as the Agencies suggest, there will only be a 3.2% increase in jurisdictional waters, the opportunity provided by this comparison should be welcomed. (p. 3)

Agency Response: During the public comment period, the agencies met multiple times with many state groups to discuss implications of the proposal, including such organizations as the Association of Clean Water Administrators (ACWA), Association of State Wetlands Managers (ASWM), and the Environmental Council of the States (ECOS), among others. We also participated in over 400 meetings with interested stakeholders, which often included representatives of the states. These discussions typically explored potential effects on the scope of jurisdiction, and ways in which the definitional approach could incorporate regionalized elements. The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Texas Conservative Coalition (Doc. #14528)

1.101 The current proposal would expand the EPA's authority to regulate almost any body of water of any kind. For instance, it includes artificial ponds created to water livestock, swimming pools created by excavating dry land, ornamental waters created for aesthetic purposes, water---filled depressions created incidental to construction activity, and many others.

Despite the EPA's public statements that the proposed rule does not drastically expand its authority, there is evidence to the contrary. If the text of the rule is not evidence enough, the maps uncovered by the Science, Space, and Technology Committee in July are particularly revealing. Committee investigations uncovered EPA maps of waters and wetlands in all 50 states. Committee Chairman Lamar Smith expressed his alarm in an August 27, 2014 letter to your office:

These maps show the EPA's plan: to control a huge amount of private property across the country. Given the astonishing picture they paint, I understand the EPA's desire to minimize the importance of these maps. But the EPA's posturing cannot explain away the alarming content of these documents.

…

You claim that the EPA has not yet used these maps to regulate. . . . While the agency marches forward with a rule that could fundamentally re---define Americans' private property rights, the EPA kept these maps hidden.

…

Serious questions remain regarding the EPA's underlying motivations for creating such highly detailed maps. The maps were created just days after the EPA announced the rule and show its sweeping scope. The EPA's job is to regulate. The maps must have been created with this purpose in mind. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. 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.**

Black Hills Regional Multiple Use Coalition (Doc. #14920)

1.102 The proposed rule goes far beyond "clarifying" the scope of the Clean Water Act (CWA), and would, in fact, broadly expand the types of waters that would be subject to federal permitting requirements and limits to their use. The proposed rule includes a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that expands the scope of waters protected under the CWA to include intermittent and ephemeral streams that do not even run year-round, ponds, and road ditches. This would trigger additional permitting and regulatory requirements for private and federal lands, increase costs for all landowners, and reduce the ability of federal agencies to manage federal lands under their jurisdiction.

The proposed rule asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that were previously under the jurisdiction of the states. The rule asserts that most waters categorically have a "significant nexus" to traditional navigable waters and then provides a catch-all category to sweep in any remaining waters by allowing the EPA or the Corps to establish a "significant nexus" on a case by case basis. The criteria for establishing a significant nexus is very low and equally ambiguous—"more than speculative or insubstantial effect…". The result will increase federal control over water and land, subjecting activities that might impact these areas to more complicated and layered reviews and potential citizen suits. (p. 1-2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments. See also Compendium Topic 6 – Ditches, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries.**

1.103 Many questions remain about the definitions used in the proposal and the impacts to most CWA programs, leaving these to become known only after the proposed rule is finalized and implementation begins. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document.**

Guardians of the Range (Doc. #14960)

1.104 Its intended federal jurisdiction extends to cover every water in the Nation. There are so few exemptions to this rule that it is clear its adoption and implementation would have transformative impacts on the nation. The Supreme Court has already spoken to such actions by federal agencies. Utility Air Regulatory Group v. Environmental Protection Agency, 573 U.S.____2014. The court held that the EPA's interpretation of its reach was unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. This is the same intent and purpose of this proposed rulemaking. (p. 1)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule does not establish any new 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.

Black Warrior Riverkeeper, Inc. (Doc. #15090)

1.105 We believe the proposed rule largely succeeds in its goal of clarifying language aimed at protection of the nation's public health and aquatic resources. By defining what are "waters of the United States" protected by the Act, the rule promotes sorely needed CWA program predictability and consistency. The proposal also reflects the Supreme Court's reading of jurisdiction under the CWA and is based on sound science that recognizes the important role played by headwaters, wetlands, and seasonal streams in maintaining water quality.[16] For all stakeholders, the proposed rule clearly identifies which bodies of

[16] In conjunction with the developed of the proposed rule, EPA's Office of Research and Development (ORD) prepared a peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters. See generally Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. According to the ORD Report, the scientific literature "clearly demonstrates" that streams, regardless of their size or how frequently they

water are subject to the CWA's jurisdiction. Finally, the rule is appropriately drawn to reflect the intent of Congress in enacting the Clean Water Act to restore and maintain the biological, chemical, and physical integrity of our water resources. (p. 1)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Hackensack Riverkeeper, Hudson Riverkeeper, Milwaukee Riverkeeper, NY/NJ Baykeeper and Raritan Riverkeeper (Doc. #15360)

1.106 Finally, it is important that the Agencies make clear to the Regions and Districts that the plain language of the Waters of the United States rule is meant to apply broadly. Water quality ought not continue to degrade because Regions and Districts are afraid to exert jurisdiction over clearly jurisdictional waters such as the above referenced wetland in Carteret. The Agencies must continually reinforce to the Regions and Districts that their primary mission is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It is the Agencies' duty to protect these waters as far as the law will allow. (p. 15-16)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Green Dining Alliance (Doc. #15700)

1.107 Senator Blunt and other conservatives have painted the proposed Clean Water Protection Rule as "egregious government overreach" that threatens the livelihoods of Missouri businesses and farmers. Representing a collection of businesses in the St. Louis Metro area that are responsible for employing over 1000 Missourians and sourcing thousands of pounds of local farmers' products per week, the GDA can definitively say that this is untrue. In fact, we find the opposite to be true. Clean water not only protects our families, but our businesses as well. The food service industry must have access to reliable, safe, clean water. (p. 1)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and

flow, strongly influence how downstream waters function and that streams and wetlands "act as the most effective buffer to protect downstream waters from pollution, provide habitat for aquatic life, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise influence downstream waters."

IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Red River Valley Association (Doc. #16432)

1.108 In May 2014 a bipartisan group of 231 House members signed a letter for the agencies to withdraw this Proposed Rule. On May 2013, after issuance of the draft guidance, 52 Senators voted on an amendment to prohibit the agencies from implementing the guidance as a basis for any proposed rule. On September 9, 2014, the House passed (262-152) H.R. 5078, the Waters of the United States Regulatory Overreach Protection Act of 2014, a bipartisan bill to prohibit the Corps and EPA from finalizing the Proposed Rule. The obvious intent of both Houses of Congress is in opposition to this Proposed Rule. (p. 3)

Agency Response: The agencies have finalized the rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Connecticut River Watershed Council (Doc. #16456)

1.109 Overall we find the rule to be a rightful restoration of protection to many of the public's waters. The rule is presented in way that improves clarity and reduces opportunities for misunderstanding the extent of jurisdiction. This regulation fairly interprets existing law and provides ample scientific basis for proposed wording of both "waters of the U.S." as well as "other waters." We harbor no illusions that this rule will set to rest debates about what is or is not jurisdictional, however it significantly improves the current definition by carefully building on the various and sometimes confounding Supreme Court decisions. (p. 1)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Save the Illinois River, Inc. (Doc. #16462)

1.110 While the proposal is pending, and afterwards, we ask you to increase your efforts on TMDLs and non-point source pollution because these two elements greatly affect our waters today. (p. 1)

Agency Response: The final rule does not establish any new 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. While TMDLs and non-point sources of pollution are outside the scope of this rule, EPA continues to work to restore and maintain the chemical, physical, and biological integrity of the Nation's waters through these two programs.

Arkansas Wildlife Federation (Doc. #16493)

1.111 AR sportsmen have long realized need to clarify "Waters of the United States" through Rulemaking. And this Process is a remarkable opportunity to do so to the benefit of all. It substantially reduces the current nightmare of CWA implementing uncertainty and annual Court challenges among Federal, State, Counties, riverside communities, private landowners, Levee Districts and recreational users of navigable waters… [ ] Moreover COE, EPA staff, State Agencies, water users and sportsmen deserve legal certainty of our current jurisdictional mix of authorities and navigational boundaries, which are largely inconsistently interpreted among local, state and federal agencies. The Rule corrects this uncertainty. (p. 1)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Greater Fort Bend Economic Development Council (Doc. #18009)

1.112 We believe the proposed rulemaking is an unnecessary and an unjustified attempt to extend federal government oversight over every form of water in the United States and every piece of land development in the United States with very few exceptions; (2) We believe this effort is an end run of the past two Supreme Court decisions concerning the Clean Water Act that curtailed the jurisdiction of federal oversight in this matter and contravenes the intent of those decisions; (3) This rulemaking makes no mention or even reference to the constitutional basis under which such federal regulatory power exists. Such matters remains in question as prior rulings before the Supreme Court have seemingly only dealt with the statutory, not the constitutional basis for federal regulation. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

Coalition for the Delaware River Watershed (Doc. #18832)

1.113 The proposed rule contains many important clarifications that we support, including:

• Defining the term "tributary,"
• Affirming that waters of the U.S. categorically include all tributaries to traditionally navigable Waters and interstate waters
• Defining "neighboring" as it relates to "adjacency" for wetlands and other waterbodies such as lakes or ponds. (p. 2)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII and VIII regarding the provisions of the final rule.

Cache La Poudre Water Users Association (Doc. #18904)

1.114 As enacted, the EPA's jurisdiction under the CWA was intended to be tied to the concept of "navigable waters." Over time, the EPA has pressed the jurisdiction under the CWA to the point that it has nearly been cast off entirely from its "navigable waters" mooring. The Proposed Rule is yet another example of this. Through the Proposed Rule, the EPA is seeking again to extend its jurisdiction, despite the Supreme Court's admonitions in *Rapanos v. US.*, 547 U.S. 715 (2006) and, *US. v. Riverside Bayview Homes*, 474 U.S. 121 (1985), and other cases where the Court reined-in the EPA's jurisdiction. This Proposed Rule will serve only to invite a similar judicial response, but only after another colossal waste of time and taxpayers' money is spent defending this ill-conceived rule. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. In particular, see Technical Support Document Section I for a discussion for case law regarding CWA jurisdiction.

1.115 Accordingly, the Association endorses the more detailed comments of others in the West in opposition to the Proposed Rule, including the National Water Resources Association, the Western Coalition of Arid States and the Colorado Water Congress, to name a few, describing the concerns, errors and deficiencies in the Proposed Rule, and urging that it be withdrawn and reconsidered.

Despite the EPA's assertions to the contrary, it is clear that the Proposed Rule expands federal jurisdiction in certain critical areas. The Proposed Rule would:

1) Categorize all "tributaries" as jurisdiction, thereby removing the opportunity to rebut federal jurisdiction on a case -by-case basis depending upon the characteristics of the tributary;

2) Categorize all adjacent "waters" (as opposed to adjacent "wetlands") as jurisdictional; and

3) Categorize all ditches as jurisdictional unless specifically exempted.[17]

Though seemingly innocuous to those not immersed in CWA nuances, and easily overwhelmed in the 86 pages the Proposed Rule occupies in the Federal Register, these changes amount to a significant jurisdictional expansion and intrusion into matters of State and local concern. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5, Topic 3 – Adjacent Waters, Topic 4 – Other Waters, Topic 8 – Tributaries. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

[17] Exempted ditches are those in upland areas, that drain only upland area, or do not contribute to traditional navigable waters.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Upper Mississippi, Illinois, & Missouri Rivers Association (Doc. #19563)

1.116 Majorities of the House of Representatives and the Senate, including members from both parties, are on record as opposing the agencies ' current efforts to expand CWA jurisdiction. On May I, 2014, a bipartisan group of 231 Members of Congress wrote EPA and the Department of the Army to request "that this rule be withdrawn and returned to your agencies." On May 14, 2013, after the agencies had issued the draft guidance but before publishing the Proposed Rule, 52 Senators voted in favor of a Barrasso Amendment to prohibit the agencies from implementing the guidance and using it "or any substantially similar guidance, as the basis for any rule." The agencies should refrain from acting in a manner so clearly contrary to the will of the majority of our nation's elected lawmakers. (p. 5)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

1.117 The proposed rule also fails to provide states with ample clarity or predictability. As mentioned earlier, the rule would identify waters having a "significant nexus" to traditional navigable waters as being a part of the "waters of the United States." Nowhere in the proposed rule, however, is a precise metric or criteria offered for evaluating the significance of any potential nexus. Ambiguity and uncertainty is further exacerbated by the proposed rule neglecting to define "interstate waters," by relying on vague and undefined concepts (such as "floodplain," "riparian area," and "shallow subsurface hydrologic connection") to identify "adjacent waters," and by creating exemptions for certain ditches that are so narrow that, in reality, few ditches would actually meet the criteria. (p. 2-3)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, IV, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 4, 5, 7 and 8, Topic 3 – Adjacent Waters, Topic 4 – Other Waters, Topic 6 – Ditches, Topic 7 – Features and Waters Not Jurisdictional, Topic 8 – Tributaries.

The Property Which Water Occupies (Doc. #8610)

1.118 The Rules disregard the congressional intent of the CWA: the protection of navigable waters, (i.e. public waters over public lands). The US Supreme Court has already held

that the Federal agencies cannot disregard the word 'navigable' when invoking jurisdiction under the CWA[18]. Under the Necessity Clause of the constitution, the judiciary also recognizes a more limited scope of jurisdiction over non-navigable tributaries and adjacent wetlands, but only when necessary to protect downstream navigable waters.[19] This, while holding that such claimed jurisdiction away from navigable waters may still constitute a regulatory taking.[20] The scope of CWA jurisdiction beyond 'traditional navigable waters' is limited to what is necessary to prevent degradation of downstream public waters. However, the Rules presume ubiquitous authority across any space where water is present, regardless of property ownership. Such a presumptive and pervasive authority to control land use disregards the congressional intent of the Act and a basic element of the property right. (p. 9)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. In particular regarding taking, see Technical Support Document Section I.**

1.119 Any CWA jurisdiction beyond navigable waters must be limited to that which is necessary to protect the quality of downstream public/navigable waterways; the presence of water alone does not and cannot invoke CWA jurisdiction. Outside of navigable water, CWA jurisdiction does not exist without a real threat to navigable waters; even then, only those land uses necessary to prevent real threats to downstream waters could invoke jurisdiction. The parameters for when jurisdiction could be invoked over private lands - which may be covered at times by water- remain ambiguous and as written establishes and arbitrary and capricious standard for invoking the CWA. The Rules fail to clarify this standard and instead create an arbitrary standard for a Federal Agency or Private Citizen to invoke CWA jurisdiction.

The parameters of Jurisdiction could be defined in conjunction with the Toxic Substances Control Act by defining reasonable use or acceptable levels for various types of materials, (possibly measured in an acceptable parts per million) . Pollutants should be classified based on the threats imposed raging from inert materials up to toxins, thereby defining reasonable use of private lands while recognizing riparian rights. Stratification as to the scope of jurisdiction based on the remoteness of waters to a navigable/public waters should also set clear limits to CWA jurisdiction. Acceptable standards should be established for acceptable water quality exiting private property toward public waters, rather than which private lands activities are 'exempted' from CWA jurisdiction. Clarifying the limitations to CWA jurisdiction over nonnavigable waters' is essential in order to establish CWA beyond the clearly defined intent of the Act to protect navigable waters. The Rules fail to define such limits. Invoking CWA jurisdictional over lands near non-navigable tributaries or even lands forming temporary streams after floods should

[18] SWANCC v. U.S. Army Corps of Engineers, 531 U.S.159, 172, (2001).
[19] United States v. Riverside Bayview Homes, lnc., 474 US 121 - Supreme Court 1985.
[20] Id .

not prevent reasonable use of private lands. The congressional intent of the CWA cannot be interpreted to foreclose upon an individual's reasonable use under riparian law. The mere presence of water provides no basis for interference with these vested property rights.

Any new CWA rules applied to non-navigable waters should classify pollutants and base jurisdiction on actual threats to the public water supply. Any ambiguity in the Rules which suggest domain over private property based on water alone should be removed. Limits to CWA jurisdiction based upon the scope of federal authority over private property and vested riparian rights should be recognized in the Rules; specifically defining reasonable use of those lands covered by non-navigable waters rather than presuming complete domain under the CWA, whenever water may be present. (p. 15-16)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

K. Mantay (Doc. #15192.1)

1.120 Strike any reference to the New Rule being "scientifically derived" or "science based," since EPA readily admits that the single greatest unregulated threat to federal waterway integrity will in fact not be regulated under this proposed Rule. (p. 2)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

O'NEIL LLP (Doc. #16559)

1.121 Please explain specifically how, as stated in the Executive Summary of the Proposed Rule, the new rule would "make the process of identifying 'waters of the United States' less complicated and more efficient" as compared with: (1) the current policies and procedures used by the two Agencies, and (2) the definition of "waters" actually contained in the CWA. A careful reading of the Proposed Rule demonstrates that, as currently proposed, it will not accomplish this stated goal. The level of complexity within the Proposed Rule (including Appendix A) runs completely counter to this expressed goal. (p. 8-9)

Agency Response: The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document regarding the provisions of the final rule.

1.122 If the Agencies decide to adopt the Proposed Rule in anything close to its current proposed form, all Corps and EPA guidance documents or manuals issued with the objective of guiding jurisdictional determinations or implementing this opaque and extremely confusing rule (and its vague and largely unbounded new definitions) must be required by this Rule to be subjected to formal "notice and comment" rulemaking, prior to their adoption for use by either agency. (p. 9)

Agency Response: **The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document regarding the provisions of the final rule. The agencies may later decide that guidance for making case-specific significant nexus determinations would be useful for agency staff and the public. While the agencies may choose to seek public comment on any such guidance, that is not required by the Administrative Procedure Act.**

1.1. COMMENTS ON STATE/TRIBAL AUTHORITY

Agency Summary Response

The comments in this section of the compendium focus on the rights of states and tribes to manage the land and water within their jurisdiction. Comments include concerns that the proposed rule infringes upon the sovereign rights of states, tribes, and local governments by expanding CWA jurisdiction to regulate waters and activities not previously covered under the CWA and interfering with their ability to make land use decisions. This rule does not affect land use and does not limit a state or tribes ability to regulate discharges of pollution to waters within their jurisdiction. Several commenters stated waters are best regulated by individual states, with the exception of those (as established in court decisions) that are interstate, are navigable-in-fact, or are consistently and directly connected to navigable/interstate waters. The agencies respect states' critical roles in protecting water quality and this rule does not supplant that role or their authorities. The federal interest in protecting waters, as shown by the CWA, nonetheless is strong, and the rule is a reasonable, considered, legally sound and scientifically based delineation of waters subject to the CWA. States retain their authorities but the CWA is premised on the need for a federal role in water quality protection. State laws vary across the country, and the federal role under the CWA was designed to ensure a floor or adequate protection is maintained nationwide; the rule is consistent with that intent. The rule is consistent with sections 101(b), 101(g), 402(b), 404(g) and 510 of the CWA which preserves their rights to regulate these waters. The agencies received many requests to clarify terms in the proposed rule and to provide brighter lines of which waters are covered under the CWA. The final rule includes several changes to provide the additional clarity requested. The changes include refining existing definitions, adding new definitions, and identifying the specific functions to be accessed in a significant nexus evaluation. The rule has further clarified the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, and stormwater and wastewater detention basins constructed in dry land.

In addition to clarifying terms, there were many calls for the agencies' to provide bright lines with respect to CWA jurisdiction wherever possible. With this final rule, the agencies are responding to those requests from across the country by providing clear distinctions wherever possible consistent with the CWA, Court determinations, science and years of experience implementing the CWA programs. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The preamble, Technical Support Document and other compendiums provide full explanations of the provisions of the rule and their bases.

In the paragraphs below, the agencies have summarized responses to the comments received regarding infringement upon state and tribal rights, roles, and responsibilities. Responses to individual comments received on this topic follow the summary and reference changes made to the rule as a result of stakeholder input received during public outreach events in combination with the written comments received during the public comment period.

Primary responsibility and rights of states and tribes to prevent, reduce and eliminate pollution: A number of comments raised concerns that this rule would usurp, limit or preempt state and tribal rights to manage waters within their jurisdiction. Several commenters assert that the rule is unnecessary because states are adequately regulating waters under their jurisdiction and some manage a broader scope of waters with more protective standards and programs than the Federal CWA. Commenters from states such as California and Pennsylvania were particularly vocal about the rule's insinuation that the scope of state's protection is lacking and thus these waters need the protections of the CWA and federal oversight. Others advocate that CWA should not supersede ongoing federal, state and local programs such as those addressing nonpoint source pollution.

The agencies support efforts of states and tribes to regulate waters within their jurisdiction; however the intent of this rule is not to change or establish standards or criteria for discharges to "waters of the United States," it is to provide clarity with respect to which waters are afforded protection under the CWA. Therefore, consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. The rule is consistent with Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA (see section 101(b) of the CWA).

States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign

authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

States and tribes are co-implementors: Several comments expressed concern over the rule's impact on the ability of the federal and state governments to work together as co-implementors of the CWA. Other comments expressed a need for the agencies and this rule to take into account state and local needs, differences in geography, and ecosystem diversity. For example, some commenters stated that nonpoint source pollution requires state watershed-oriented water quality management plans, and emphasized that federal agencies should collaborate with states to carry out the objectives of these plans.

The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule recognizes the unique role of states and tribes. As stated in the preamble, the agencies will work with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. States and tribes may assume permitting responsibility for section 402 and 404 of the CWA. As co-implementers of these permitting programs, the agencies' commit to continue to work collaboratively with states and tribes with approved 402 and 404 programs. The rule is consistent with sections 101(b), 402(b), 404(g), and 510 of the CWA.

How the rule applies within states and tribes with approved CWA programs: Several comments were received requesting that the agencies clarify how various approved state and tribal programs are affected by the rule. Some commenters raised concerns that an expansion in CWA jurisdiction will either usurp or duplicate efforts at the state and local level to manage these aquatic resources. Others echoed this concern of usurping or duplicating their efforts by adding that their state, tribe or local government currently regulates more waters with more protective standards and limits than the CWA. Some comments assert such duplication is unnecessary, serving only to add an additional level of bureaucracy, delaying permits and increasing costs to permittees. Others raised concern that this rule would adversely affect the ability of states and tribes to assume administration of and continue implementation of sections 402 and 404 of the CWA.

The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs

managing these resources. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. Therefore, consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. Additionally, by providing greater clarity regarding what waters are subject to CWA jurisdiction, the frequency with which states and tribes with authorized section 402 and 404 CWA permitting programs will need to make jurisdictional determinations on a case-specific basis is reduced.

The intent of this rule is to provide clarity with respect to which waters are afforded protection under the CWA. The agencies recognize that the establishment of clear boundaries in the rule for jurisdiction does not in any way restrict states from considering state specific information and concerns, or consider emerging science to evaluate the need to more broadly protect their waters under state law. Of particular importance, states and tribes authorized by the administrator of the EPA to administer the CWA section 402 and 404 permitting programs continue to do so per their Memoranda of Agreements with the EPA and consistent with the CWA and their state or tribal laws and regulations.

Two comments (1.16 and 1.17) pointed out that the rule provides CWA protection to waters where the state or tribe has not taken on such responsibility providing national consistency. The Agencies agree the federal role under the CWA was designed to ensure adequate protection is maintained nationwide; while the rule is consistent with that intent, it does not limit or prevent any state or tribe from managing waters within their jurisdiction.

Rights of states and tribes to regulate water quantity and use: Some commenters raised concerns the rule infringes upon or in some cases usurps the rights of states and tribes to regulate water quantity and use. This rule recognizes the unique role of states related to water quantity and as confirmed by section 101(g) of the CWA. The rule is consistent with Congressional policy not to supersede, abrogate, or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction, and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

Rule alters the relationship between federal, state, tribal and local governments: Several comments were received voicing concern that this rule upsets the balance of federalism set out by the constitution and has a negative impact, infringing upon the sovereign rights of states and tribes to manage their waters by 'federalizing' all of these waters. The intent of this rule is not to change or establish standards or criteria for discharges to "waters of the United States," it is to provide clarity with respect to which waters are afforded protection under the CWA. The agencies respect states' critical roles in protecting water quality and this rule does not supplant that role or their authorities. The federal interest in protecting waters, as shown by the CWA, nonetheless is strong, and the rule is a reasonable, considered, legally sound and scientifically based delineation of waters subject to the CWA. States retain their authorities but the CWA is premised on the need for a federal role in water quality protection. State laws vary across the country, and the federal role under the CWA was designed to ensure a floor or adequate protection is maintained nationwide; the rule is consistent with that intent. The agencies will

continue to work collaboratively with states, tribes and local governments in the implementation of CWA programs, many of whom are co-implementors of the CWA's provisions.

Jurisdictional scope of the rule: Many comments were received raising concerns the rule expands jurisdiction of the CWA beyond what is allowable pursuant to the Commerce Clause of the Constitution. Several commenters stated the rule does not preserve the primary responsibilities and rights of states and tribes provided for under section 101(b) of the CWA. Concerns raised in this section assert that the proposed rule would expand CWA jurisdiction to regulate ditches, ephemeral streams, seeps, prairie pot holes agricultural practices, groundwater, subsurface flow, MS4s, and even isolated waters via subsurface flow connections. The commenters claim the agencies are asserting jurisdiction over waters, water features and systems that have traditionally been the responsibilities of states, tribes, and local governments and suggest these and all other waters that are intrastate with only minimal or temporary hydraulic conductivity to traditional waters of the United States are best regulated by individual states and tribes. Only those waters that are interstate, are navigable-in-fact, or are consistently and directly connected to navigable/interstate waters (as established in court decisions) should be covered by the CWA.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. See Technical Support Document.

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of clear boundaries of jurisdiction. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that could pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

In order to improve clarity, the final rule also expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United 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 clarifies other features such as ditches.

Ditches: Some commenters expressed concern that the rule expands CWA jurisdiction over ditches which have traditionally been regulated by states, tribes and local governments and should remain regulated by these entities and not the federal government. While a more robust discussion of which ditches are covered by the CWA and which are not can be found in the preamble as well as the Ditch Compendium, the agencies note that the rule does not expand current CWA jurisdiction. Ditches have been regulated under the CWA as "waters of the United States." In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created confusion, and that the term has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act" for more information.

The rule also does not affect or ***modify*** existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a

whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

- Agriculture – Several commenters state that farmers are better stewards of the lands and Federal control of their private property and water rights is unnecessary. Other comments raised concerns that the rule regulates agricultural activities exempt under CWA. The agencies do not believe this rule will have a negative effect on agriculture. The final rule 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. See discussion of adjacent in preamble.

- Stormwater and MS4s – Several comments below raise concerns that the agencies are expanding jurisdiction of the CWA to include MS4s as "waters of the United States." They object to inclusion of these systems under the protections of the CWA citing they are constructed treatment systems and not "waters of the United States." The rule includes a specific exemption for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The preamble and compendium on Exclusions provides a full discussion of this exclusion.

- Ground water and subsurface flow to regulate isolated waters – Several concerns were raised in comments that the agencies' are trying to exert regulatory authority over shallow subsurface groundwater. The rule makes clear that neither shallow subsurface connections nor any type of groundwater, shallow or deep, are "waters of the United States." This is discussed more fully in the preamble and compendium on Exclusions.

- Seeps, prairie potholes and other similarly situated waters in aggregate - Many commenters expressed concern that the rule places features such as isolated waters under federal jurisdiction contrary to Congressional intent and as confirmed in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). Others raised concerns that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country.

The rule provides for case-specific determinations under more narrowly targeted circumstances than the proposed rule based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The preamble and Technical Support Document provide a comprehensive discussion of the legal basis for this rule.

- Regularly intermittent seasonal and ephemeral streams – Several commenters claim that the rule's expansion of the CWA's jurisdiction to cover regularly intermittent seasonal

> and ephemeral streams is not consistent with Congressional intent or the commerce clause and is an overreach by the agencies. The agencies respectfully disagree. The Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact.

Please see the preamble, Technical Support Document, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Burden on states and tribes: Several comments raised concern that the rule, requires states and tribes to take on management of a significant number of waters. Some comments see the increase in their responsibilities as a result of waters losing CWA protections while others contend the increase is due to the rule's expansion of the CWA's jurisdiction which would require states and tribes with approved CWA programs to manage these additional water resources. Concern focused on the burden this places on states and tribes and in particular how this unfunded mandate was not taken into account by the agencies when assessing the cost implications of the rule. Others requested the agencies do more work to more accurately cost out the cost implications on states, tribes and local governments.

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). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes 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 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 docket.

Need to clarify terms: Several comments requested that the agencies provide simpler definitions, define terms introduced in the proposed rule or even the existing regulations and provide more bright lines with respect to which waters are protected under the CWA. Others commented that the proposed rule introduced vague concepts and undefined terms creating more confusion.

With 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 agencies have defined terms such as neighboring and tributary. Each of the definitions included in the final rule, have been included ultimately with the goal of providing increased clarity for regulators,

stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

In the final rule, the agencies added exclusions for all waters and features identified as generally exempt in preamble language from *Federal Register* notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. For the first time, the agencies also establish by rule that certain ditches are excluded from jurisdiction. In addition to these exclusions, the agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under the proposed rule language where this was never the agencies' intent.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation. The final rule also significantly reduces the uncertainty and number of case-specific determinations that will be required, reducing state and federal workload associated with jurisdictional determinations.

Science supporting the rule: There were several comments that the agencies are basing this rule upon on several studies and sets of data which contain inadequate and inaccurate information regarding the breadth and scope of state laws and programs. In particular, several commenters raised concerns that the 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* does not accurately capture the authorities of or programs implemented by state and local governments.

The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. Particularly as that science informed the policy judgments and legal interpretations as to which waters have a "significant nexus" with traditional navigable waters, interstate waters, and the territorial seas. The relevant science on the relationship and downstream effects of waters has advanced considerably in recent years. A comprehensive report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (hereafter the Science Report) synthesizes the peer-reviewed science. A copy of which can be found in the docket.
Based on a review of more than 1,200 publications from the peer-reviewed literature, the Science Report provides much of the technical basis for 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. The SAB's review confirmed many of the findings of the Science Report.

Although these conclusions play a critical role in informing the agencies' interpretation of the CWA's scope, the agencies' interpretive task in this rule – determining which waters have a "significant nexus" – requires the integration of this science with policy judgment and legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this

determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate. The agencies did not base their significant nexus conclusions on the ELI report.

More input needed: Several comments were received suggesting the agencies need to seek input from states and local governments and to consult with states and tribes prior to issuing this rule. Some comments requested the agencies consult with states regarding the economic impact the rule will have on states and tribes (see above response on burden on states and tribes).

This rule reflects significant consultation with many stakeholders. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

A detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule can be found in the docket for this rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States*.] The agencies will continue to work closely with the states to implement the final rule.

Specific Comments

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

1.123 Discuss in detail how the proposed rule will impact tribes and tribal sovereignty. (p. 13)

Agency Response: **See Summary Response and Preamble to the Final Rule. Federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many tribes, for example, regulate groundwater, and some others protect wetlands that are vital**

to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000), agencies generally may not issue a regulation that has tribal implications, (1) that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the agencies consult with tribal officials early in the process of developing the proposed regulation and develop a tribal summary impact statement, or (2) that preempts tribal law unless the agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

This action does not have tribal implications as specified in E.O. 13175. In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies began consultation with federally-recognized Indian tribes on the Clean Water Rule defining "waters of the United States" in October 2011. The consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued, in stages, over a four year period, until the close of the public comment period on November 14, 2014. EPA invited tribes to provide written input on the rulemaking throughout both the tribal consultation process and public comment period.

EPA specifically consulted with tribal officials to gain an understanding of, and to address, the tribal views on the proposed rule. In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from three tribes during the initial consultation period.

EPA continued to provide status updates to the National Tribal Water Council and the National Tribal Caucus during 2012 through 2014. The final consultation event was completed on October 23, 2014 as a national teleconference with the Office of Water's Deputy Assistant Administrator. Ultimately, EPA received an additional 23 letters from tribes/tribal organizations by the completion of the consultation period. The comments indicated that Tribes, overall, support increased clarity of waters protected by the Clean Water Act, but some expressed concern with the consultation process and the burden of any expanded jurisdiction. The agencies

considered the feedback received through consultation and written comments in developing the rule.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

Secretary of Energy & Environment, State of Oklahoma (Doc. #2038)

1.124 As co-regulators of the Clean Water Act (CWA), States will be significantly impacted by the proposed rule. The rule as written will affect multiple programs that are implemented through the CWA, as well as State programs that complement the jurisdiction of the CWA. The proposed rule also includes multiple changes that significantly blur the definition and scope of CWA regulated waters, and several portions of the proposed rule create new jurisdictional classifications and terminology. Additionally, the State of Oklahoma would benefit greatly from an analysis of recently "exempted" practices under the proposed rule that may trigger additional state and/or federal regulations, create the potential for exempt activities resulting in State water quality violations, and/or lead to other unforeseen consequences. (p. 1)

Agency Response: See Summary Responses for Sections 1.0 and 1.1. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 3 – Adjacent Waters, Topic 7 – Features and Waters Not Jurisdictional, and Topic 8 – Tributaries. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction,

reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Barona Band of Mission Indians (Doc. #2476)

1.125 The Tribe believes that the proposed rule seeks to extend the scope of the jurisdiction of the EPA and the ACE under the Clean Water Act (the "CWA") beyond what the statute and federal law allow, thereby harming the sovereign interests of the Tribe, especially its sovereign right to control the use and development of the land of its federal Indian reservation, and of its natural resources. (p. 1)

Agency Response: **See Sections 1.0 and 1.1 Summary Responses and Preamble to the Final Rule. Federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for**

permitting authorities, including the tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal issues and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II.

Attorney General of Texas (Doc. #5143.2)

1.126 The Rulemaking Subrogates the Primary Responsibilities and Rights of States under the Act

One of the paramount objectives of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, that objective does not grant the federal government carte blanche to achieve those goals by any means necessary. This "ends justifies the means" mentality has never once been accepted as a doctrine of law in the United States. Instead, the federal government must consider an equally important objective of the Clean Water Act:

> [T]o recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b) (emphasis added).

The *Rapanos* plurality observed that "the Government's expansive interpretation would ' result in a significant impingement of the States' traditional and primary power over land and water use."" *Rapanos*, 547 U.S. at 738 (quoting *SWANCC*). The Court stated, further, that only a "clear and manifest" statement from Congress could authorize an unprecedented intrusion into traditional state authority and that "'waters of the United States' hardly qualifies. " *id* (citing *BFP* v. *Resolution Trust Corp*., 511 U.S. 531, 544 (1994)).

The Clean Water Act also states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter" and that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(g). In granting the "primary responsibilities and rights" of the Clean Water Act to the States, and in designating allocation authority to the States, Congress made it clear that the goal of pollution prevention must be accomplished though the state. If not withdrawn, this rulemaking will significantly impinge on the States' traditional and primary power over land and water use. Furthermore, it will effectively read out and subrogate any notion of federalism in the Clean Water Act, contradicting the Act's objective in 33 U.S.C. § 1251(b) and bringing to fruition the Supreme Court's concerns in *Rapanos*. See id. at 738. (p. 5-6)

Agency Response: **See Preamble to the Final Rule, Technical Support Document and summary response above. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate.

See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700 (1994).

North Dakota Water Resource Districts Association (Doc. #5596)

1.127 The Association and its member Districts have operated under the Solid Waste Agency of Northern Cook County and Rapanos doctrines since 2001 and 2006, when the Supreme Court of the United States struck down previous attempts to expand Federal jurisdiction over waters. Our Districts have had ample opportunity to adopt and implement an effective and efficient system for determining local jurisdiction over waters and recognizing what constitutes Federal jurisdiction. Local governments, water users and resource districts have competently operated under the current definition, and we feel there is no justification for this Federal overreach. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Pennsylvania Department of Transportation (Doc. #6258.1)

1.128 PennDOT believes that every effort should be made to streamline the permitting process while still protecting the environment. Operationally the department feels this rule will have little impact to Pennsylvania as the state regulations are more robust than the currently proposed federal rule. (p. 1)

Agency Response: States retain full authority to implement their own CWA programs to more broadly or more fully protect the waters in their state. Under section 510 of the Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.

Illinois House of Representatives (Doc. #7978)

1.129 The rule would place features such as ditches, ephemeral drainages, ponds (natural or man -made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal jurisdiction. These areas are the reserved domain of the state government not the federal government…[ ]

Illinois municipal units of government and other jurisdictions such as small towns, counties, drainage districts, water systems, irrigation districts, transportation departments, and municipal utilities will be profoundly impacted by the shift from state and local control of water-related land uses to federal control. (p. 2)

Agency Response: **The rule does not regulate land use. See Preamble to Final Rule. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule. This rule recognizes the unique role of states related to water quantity and as recognized by section 101(g) of the CWA. States, consistent with the CWA, retain full authority to implement their own CWA programs to more broadly or more fully protect the waters in their state. Under section 510 of the Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters.**

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

1.130 The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and 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. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. See Preamble to the Final Rule and Technical Support Document.**

1.131 Pennsylvania was therefore frustrated, disappointed and frankly, alarmed, to discover that in formulating this rulemaking, EPA is relying on inadequate and inaccurate information regarding the breadth and scope of state law programs. It is of great concern to Pennsylvania that, despite delegation agreements referencing existing state laws, and the routine interaction with Pennsylvania DEP regarding our obligations and collaboration in administering our NPDES duties alone, EPA would nonetheless rely on and cite in public forums with Pennsylvania DEP officials, the 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*. This assessment is named as background information supporting the rulemaking,[21] in articles[22] and in public

[21] http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act

presentations by EPA officials[23], although it is not cited in U the rulemaking. One of DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is needed because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is 13 completely erroneous and reflects a lack of due diligence and coordination with states.

The ELI study fails entirely to identify codified statutes and regulations' that have provided the foundation for Pennsylvania's regulatory programs for decades - in some instances for nearly half a century. Instead, the ELI report only cites a 1996 Executive Order and the wetlands provisions under the PA Dam Safety and Encroachments Act ("DSEA"), and identifies these as loopholes in Pennsylvania. The ELI report does not further analyze the Pennsylvania wetlands permitting program (or compare it to the ACOE 404 permitting program) and more egregiously, fails to reference or acknowledge the regulatory authority under the Pennsylvania Cleans Streams Law and the multiple chapters of the Pennsylvania Code which comprise the state's regulatory program. Again, these state laws and regulations form the basis for delegation of the Clean Water Act NPDES program to Pennsylvania, as well as the foundation for the ACOE Pennsylvania SPGP for Clean Water Act Section 404 authorizations.

In 2013 alone, DEP provided approximately 13,066 state law water program authorizations 4,914 of which were under the Clean Streams Law for the delegated NPDES program. These numbers represent the extensive state law oversight in Pennsylvania over projects which affect or have the potential affect waters of the Commonwealth. In order to obtain each one of these authorizations, the permittee is required to undertake its project in compliance with one or more chapters of Title 25 of the Pennsylvania Code. It is particularly noteworthy given the ELI assessment of the Pennsylvania program, that the authorizations and oversight undertaken by PA DEP pursuant to the delegated NPDES program constitutes only 38% of the water related permitting in 2013. In other words, 62% of the 2013 water related permitting in Pennsylvania was pursuant to state law authority only.

DSEA/CSL – Chapter 105	3,224
CSL/NPDES	4,914
CSL/Sewage Facilities Act[24]/Non-NPDES	4,928

As these statistics demonstrate, Pennsylvania does in fact have a significant and robust regulatory program that reaches beyond the federal Clean Water Act. Pennsylvania's approach in fact could serve as a model for the cooperative federalism at the heart of the

[22]http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30

[23] June 13,2014, Berks County, EPA Official Nancy Stoner

[24] Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 et seq.

Clean Water Act, which envisions a federal-state partnership in the oversight and protection of the nation's waters with the federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each states. (p. 2-4)

Agency Response: **See summary response, Preamble to the Final Rule and Technical Support Document. The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. The agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate.

See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700 (1994).

West Virginia Attorney General, et al. (Doc. #7988)

1.132 The Proposed Rule disregards the statutory requirement mandating respect for State primacy in the area of land and water preservation and instead makes the Federal Government the primary regulator of much of intrastate waters and sometimes wet land in the United States. The Agencies may not arrogate to themselves traditional state prerogatives over intrastate water and land use; after all, there is no federal interest in regulating water activities on dry land and any activities not connected to interstate commerce. Instead, States by virtue of being closer to communities are in the best position to provide effective, fair, and responsive oversight of water and land use and have consistently and conscientiously done so. (p. 6)

Agency Response: See Preamble to the Final Rule and Technical Support Document Section I. The rule does not regulate land use. The agencies respect states' critical roles in protecting water quality and this rule does not supplant that role or their authorities. The federal interest in protecting waters, as shown by the CWA, nonetheless is strong, and the rule is a reasonable, considered, legally sound and scientifically based delineation of waters subject to the CWA.

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

States, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Many states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

State of Iowa (Doc. #8377)

1.133 The overriding concern of a diverse group of impacted stakeholders, including state leaders, is that the proposed rule will impose significant barriers to the advancement of innovative, state- and local -driven conservation and environmental practices that would actually advance our common goal of water quality. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. States, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the

waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Many states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

1.134 Abandonment of Cooperative Federalism: States, not the Federal government, have the lead for advancing water quality through the CWA and more importantly through state - local-private sector partnerships. Section 101(b) of t he CWA clearly states that, "it is the policy of the Congress to recognize, / preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..." Successful water quality efforts are driven by engaged stakeholders who have close relationships with state and local officials, not by Federally-prescribed directives. Given that state officials were not involved in the drafting of the proposed rule over the last few years, it is no surprise that the proposed rule will actually impede effort s to advancing innovative, state-based water quality initiatives, such as the State of Iowa Nutrient Reduction Strategy. As currently written, this rule is nothing more than Federal encroachment on the states. Many stakeholders believe the proposed rule is the most egregious example of Federal overreach in the last few decades - we unfortunately agree. The proposed rule confuses Federal control with environmental protect ion. The State of Iowa believes that environmental protection is best driven locally. Nobody cares more about local water quality than those of us who drink it, fish it, boat it, and swim it . Farmers, ranchers and even water quality advocates have noted that the proposed rule is likely to curtail many voluntary water quality improvement projects if such projects would trigger the cost and delay of seeking Federal permits. Such unintended consequences are precisely why the Federal government needs to better engage state governments, local communities, and affected industries. The EPA itself has recently done a better job engaging state and local stakeholders as part of its Clean Air Act implementation and that proactive outreach stands in stark contrast to the approach taken on this CWA rule. The EPA Headquarters' approach on this rule also starkly differs from the very good relationship that State of Iowa leaders have had in advancing state-led and public-private partnerships with EPA Regional Administrator Karl Brooks. (p. 1-2)

Agency Response: **See Preamble to the Final Rule, Technical Support Document and Summary Response. States, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Many states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA**

for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Agency Response: **The proposed rule focuses heavily on the clean water purposes of the CWA statute by relying on the assumption that whatever affects waters is waters. This approach ignores another primary purpose of the CWA statute, which is the preservation of primary state responsibility for ordinary land-use decisions. Maintaining the primacy role of states is critical to the protection of water resources at the State level, but this rule proposes to remove that role and replace it with Federal control. Given the rule's nationwide scope, it provides inadequate clarity to address the unique situations and geographic features found within individual states and regions. Any rule proposed must provide a clear extent of Federal jurisdiction focused on perennial and navigable waters while preserving a role for states to address their unique situations for waters beyond these areas. (p. 5)**

Agency Response: **States, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Many states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of

restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Navajo Nation Environmental Protection Agency (Doc. #10117)

1.135 Finally, the proposal recognize s that "States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state [and on I" their lands]. Under Section 510 of the [Clean Water] Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state or tribe to establish more protective standards or limit s than the Federal CWA." 79 Fed. Reg. at 22 194. The Navajo Nation EPA Water Quality Program fully supports this statement.

The Navajo Nation has its own Clean Water Act which protects various categories of "other waters') without the requirement to demonstrate a significant nexus to waters of the United States. The Navajo Nation EPA Water Quality Program appreciates that the proposed "waters of the United States" definition in no way limits the Navajo Nation's authority to protect the water quality of Navajo Nation surface waters. (p. 3)

Agency Response: Federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal issues and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

Washington State Senate (Doc. #10871)

1.136 We are indeed proud of our state and local water quality programs, but we also support continuation of a strong federal and state partnership in the protection of our waters. As a coastal state and one sharing the downstream waters of two major interstate rivers (one of which is international), we strongly appreciate the "connectivity" of all of the waters in our region, and the strong role which federal water pollution control laws and programs must play in protecting and restoring our water resources.

Furthermore, it would be an incorrect premise to argue that these federal regulations would undermine state laws. "Exhibit A" is the fact that Washington State has enacted no provisions that provide pollution control protections comparable to the dredge and fill permitting well as water quality standards provisions of the federal Clean Water Act. (p. 3)

Agency Response: See Preamble to the Final Rule. States consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Many states, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

New York State Attorney General (Doc. #10940)

1.137 It promotes the consistent and efficient implementation of State water pollution programs across the country in accordance with the principles of "cooperative federalism" on which this landmark statute is based. (p. 1-2)

Agency Response: See Preamble to the Final Rule, Technical Support Document and Summary Response. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A

federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state efforts to protect their waters. States retain full authority to implement their own programs. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters.

Illinois State Senate, Jacksonville, IL (Doc. #11995)

1.138 Your rule expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity, and the rule is flawed in a number of ways, which are highlighted below.

… [ ]

- The rule would place features such as ditches, ephemeral drainages, ponds (natural or manmade), prairie pot holes, seeps, flood plains, and other occasionally or seasonally wet areas under federal jurisdiction. These areas are the reserved domain of the state government not the federal government.
- Rather than providing clarity and certainty in identifying covered waters, the rule instead creates more confusion and will inevitably cause unnecessary litigation. The rule relies heavily on undefined and vague concepts.
- The rule throws into confusion extensive state regulation under various CWA programs. Implementation of this rule will have significant implications on most if not all of the fourteen (14) statewide permits under the purview of the Illinois Department of Natural Resources.
- Illinois municipal units of government and other jurisdictions will be profoundly impacted by the shift from state and local control of water-related land uses to federal control.

- There is concern that additional federal revenue or assistance in the future to help meet the cost of this rule will not be forthcoming. Expansion of federal jurisdiction under the Clean Water Act will in fact be an unfunded mandate on the public and private sectors. (p. 1-2)

Agency Response: **See Preamble to the Final Rule, Technical Support Document and Summary Response. The rule does not regulate land use. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.**

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state efforts to protect their waters. States retain full authority to implement their own programs. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state to manage the waters within its jurisdiction or to more broadly protect their waters. This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs.

Utah State Senate et al. (Doc. #12338)

1.139 Currently, there are many waters that are subject to state regulations only. This proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. Given this expansion, we would ask if you can identify any water that would not be subject to federal jurisdiction unless specifically exempted. Such an expansion in federal jurisdiction would fundamentally alter our ability to make decisions regarding the use of land within our borders. Due to the fact that States often regulate more waters than are encompassed by the current definition of waters of the United States it is not clear what benefit the expansion of federal authority is designed to achieve. It appears that the Agencies did not even consider existing State authorities when developing its proposed rule. (p. 2)

Agency Response: **See Preamble to the Final Rule, Technical Support Document and Summary Response. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.**

State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. This rule recognizes

the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state efforts to protect their waters. States retain full authority to implement their own programs. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state to manage the waters within its jurisdiction or to more broadly protect their waters.

Kansas Water Authority (Doc. #12350)

1.140 The KWA concurs with the letter sent by Governor Sam Brownback, on behalf of the state of Kansas, conveying concerns over the rule. The rule, as proposed, not only has significant impact on Kansas landowners and land managers in their ability to make land use decisions, but also places a burden upon, and impacts the state's ability to manage and regulate the water resources under Kansas jurisdiction.

The KWA is very concerned about the following items in particular:

- The KWA is responsible for prioritizing the funding of the Kansas Water Plan which is used to implement water quality improvement projects. This proposed rule and the associated costs with it could cause redirection of priority water improvements the state has worked so hard to address over the past several years.

Kansas consistently ranks in the top of the nation in reported sediment, phosphorous and nitrogen load reduction. Kansas has seen improvements in water quality in recent years and corresponding removal of streams from the impaired 303d list. In the past five years in many water bodies have removed in our efforts. These improvements are the result of appropriate positive coordination of federal and state agencies with individual landowners. The proposed rule changes that balance to lessen the burden on the federal government marginally, while creating significant additional unnecessary requirements for both state agencies and individual landowners. The net effect rule will be additional expenditures at the state level without a corresponding improvement in water quality. (p. 1-2)

Agency Response: **The rule does not regulate land use. See Preamble to Final Rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. States retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. Therefore, consistent with the CWA nothing in this rule limits or impedes any existing or**

future state efforts to protect their waters. Additionally, by providing greater clarity regarding what waters are subject to CWA jurisdiction, the frequency with which states and tribes with authorized section 402 and 404 CWA permitting programs will need to make jurisdictional determinations on a case-specific basis is reduced.

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

1.141 The overreach of your proposal is objectionable not for the protections your agencies seek to extend. Montanans long ago decided our waters are worth protecting and acted accordingly. The problem is that your overreach impinges directly on our state sovereignty. It offends Congress's stated intention in the Clean Water Act to recognize, protect and preserve the primary rights of the States to manage their lands and water resources. It violates, in my opinion, the admonitions of the U.S. Supreme Court that the Act's jurisdiction is and must be limited to waters that have a significant nexus to core waters. In short, the proposal seeks to extend the reach of the Act beyond what is allowed by the Commerce Clause. (p. 3)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. Therefore, consistent with the CWA, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. Additionally, by providing greater clarity regarding what waters are subject to CWA jurisdiction, the frequency with which states and tribes with authorized section 402 and 404 CWA permitting programs will need to make jurisdictional determinations on a case-specific basis is reduced.**

Wyoming Association of Conservation Districts (Doc. #14068)

1.142 The Wyoming State Engineer articulated the Association's concerns succinctly in testimony he provided to the United States House of Representatives Committee on Natural Resources; Subcommittee on Water and Power Hearing:

'The Clean Water Act limits the federal jurisdiction over state waters recognizing that the states are better situated to make decisions regarding water, including water quality in minor waters that are not of national significance. The Wyoming Department of Environmental Quality, Water Quality Division is the agency responsible for establishing water quality standards and TMDLs, administering the NPDES discharge permitting

program and providing section 401 water quality certifications for federally permitted projects on waters in Wyoming. The proposed rule attempts to erode Wyoming's primary authority over low flow, remote, headwater stream channels and isolated ponds and wetlands by expanding the concept of national significance."

The Association incorporates by reference herein, attached hereto, the testimony provided by Mr. Pat Tyrrell, Wyoming State Engineer to the above referenced Committee. Mr. Tyrell's testimony substantively addresses the legal issues and concerns held by the Association with the proposed rule.[25] (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. Therefore, consistent with the CWA, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. Additionally, by providing greater clarity regarding what waters are subject to CWA jurisdiction, the frequency with which states and tribes with authorized section 402 and 404 CWA permitting programs will need to make jurisdictional determinations on a case-specific basis is reduced. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the**

[25] United States House of Representatives Committee on Natural Resources Subcommittee on Water and Power Hearing: "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs." Testimony of Patrick Tyrrell, P.E. Wyoming State Engineer; June 24, 2014

quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

1.143 EPA presents the following additional rationale for exerting jurisdiction:

According to a study by the Environmental Law Institute, 36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act.[26]

EPA relies on the above referenced report as the basis for arguing that waters are unprotected, and subsequently justify broadly defining those waters to be considered jurisdiction. There are a number of reasons why reliance on the lack of state authority and the referenced report is problematic.

1) State Authorities – The Supreme Court, to the Association understanding, did not condition federal jurisdiction based on whether EPA or a Law Institute felt a state did or didn't have adequate regulatory authorities. The jurisdiction issue is unrelated to a state's current regulatory scheme and should be based on whether a specific water has a "significant nexus" or impact to a "traditionally navigable water". Not on whether the agency felt that regulatory controls in the state are adequate or not. How to regulate and protect non-jurisdictional waters is an authority retained by the respective state.

2) The above referenced report, repeatedly referenced throughout the extensive materials published by EPA advocating the rule, cannot be accepted as unbiased nor accurate evaluation of state authorities. Especially given that the Institute filed an Amicus in the Rapanos case arguing for federal jurisdiction[27] and EPA provided the funding for the referenced report.

3) The Association also believes the report contains inaccuracies as it pertains to whether a state had authorities in place for non-jurisdictional waters to protect water quality and also their analysis of limitations placed on the authority. As an example, the report claims that Wyoming does not have state coverage of non-jurisdictional waters and that the state has limitations placed on it, however a review of Wyoming Chapter 1 Surface Water quality regulations defines waters of the state as follows:

(xlvii) "Surface waters of the state" means all perennial, intermittent and ephemeral defined drainages, lakes, reservoirs and wetlands which are not man-made retention ponds used for the treatment of municipal, agricultural or industrial waste; and all other bodies of surface water, either public or private which are wholly or partially within the boundaries of the state. Nothing in this definition is intended to expand the scope of the Environmental Quality Act, as limited in W.S. 35-11-1104.[28]

The Environmental Quality Act limitations are described as follows:

[26] http://www.epa.gov/uswaters

[27] Brief of Environmental Law Institute as Amicus Curiae (co author), Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers, Nos. 04-1043, -1384 (U.S. filed Jan. 2006).
"ELI has concluded from its long-standing involvement in wetlands law and policy that the current comprehensive federal program is absolutely essential to the health of our Nations waters."

[28] http://deq.state.wy.us/wqd/WQDrules/Chapter_01.pdf

§ 35-11-1104. Limitation of scope of provisions.[29]

(a) Nothing in this act:

(i) Grants to the department or any division thereof any jurisdiction or authority with respect to pollution existing solely within commercial and industrial plants, works or shops;

(ii) Affects the relations between employers and employees with respect to or arising out of any condition of pollution;

(iii) Limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control, the director of the Wyoming game and fish department, the state mine inspector, the oil and gas supervisor or the oil and gas conservation commission, or the occupational health and safety commission.

The above limitations have little to nothing to do with limiting the state of Wyoming, Department of Environmental Quality's authorities to protect water quality.

Specific to the examples provided by EPA where enforcement actions were abandoned due to the difficulty of demonstrating jurisdiction based on a search of water quality enforcement authorities in the respective states, it appears that all three states have water quality protection and enforcement authorities and subsequently could have addressed the alleged discharges described by EPA.[30] (p. 8-9)

Agency Response: **See Summary Response. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.**

The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. The agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

[29] http://legisweb.state.wy.us/LSOWEB/StatutesDownload.aspx

[30] Texas Commission of Environmental Quality; Enforcement Initiation Criteria (EIC); https://www.tceq.texas.gov/assets/public/agency/eic-a4-tpdes-rev-14.pdf Environmental Protection Division; A Division of the Georgia Department of Natural Resources http://epd.georgia.gov/watershed-protection-branch http://epd.georgia.gov/enforcement Arizona Department of Environmental Quality; http://www.azdeq.gov/function/forms/docs.html#hand

Commonwealth Pennsylvania Department of Agriculture (Doc. #14465)

1.144 The Pennsylvania Department of Agriculture (PDA) is frustrated and disappointed to discover that in formulating this rulemaking, EPA is relying on inadequate and inaccurate information regarding the breadth and scope of state law programs. It is of great concern to PDA that, despite delegation agreements referencing existing state laws, and the routine interaction with the state Department of Environmental Protection (DEP), EPA would rely on the 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. This assessment is named as background information supporting the rulemaking,[31] in articles[32] and in public presentations by EPA officials,[33] although it is not cited in the rulemaking. One of PDA's main concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is needed because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states. (p. 2)

Agency Response: **See Summary Response. The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule. The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. The agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.**

State of Wyoming (Doc. #14584)

1.145 Most waters, with the exception of those that are interstate, navigable, or consistently and directly connected to navigable/interstate waters (as established in court decisions) are best regulated by the individual states. This important principle is consistent with the Act, and the proposed rule runs counter to it.

[31] http://www.epa.gov/uswaters/documents-re1ated-proposed-definition-waters-united-states-under-clean-water-act
[32] http://yosemite.epa.gov/opal admpress.nsf/3881 d73 f4d4aaa0b8 5257359003 f5348/ae90dedd9595 a0248 5257 ca600557 e3 0
[33] June 13,2014, Berks County, EPA Official Nancy Stoner

The proposed rule relies on only one purpose of the Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and ignores the equally important purpose "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources." Compare Definition of the "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22187,22194-95 (proposed April21, 2014) with 33 U.S.C. § 1251(a)-(b). The proposed rule overrides the jurisdictional responsibilities of states for waters within their boundaries and places almost every body of water in the country under the control of federal agencies. It takes away the primary rights of the states recognized in the Act.

States should be consulted for any proposed change in regulation under the Act and certainly should have been consulted early and continuously for a drastic proposal like this one. Yet state governments were not appropriately consulted.

On September 12, 2014, Administrator McCarthy hosted a meeting in Washington, D.C. During that meeting, EPA staff acknowledged that little was done to solicit input from policy makers in state government on the proposed rule. The EPA indicated it viewed public comments related to previously proposed and withdrawn guidance documents as sufficient input to move forward. The EPA has been visiting stakeholders to provide "information" during an extended comment period. At least one of these sessions occurred in Wyoming. The EPA announced the discussions were "not recorded, not for official comment, and only to provide information."

Public information presentations are an inadequate alternative to the consultation process that should have occurred specific to the proposed rule. Using comments received in 2011 on withdrawn guidance in lieu of new consultation for this rulemaking, is unacceptable and falls short of the requirements of Executive Order 13132. See 64 Fed. Reg. 43255 (August 10, 1999). (p. 1-2)

Agency Response: **The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementers of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry,**

agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

1.146 The Agencies should start over with respect to the proposed rule. They should not try to exert regulatory authority over shallow subsurface groundwater, irrigation ditches, small, intermittent or ephemeral streams, or other small water bodies. They should defer to the states for the regulation of these and all other waters that are intrastate with only minimal or temporary hydraulic conductivity to traditional waters of the United States. (p. 3)

Agency Response: **The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be**

defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See also Preamble to the Final Rule III and IV and Technical Support Document Sections I, II, VII, VIII and IX.

Maine Department of Environmental Protection (Doc. #14624)

1.147 Maine DEP plays the lead role in the regulation of impacts to water quality in Maine, through delegated authority under the Clean Water Act and through regulatory powers reserved to the state. Protection of the waters of the state of Maine is essential to Maine's identity and its rich environmental and natural resource heritage. Much of Maine's economy directly depends upon the continued high quality of all waters of the state, including those waters regulated by the Clean Water Act ("CWA"). EPA has delegated to Maine the authority to administer many sections of the CWA, including those which rely upon the definition of WOTUS: Sections 303, 401 and 402. In addition to administration of the CWA, DEP administers several other laws which regulate the land and water use of the state, including by not limited to the Natural Resources Protection Act (38 M.R.S.A §480-A et seq.), stormwater management law (38 M.R.S.A §420-D), Site Location of Development laws (38 M.R.S.A §481 et seq.), and shoreland zoning laws (38 M.R.S.A §435 et seq.).

Given Maine's rich environmental heritage as well as Maine's dependence on the high standard of environmental quality to ensure a prosperous economy, DEP regulates activities which impact waters of the state. Waters of the state regulated by the State of Maine include surface and subsurface waters. (38 M.R.S.A. §361-A(7)) Although the Rapanos[34] opinions sought to clarify what is and is not considered jurisdictional under the CWA, neither the plurality opinion written by Justice Scalia nor the concurrence written by Justice Kennedy overturned the premise described in SWANCC[35] that the states have the traditional and primary power of land and water use (see SWANCC at 174). Pursuant to the 10t h Amendment of the U.S. Constitution, the Agencies' jurisdiction under the CWA is limited to the powers delegated to the United States by the Constitution (in this instance, by the Commerce Clause in Article I, Section 8), and all remaining powers are reserved to the States. (p. 1-2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document Section I. This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Consistent with the CWA, and as is the case today, nothing in this rule limits or

[34] Rapanos v. United States, 547 U.S. 715 (2006).
[35] Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

impedes any existing or future state efforts to protect their waters. States retain full authority to implement their own programs. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters.

State of Oklahoma (Doc. #14625)

1.148 While not stated explicitly in the proposed rule, expansion of EPA and Corps jurisdiction over any waters not previously considered WOTUS must be predicated on a belief that states are incapable of protecting and managing such waters - an assertion that simply is not supported by science or facts. The OWRB and other state agencies in Oklahoma have been responsible and effective stewards of water quality and quantity management both before and since enactment of the CWA. In fact, many of Oklahoma's success stories are highlighted in EPA's own publications and webpages and are due to state and local voluntary conservation programs, effective water management strategies, and superior water quality monitoring networks. (p. 11)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document Section. This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state efforts to protect their waters. States retain full authority to implement their own programs. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters.

Western Governors Association (Doc. #14645)

1.149 The Western Governors appreciate the proposed rule's objective to clarify the meaning of "Waters of the United States" in the CWA. Any changes within the proposed rule must

stay within the limits set by Congress and the Supreme Court,[36] recognizing the authority of states to manage water within their boundaries.

The Governors appreciate that the SAB's connectivity study was released prior to the close of the proposed rule's comment period. We note with concern, however, that the Board has indicated its support for utilizing connectivity of water as a scientific basis for even broader federal agency jurisdiction under the CWA than what is now suggested under the proposed rule.[37] We urge you to remember that legal authority and precedent are at the core of the question of the agencies' jurisdiction under the Act. Both hydrology and laws vary from state to state. The best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with — and intimately understand — the issue at hand. (p. 1-2)

Agency Response: **The final rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II regarding the provisions of the final rule.**

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.

The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate.

This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under

[36] See Supreme Court rulings in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001) and in Rapanos v. United States, 547 U.S. 715 (2006).

[37] Letter from David T. Allen, Chair of the EPA Science Advisory Board, to EPA Administrator Gina McCarthy. Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act," September 30, 2014.

the CWA. Under section 510 of the CWA, 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. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. States and tribes retain full authority to implement their own programs. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters.

1.150 States have jurisdiction over water resource allocation decisions and are responsible for how to balance state water resource needs within CWA objectives. New regulations, rulemaking, and guidance should recognize this authority.

a. **CWA Jurisdiction**: Western Governors urge EPA and the Corps to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

b. **Total Maximum Daily Loads (TMDLs)/Adaptive Management**: States should have the flexibility to adopt water quality standards and set total maximum daily loads (TMDLs) that are tailored to the specific characteristics of Western water bodies, including variances for unique state and local conditions.

c**. Anti-degradation**: CWA Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA oversight. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new anti-degradation policies or implementation requirements, EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.

d. **Groundwater**: States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders and are primarily responsible for allocating, protecting, managing, and otherwise controlling the resource. The regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources. The federal government should not develop a groundwater quality strategy; instead, it must recognize and respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities. (p. 5-6)

<u>Agency Response:</u> The comments concerning Total Maximum Daily Loads (TMDLs)/Adaptive Management, Antidegradation are outside the scope of the rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no

changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the

United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See also Preamble to the Final Rule III and IV and Technical Support Document Sections I, II, VII, VIII and IX.

1.151 Permitting: Actions taken by EPA in its CWA permitting processes should not impinge upon state authority over water management or the states' responsibility to implement CWA provisions.

a. **State Water Quality Certification**: Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. Section 401 of the CWA is operating as it should and states' mandatory conditioning authority should be retained without amendment.

b. **General Permits**: Reauthorization of the CWA must reconcile the continuing administrative need for general permits with the site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance thatbetter support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.

c. **Water Transfers**: Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors generally support EPA's current water transfers rule, which exempts water transfers between waters of the United States from NPDES permitting requirements.

d. **Pesticides**: Western Governors generally support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public health related pesticide applications to waters of the U.S. and will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies. (p. 6-7)

Agency Response: **See Summary Response and Preamble to the Final Rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

1.152 Nonpoint Source Pollution: Nonpoint source pollution requires state watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy that maintain the non-regulatory and voluntary nature of the program. In general, the use of point source solutions to control nonpoint source pollution is also ill-advised.

Forest Roads: Stormwater runoff from forest roads has been managed as a nonpoint source of pollution under EPA regulation and state law since enactment of the CWA. Western Governors are concerned about efforts to treat forest roads as point sources under the NPDES program and support solutions that are consistent with the long-established treatment of forest roads as nonpoint sources, provided that forest roads are treated equally across ownership within each state.
Nutrient Pollution: Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the nation, and continued cooperation between states and EPA is needed. However, nutrients produced by non-point sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

States should be allowed sufficient flexibility to utilize their own incentives and authorities to establish standards and control strategies to address nutrient pollution, rather than being forced to abide by one-size-fits-all federal numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches. (p. 7-8)

Agency Response: **See Summary Response and Preamble to the Final Rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Arizona State Land Department (Doc. #14973)

1.153 The Proposed Change purports to solve the problem of a lack of a definitional framework within which to consistently understand the meaning of "waters of the United States." While clarification is a laudable goal, the doctrine of the separation of powers mandates that the judiciary take responsibility for interpreting this phrase.

Adherence to the separation of powers is a foundational principle upon which this country's system of governance was built. The Founders foresaw the necessity of

respecting the specific roles of the executive, legislative, and judicial branches in an effort to ensure a system of checks and balances to protect citizens from abuses of power. This foundational requirement must be respected and cannot be avoided simply because the decisions made by one branch within its own purview may not reflect a different branch's ideal situation.

With respect to the issue under discussion, the judicial branch has both the authority and responsibility to interpret and apply the law. In fact, the judiciary has already passed upon this issue; the fact that it has chosen not to draw a bright line settling the meaning at this particular juncture does not mean that an administrative agency can now step in to usurp judicial authority and prevent the courts from either drawing a bright line in the future or continuing to interpret the meaning of "waters of the United States" on a case by case basis.

The Proposed Change should not be misused as a means of circumventing a fundamental principle of governance. The judiciary is tasked with the authority to interpret and apply laws, and this duty cannot be breached. To allow such a flagrant violation of the separation of powers would be to chip away at the foundation that has served this country from its inception. (p. 4)

Agency Response: See Preamble to the Final Rule and Technical Support Document Section I.

San Carlos Apache Tribe (Doc. #15067)

1.154 The proposed rule seeks to regulate land, not navigable waters. The proposed rule violates existing federal law and circumvents Congressional intent. The proposed rule seeks to regulate commerce beyond the limits of the Commerce Clause as interpreted by the Supreme Court. The adoption of the proposed rule, as currently drafted, would result in an infringement upon and usurpation of the Tribe's sovereignty, self-governance and self-determination. (p. 6)

Agency Response: Federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA. *See* CWA section 518; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal issues and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Section I. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

Arizona Department of Environmental Quality, et al. (Doc. #15096)

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

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

CWA § 101(g).

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

This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This State's jurisdiction amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only.

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

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

programs (on the one hand) and programs by which of other federal agencies and States that allocate quantities of water (on the other hand).[38]

The statute and its legislative history are clear. The allocation of water is not within the purview of the Clean Water Act. Accordingly, jurisdiction cannot be based on water supply and water retention functions. (p. 3-4)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).**

1.156 In addition, assertion of jurisdiction based on groundwater impacts directly affects States' authority to allocate water resources. The implications of this rationale became very clear in a recent draft directive issued by the National Forest Service, titled: "Proposed Directive on Groundwater Resources Management" ("Directive"), 79 Fed. Reg. 25,815 (May 6, 2014). Under this Directive, the Forest Service claims the authority to evaluate all applications for groundwater withdrawals not only on Forest Service lands, but also on adjacent lands, due to "hydraulic continuity." As in the proposed rule, the Directive has no clear definition of "adjacent." If, like EPA and the Corps, the Forest Service believes all waters are connected, it could likely claim that all state water rights applications must be evaluated by the Forest Service regardless of the distance from federal lands. Thus, the theory of federal jurisdiction espoused by EPA and the Corps has implications even beyond the Clean Water Act. (p. 6-7)

Agency Response: **The draft directive issued by the National Forest Service, titled: "Proposed Directive on Groundwater Resources Management" ("Directive"), 79 Fed. Reg. 25,815 (May 6, 2014) is outside the scope of this rule. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through**

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

subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. See also Preamble to the Final Rule III and IV and Technical Support Document Sections I, II, VII, VIII and IX.

Wisconsin Department of Natural Resource (Doc. #15141)

1.157 It remains unclear what benefit this new rule would have for the State of Wisconsin, its citizens, or even water quality because the new rule ignores existing state regulations and authorities. The State of Wisconsin more broadly defines "Waters of the State," so we would be remiss if we did not object to another instance of the federal government encroaching upon powers and responsibilities previously delegated to the states. As co-regulators of our state's water resources, we believe that a thorough and robust consultation is both warranted and imperative for any rule package to move forward. In Wisconsin, there are many waters that are subject only to state regulations; however, this rule aims to vastly expand the reach of federal regulations while Wisconsin's regulatory authority would be duplicative, at best, if not outright eliminated. For example, the State of Wisconsin remains one of the few states that currently regulate isolated, non-federal wetlands following the decision in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This illustrates that environmental protections are best when driven locally by those who are directly impacted. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect**

the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Louisiana Department of Environmental Quality (Doc. #15164)

1.158 As noted in the letter accompanying these comments, the LDEQ recognizes the desire by U.S. Army Corps of Engineers and the Environmental Protection Agency to provide regulatory clarity following the Supreme Court decisions addressing the CWA. However, the LDEQ believes an attempt to bring clarity should not incorporate language that may improperly expand federal authority under the CWA. The broad exercise offederal authority embodied by the proposal is not supported by the CWA, and only Congress, through new legislation, can expand the authority currently contained in the proposed rule. Accordingly, the rule should be re-drafted to recognize both the limitations on federal authority and the primary responsibilities of the states under the CWA. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Sealaska Corporation (Doc. #15356)

1.159 Finally, the proposed rule is also inconsistent with the CWA policy to preserve the primary responsibilities and rights of states over land and water resources. The rule asserts that it "does not affect" this policy because states "retain full authority to implement their own programs to more broadly or more fully protect the waters in their state."[39] This statement ignores the scope of Congress' policy statement, which applies not only to the rights of states "to prevent, reduce, and eliminate pollution," but also to state's rights "to plan the development and use . . . of land and water resources."[40] While the proposed rule may preserve states' rights to address pollution by adopting more stringent regulations than the Agencies, it does not preserve the primary authority of states to plan the development and use . . . of land and water resources," as Congress intended when it adopted the CWA. On the contrary, the proposed rule asserts authority over isolated, non-navigable water bodies and land areas that Congress never intended to be regulated under the CWA. By eliminating the discretion of states to leave such areas unregulated, the proposed rule would invade the primary authority of states to plan for the development and use of these resources. As such, the rule is contrary to CWA as well as the state consultation criteria set forth in Executive Order 13132. As explained by the Western States Water Council and many other parties,[41] the statement in the proposed rule that Executive Order 13132 "does not apply" is simply incorrect, and the Agencies'

[39] 79 Fed. Reg. 22,189, 22,194.
[40] § 1251(b).
[41] See, e.g., http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf.

"voluntary federalism consultation" regarding the proposed rule was clearly inadequate, as reflected in the surprise and concern being expressed by states across the country.[42] (p. 9-10)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. See Preamble to the Final Rule.**

North Dakota Office of the Governor, et al. (Doc. #15365)

1.160 The fact that some waters that are not included within the CWA's current definition of WOTUS does not mean they are left unprotected. These state-only waters have traditionally been under state control. States have historically exhibited the ability to appropriately regulate them and address statewide and local concerns.

In North Dakota, the Legislature established a policy to protect all waters of the state, regardless of whether they fall within federal jurisdiction. N.D.C.C. § 61-28-01. Waters of the state is defined broadly and includes all surface and groundwater in the state. N.D.C.C. § 61-28-02(15).

North Dakota law not only protects more types of waters than the CWA, it also places greater protections on those waters. For instance, it is unlawful in North Dakota to pollute or place wastes where they are likely to pollute any of these waters. N.D.C.C. § 61-28-06. And protections are included for waters involved in water transfers. N.D.C.C. § 61-28-09.

The NDDH goes above and beyond merely implementing the federal CWA programs delegated to it by EPA. NDDH also implements a comprehensive state program to protect

[42] 79 Fed. Reg. 22220-21.

all waters of the state, addressing the protection of beneficial uses as defined in state law. As part of this program, NDDH has adopted extensive regulations to prevent and control water pollution. See N.D. Admin. Code art. 33-16. A person violating the state's water pollution control laws and rules is subject to an NDDH enforcement action, including the potential of substantial penalties. N.D.C.C. § 61-28-08. (p. 4)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

State of Florida (Doc. #15429)

1.161 Congress specifically explained that the CWA was designed to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). The CWA also requires the federal agencies to cooperate with State and local authorities "to develop comprehensive solutions to prevent, reduce, and eliminate pollution." *Id*. § 1251(g). As noted above, the Proposed Rule does more than define "waters of the United States" as Congress never intended; it undermines the cooperative federalism that Congress did intend. Congress's goal, unlike the Proposed Rule, was consistent with the limitation the Commerce Clause imposes on Congress.

This unprecedented expansion of federal power runs the "real risk" that "the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic" will be erased. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583-84 (1985) (O'Connor, J., dissenting). It also represents a transformation of what was supposed to be a cooperative federal-state endeavor into the raw exercise of a general federal police power. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

New Mexico Environment Department (Doc. #16552)

1.162 The proposed definition of "tributary," as including non-seasonal intermittent and ephemeral streams, far exceeds Congressional authority in enactment of the CWA under the commerce clause powers as well as the Court's findings in Rapanos (plurality and concurring opinions), SWANCC, and Riverside Bayview. See Rapanos, 547 U.S. at 733-734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."); see also 547 U.S. at 715 and 768 (Congress intended to regulate at least some waters that are not traditionally navigable).

As applied in New Mexico, such an expansive definition of "tributary" to include nonseasonal intermittent[43] and ephemeral streams will greatly enlarge federal jurisdiction and authority over almost all State waters. The proposed definition could easily find any tributary to tributary to tributary, ad infinitum, a federal jurisdictional water. This would in effect engulf all streams, drainage systems, and watersheds within the State. The question would then be on what waters, outside closed basins, would remain "state waters"?

Based on EPA Figures 1 and 2 above, the proposed definition of "tributary" will result in federal authority over almost all state waters that are not within closed basins. Thus, of the State's non-perennial streams, most, under the proposed rule, would in some manner drain to a tributary of a jurisdictional water and therefore be found a jurisdictional water. See Figure 1 and 2 above indicating the States intermittent and ephemeral streams. It is disconcerting how the Agencies can claim, in light of Rapanos, SWANCC, and Riverside Bayview, that all waters that simply touch or connect through a tributary system to jurisdictional waters, no matter the lack of permanence, visible hydrologic connection, distance, or finding of a "substantial nexus," can be found a federal jurisdictional water. The Department agrees with Michael Campbell's assessment that the Rapanos decision would reject "that the CWA protects every discernible water that contributes flow, directly or indirectly, to a traditionally navigable water, no matter how remote or insignificant the contribution--such as an ephemeral stream that might be 100 miles or more upstream of a traditionally navigable water. Michael Campbell, Waters Protected by the Clean Water Act: Cutting Through the Rhetoric on the Proposed Rule, 44 Envtl. L. Rep. News & Analysis 10559, 10561 (2014) (emphasis added); citing Rapanos, 547 U.S. at 781 (Kennedy, J., concurring). (p. 13-14)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. See Summary Response, Preamble to the**

[43] Permanency requirement for intermittent waters under the Rapanos test requires at least three months of flow; this is often termed "seasonal intermittent flows ." Deerfield Plantation Phase II-B Prop. Owners Ass 'n, Inc. v. U.S. Army Corps ofEng'rs, 501 Fed. Appx. 268, 271 n.1 (4th Cir. 2012) .

Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

Office of the Governor, State of Montana (Doc. #16694)

1.163 Additionally, the State of Montana urges the EPA and USACE to ensure that the rule does not in any way diminish the intent and purpose of CWA Section 101(g) which states: "(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." (p. 5-6)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Arizona State Senate (Doc. #16895)

1.164 This action is not supported by the Clean Water Act or the Commerce Clause of the U.S. Constitution. Congress memorialized State primacy over the management and regulation of intrastate water and land by declaring that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use ... of land and water resources .. . (33 U .S. C. § 1251(b))." States, not the federal government, are in the best position to provide effective, fair and responsive oversight of water and land use and have carried out the obligations of protecting these resources consistent with local customs, cultures and the economic wellbeing of the local communities. (p. 1)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under

the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

State of South Dakota (Doc. #16925)

1.165 EPA and the Corps , by way of this rulemaking, are infringing on state's rights to define and regulate their own waters. This right is guaranteed and protected by 101 (b) and 101(g) of the federal Clean Water Act. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Arizona House of Representative (Doc. #17041)

1.166 The CWA was intended to serve as a mechanism for states and federal agencies to work jointly to protect water resources. However, this proposed rule grants virtually all oversight of water resources to federal administrative agencies. States have been effective managers of water quality and water resources, and this rule fails to acknowledge the partnerships between states and the federal government that have been in place for decades. This is an unacceptable restriction on states right to self-govern. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full

authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Nebraska State Legislature (Doc. #19315)

1.167 The authority of the individual states to manage the water located within their boundaries is unambiguously recognized in the CWA. Section 101(g) of the Act establishes this right and the duty of federal agencies to work cooperatively with state and local agencies:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The proposed rule undermines this specific, express charge by Congress because it does not allow states to maintain their sovereignty with regard to water management, opting instead for a onesize- fits-all determination by federal agencies. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

State of Alaska (Doc. #19465)

1.168 Not only would application of this new term "adjacent waters" vastly expand the waters and wetlands subject to federal control, it would likely leave nothing for a state to assume

control over. Congress clearly did not intend either of these results. The agencies' legal analysis is a reckless construction of discrete terms and different sections of the CWA, undermining Congressional intent and creating further confusion about what waters or wetlands are jurisdictional under the CWA, versus what waters and wetlands are assumable under a state program, two distinctly different concepts. (p. 27)

Agency Response: **The CWA identifies the waters over which states may assume permitting jurisdiction. See CWA section 404(g)(1). 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).**

At the request of the Association of Clean Water Administrators, the Environmental Council of States, the Association of State Wetlands Managers (letter April 30, 2014) and several states, 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). The agencies welcome the participation of Alaska and others in this effort.

Western Governors Association (Doc. #19654)

1.169 We are writing with respect to the pending rulemaking regarding the jurisdiction of the Clean Water Act. As Governors of Western states, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management. (p. 1)

Agency Response: **Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion**

including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

A detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule can be found in the docket for this rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States*.]

Kittson County Board of Commissioners (Doc. #1022.1)

1.170 WHEREAS, these agencies are currently using interpretive guidelines established by the EPA in 2011 and these guidelines do not grant them final authority. (p. 1)

Agency Response: The joint EPA-Corps 2011 guidance was never finalized. Thus, the agencies do not and have not relied on the unissued 2011 guidance referenced in this comment. To the extent the agencies have relied on guidance to determine if a water is jurisdictional under the CWA, they refer to guidance issued jointly by the two agencies in 2003 (post *SWANCC*) and 2008 (post-*Rapanos*).

The EPA and the Corps clarify the scope of "waters of the United States" in this final rule using the text of the CWA, Supreme Court Decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute. See Section 1.0 Summary Response, Preamble to the Final Rule and Technical Support Document.

Catawba County Board of Commissioners, North Carolina (Doc. #1763)

1.171 The rule creates significant unfunded mandates and preempts state and local authority. (p. 1)

Agency Response: This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs. The scope of

regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Board of County Commissioners, Huerfano County (Doc. #1771)

1.172 The imposition of this rule will in fact, duplicate the regulations of the Colorado Department of Public Health and Environment and usurp their enforcement authority. This proposed rule is yet another example of an overgrown federal agency trying to recover after losing a court case. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Preamble to the Final Rule and Summary Response.

County of Elk (Doc. #2727)

1.173 "Waters of the United States" have been clearly defined by two Supreme Court decisions over the past decade. Redefining these waters does not change the fact that they should be under states, and not federal, regulation. This is considered an overreach by the EPA and has raised dissent among our area residents, especially our farmers. This change would also give the EPA the ability to bypass the authority of Congress, which· was not the intent of the Clean Water Act, enacted in 1972, nor of the Founding Fathers in 1776. (p. 1**)**

Agency Response: The EPA and the Corps clarify the scope of "waters of the United States" in this final rule using the text of the CWA, Supreme Court Decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute. See Section 1.0 Summary Response, Preamble to the Final Rule and Technical Support Document Section I.

Sheridan County Commission (Doc. #3271)

1.174 I feel this proposed rule would expand the scope of CWA jurisdiction and would place local governments in difficult situations as they deal with local water issues in the future. The federal government needs to regulate the navigable waters of the United States and let the States and local governments deal with the local water issues. (p. 1)

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

existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Sweet Grass Conservation District (Doc. #3310)

1.175 We oppose attempts to expand the jurisdictional control of the Army Corps of Engineers and EPA over water resources. The management of non-navigable waters should be left in the hands of landowners and local governments. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Wayne County Commissioners (Doc. #4226)

1.176 We feel this proposal is redundant to State wetland regulations that are already in place and mitigate wetland impacts from a prepaid wetland bank of credits for road projects. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Lincoln County Conservation District, Washington (Doc. #4236.2)

1.177 Most states, including the state of Washington, have even broader definitions for "Waters of the States," which also specifically include ponds, lakes and groundwater that the current and proposed Waters of the United States Rule do not. The State of Washington, like all other states, has the option of requiring more regulations on the Waters of the State than what are required by the federal government. (p. 5)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Bonner County Board of Commissioners (Doc. #4879)

1.178 Local government needs the ability to manage all "seasonally wet properties" local taxpayers expect them to manage for unpredictable weather, vegetation and safety issues. Continuously wet waterways that cross multiple property owners or state boundaries may benefit from currently defined "Navigable Waters". Wetlands, drainage ditches and seasonal waterways should all be managed by local taxpayers' dollars without the need for permitting from federal agencies. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Consolidated Drainage District #1, Mississippi County, MO (Doc. #6254)

1.179 Consolidated is responsible for facilitating drainage and reclamation for agricultural purposes. Drainage districts in Missouri are created in order to reclaim and protect land that is swamp, wet and overflowed lands, or subject to periodic overflow. Set up through statute (see Missouri Revised Statutes Chapter 242), we develop a reclamation plan, which we implement with oversight from the circuit court of the county in which we operate. We are a governmental entity tasked with very important responsibilities for the farmers in our area. The farmers who own land within our jurisdiction elect our officers. (p. 1)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Preamble to the Final Rule and Summary Response.**

Texas Soil and Water Conservation District #343 (Doc. #6793)

1.180 Second, the proposed definition annihilates the federalist system that underpins the CWA. There is a line at which point the states must be allowed to take over. This proposal has obliterated that important and fundament line. By expanding the definition of tributary, expanding the definition of "adjacent", and expanding the category of "adjacent wetlands" to "adjacent waters," you have delivered a devastating blow to landowners. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.**

White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936.1)

1.181 -Undermines state and local jurisdiction authority and may require draft changes to Comprehensive land Use Plans, Floodplain Regulations, Building and/or Special Use Permit applications, Watershed/ storm Water Management Plans.

-Diminishes trust and cooperation.

-Moves waters from state to federal jurisdiction

-There needs to be agreed clarity as to where the federal government's regulation of waters of the U.S. ends and where the States jurisdiction begins. For example, if the tributary crosses state lines, it's a federal and state issue. If the tributary only lies within state lines, it's a state and local issue. (p. 2)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support**

Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

Murray County Board of Commissioners (Doc. #7528.1)

1.182 In a theoretical sense, we agree that all water on the ground, in the ground, and in the air has a connection. School children are taught about the water-cycle. But the significance of that connection to navigable waters within the legal jurisdiction of Congress under the Commerce Clause is limited. Use of the word "navigable" expresses that the Clean Water Act draws a distinction between "waters of the United States" and "waters of the States." (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

Kosciusko County (Doc. #7623)

1.183 As County Surveyor, pursuant to statutes contained within Indiana Code, I have the responsibility to protect the health, welfare, and safety of our taxpaying citizens, including storm water flood protection and water quality. Under the auspices of our County Drainage Board I believe that we have done a credible job of achieving both. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Upper Colorado River Authority (Doc. #7966)

1.184 It is also our firm belief and assertion that State, regional and local governmental entities are more in touch with local environmental and economic situations, and therefore more

accountable to their citizens and better equipped to meet local needs than federal agencies. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, states and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Southeast Texas Groundwater Conservation District (Doc. #8142)

1.185 It is believed that the rule change would result in an infringement on the sovereignty of individual States as well as on the rights of private property owners and thus unacceptable. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet

soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

Southeast Texas Groundwater Conservation District (Doc. #8419.1)

1.186 It is believed that the rule change would result in an infringement on the sovereignty of individual States as well as on the rights of private property owners and thus unacceptable. It is not needed and will result in more unnecessary duplication of regulations and rules. The most objectionable part is the definition of "Tributaries" which could extend agency jurisdiction to almost every square foot of the country. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I, II, and VII.

City of Portland, Maine (Doc. #8659)

1.187 How does the Rule apply in a State with delegated authority like the State of Maine? Would this expand EPA's jurisdiction in a delegated state? Which agency would administer this proposed Rule, Maine DEP, or EPA? (p. 3)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Preamble to the Final Rule and Summary Response.

Beaver County Commission (Doc. #9667)

1.188 Reference: FR page 22189, column 1: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law.*

In addition, the agencies propose that "other waters" (those not fitting in any of the above categories could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated' 'other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of

significant nexus and explain how similarly situated' 'other waters" in the region should be identified.

Discussion: The above statements are? not examples of agencies adding clarity to existing laws. Instead, these statements are additional examples of "mission creep", i.e. self-determined expansion of their mission beyond statutory authority. These statements serve to usurp the authority and jurisdiction of state and local governments. Although the powers of the federal government are vested by the U.S. Constitution, it is state government that tends to have a greater influence over most Americans' daily lives.

The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; thus the states, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), handle the majority of issues most relevant to individuals within their respective jurisdictions…[ ]

By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the Agencies [ ]

Reference: Page 22189, column 3: This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b).

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and / neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Discussion: The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA.

The lead-in paragraph for Section 101 of the CWA states: *The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act---(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to ... and(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act ...*

When the above statements are presented in the context that they are found in the CWA it becomes much more evident that Congress did intend for Federal actions conducted under authority of the CWA to not interfere with state rights and authorities, and state

responsibilities to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

We also have a concern with the statements: "*This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states ..." and "This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State...* " When considering all of the concerns and problems that have occurred with the current implementation of the CWA it is difficult to believe that the action called for under the proposed rule would not add an additional burden on the states as they work to carry out their rights and responsibilities to manage the water and land resources within their jurisdiction.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all States and across the entire nation.

For over one hundred years the nation's state and local governments have dealt with the planning, development and use of land and water resources, including water pollution within their jurisdictions. These tasks have been carried out-faithfully at the local level without having to take extremely punitive measures, which seems to be the norm when federal agencies have intervened in the recent past. This heavy-handed approach to gain compliance is now a common practice in the way the Agencies conducts their permitting activities. This constant fear of harsh fines and threats of being imprisoned by federal agencies has greatly affected the states' responsibilities and rights when dealing with local efforts to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. We can only foresee this situation becoming much worse if the proposed rule is implemented.

Congress has over the years been very careful to encourage state and local government responsibility for and involvement in the planning, permitting and proper implementation of land and water use activities. Only in the last twenty or thirty years has the role of the states and local governments been usurped by the mission creep of federal agencies. This proposed rule is another example of a mission creep that is being fueled and driven by a few select elite environmental organizations that will stop at nothing to impose their will on the American public.

Recommendation: Withdraw the current proposed rule.

Additionally, the Agencies must:

- End actions that allow mission creep within the federal governmental agencies.
- Discontinue unconstitutional self-serving efforts to increase the Agencies' boundaries of jurisdiction over land use activities across the nation.
- Work diligently to divest themselves of all permitting authority and rather put their efforts towards helping the states and local governments coordinate and

jointly plan for permitting and implementing sound land and water use practices across the entire United States, which is the clear intent of the CWA.

Connect with the American public and not give in to the desires of a select elite group of environmental organizations that hope to gain control of the nation's land and water resources through the manipulation of the Federal land and resource management agencies. (p. 7-10)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

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

1.189 Local agencies can better determine priority needs. Each watershed has unique hydrological, geological, and climatological conditions which will make one size- fits all federal guidance on determining what is considered a water of the US extremely difficult to fairly implement. Most regions in Colorado have a good working relationship with the Army Corps of Engineers and the environmental health department in trying to protect and improve water quality, so delegating more authority and flexibility to the state and/or local government would enable local entities to protect their resources in a more economically efficient manner. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Custer County Commission (Doc. #10186)

1.190 Another issue at stake is that the Constitution of the State of Montana states that "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law". (p. 2)

Agency Response: Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Dayton Valley Conservation District (Doc. #10198)

1.191 The State of Nevada already has statutes that clearly provide for protection of all waters in Nevada. There is no reason for the EPA and Corps to duplicate regulations that the State of Nevada currently administers. Although not all states currently regulate runoff, the State of Nevada does. Blanket use of the proposed rule change will duplicate efforts, complicate administration, and impact state rights. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Elk County Commissioners (Doc. #10941)

1.192 We urge you to abandon this change in definition and allow the states to have jurisdiction over their own sources, a much more practical solution. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Sanpete County, Manti, Utah (Doc. #11978)

1.193 Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the EPA and the Corp to act as the primary permitting and enforcement agency or land and water use activities across the nation. Contrary to what is being presented in the proposed rule, it is obvious that these agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will haw the ability to greatly influence the land and water uses in all State s and across the entire nation. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Board of County Commissioners, Churchill County, Nevada (Doc. #12260)

1.194 We urge you to delay any implementation of the proposed rule and request that you engage in consultation with each state and local government to formulate recommendations for a consensus regulatory proposal that would identify the scope of

waters to be covered under the Clean Water Act and those waters to be reserved for the states to determine how to regulate. The resulting proposal should be published in the Federal register for public review and comment. (p. 2)

Agency Response: The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

A detailed narrative of agencies' outreach and discretionary consultation efforts can be found in the docket for this rule. [See Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States.] The agencies will continue to work closely with the states to implement the final rule.

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

1.195 Counties are already tasked with the responsibility to protect the health, welfare and safety of their residents, as well as maintain and improve quality of life. This includes protecting valuable water resources to ensure that our waters remain clean. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

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

1.196 The Federal Emergency Management Agency (FEMA) expends over $100 million annually identifying floodplains, and recognizes the authority of local government to adopt the appropriate ordinances to manage land uses within the designated floodplain. This proposed rule grants full discretion to EPA to exercise best professional judgment to identify a floodplain and imposes the full force of the Clean Water Act on any land use decision that could affect undefined "water" within that floodplain or riparian area. (p. 3)

Agency Response: **The rule does not regulate land use. See Preamble to the Final Rule and Technical Support Document for tools available to assist in jurisdictional determinations including FEMA maps.**

Uintah County, Utah (Doc. #12720)

1.197 The proposed definition of tributary seems designed to place the COE and EPA in a position to intervene in any and all activities on every square foot within the United States. The proposed rule is an attempt to circumvent the will of the United States Supreme Court. The message from the Court was that the Agencies had intruded beyond their authority. It appears the Agencies have interpreted this decision as an invitation to replace a bad policy with an even worse policy. (p. 4)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.**

Wibaux County Commissioners, Wibaux, Montana (Doc. #12732)

1.198 Wibaux County, Montana, contains 890 sq. miles, and the majority of our economy is agricultural oriented. The agriculture people of our county rely very heavily on the rangeland and farmland. They make their living off of the land and so they are very good stewards of their land. The farmers and ranchers of our county should have more interest and input of their land then the special interest groups in this country. Federal control of our private property and the water rights is unnecessary. The landowners have been the caretakers of their land and water as a natural resource for hundreds of years. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section**

510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Whitman County Commissioners, Colfax, WA (Doc. #12860)

1.199 The proposed rule violates the above premise and exceeds the authority given for federal regulation. It steps into trying to regulate areas left by the Constitution and the Congress of the United States that should only be properly regulated through State Law and Codes. (p. 1)

Agency Response: See Summary Response, Preamble to the Final Rule, and Technical Support Document Sections I and II. See also Response to Comments Compendium Topic 5 – Significant Nexus, Introduction and summary response to comments 1, 2, 3, 4, and 5.

1.200 Our state regulations are adequately protecting the natural resources of Whitman County while still allowing our citizens to be productive. Our local towns and businesses are small with limited resources. Any holdup of a project due to additional unnecessary regulations will produces no measurable benefit yet cost extra money-money that will be taken away from other projects of equal importance. This proposal does nothing to increase benefits-it simply creates more burdensome regulation and paperwork. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Flathead County Board of Commissioners (Doc. #13072)

1.201 The language of the proposed update is confusing, inconsistent and at odds with the current language of the Clean Water Act. The Montana Legislature has charged the

Montana Department of Natural Resources and Conservation with implementing and administering the exercise of the state's sovereign power and specifically directs that attempts to gain control of large quantities of water be resisted, Montana Code Annotated (MCA) 85-1-101 Policy considerations. Also, the Montana Legislature has defined "public ways", MCA 85-1-111, and "navigable waters", MCA 85-1-112. The proposed rules seem to be in conflict with these MCA's. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).**

Mille Lacs County Board of Commissioners (Doc. #13198)

1.202 In addition to our comments highlighted in that joint letter, the Board is additionally concerned about the impacts this federal rule will have to the relationship between tribal governments, our county, and the public trust responsibilities of the State. The interplay between the federal government, the States, tribal governments, and local governments is of great concern to Mille Lacs County and other local governments around the state of Minnesota. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer**

waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Carson Water Subconservancy District, Carson City, NV (Doc. #13573)

1.203 CWSD strongly believes that the best way to achieve water quality improvements in the Carson River is by working with local government and landowners along the river to more effectively implement projects rather than expanding the jurisdiction of the Corps' regulatory authority. The State of Nevada already has statutes that clearly provide for protection of all waters in Nevada. There is no reason for the EPA and Corps to duplicate regulations that the State of Nevada currently administers. Although not all states currently regulate runoff, the State of Nevada does. Blanket use of the proposed rule change will duplicate efforts, complicate administration, and impact state rights. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Big Horn County Commission (Doc. #13599)

1.204 1) The proposed rule abandons cooperative federalism. The principles of cooperative federalism dictate that control of land use decisions properly rests with state and local governments. As the Supreme Court recognized, "regulation of land use is perhaps the quintessential state activity.

2) The proposed rule establishes a presumption of federal jurisdiction, confusing jurisdiction with water quality. The result is a series of counterproductive regulatory hurdles to locally driven water conservation and stewardship practices. (p. 3)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under

the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Brown County (Doc. #13603)

1.205 Many regulations are already in place to protect water quality, every state has construction storm water permits for construction exceeding 1 acre, oil and hazardous chemical spill laws and MS-4 storm water quality regulations for urban areas. The idea that waters of the US designation is needed for ephemeral streams to protect water quality downstream does not take into account other federal and state laws and regulations. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. See also Response to Comments Compendium 5 – Significant Nexus and Topic 8 – Tributaries.

Lipan-Kickapoo Water Conservation District, Vancourt, Texas (Doc. #13617)

1.206 The proposed rule would eviscerate planning and allocation in some areas of the State, especially where there is a "significant nexus" between groundwater and traditional "navigable waters" of the state. (p. 1)

Agency Response: Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . .

. of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

Maricopa County Board of Supervisors (Doc. #14132.1)

1.207 When Congress enacted the CWA, it intended to preserve state and local control over land development and water resource management. The proposed rule replaces that local control with federal regulation. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs

managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. See also Response to Comments Compendium 5 – Significant Nexus and Topic 8 – Tributaries.

The Board of County Commissioners of Otero County New Mexico (Doc. #14321)

1.208 Under the 1977 Amendments, Congress deemed it appropriate and necessary to emphasize the traditional role of the states in the management of land and water resources, and specifically noted its intent to:

> recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b) (emphasis added). Yet, by drafting a regulatory definition so encompassing as to embrace those isolated, unconnected and wholly intrastate wetlands, ponds, oxbow lakes, etc. simply because they fall within a "floodplain"—a term not found in the statutory text—the agencies' Proposed Rule is sure to impinge upon the states' traditional land use and water management authority. See SWANCC, 531 U.S. at 174. (p. 11)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Natural Resources, Clearwater, FL (Doc. #14426.1)

1.209 State permits in Florida also requires a stormwater pollution prevention plan to address erosion and sediment control, even if a discharge is not made to a WOTUS. As a result, all of the additional benefits sought by the revisions to the rule will not be realized in Florida since this protection is already offered at a state level. With the aforementioned federal permitting timeframes and the fact that much of the program is duplicative of state efforts, we believe that the proposed rule will result in a significant increase in the cost of maintaining the stormwater system and other capital improvement projects. Therefore, we recommend that the Federal agencies consider delegating permitting authority, where the overlap exists, to the State of Florida's Department of Environmental Protection or Water Management Districts to streamline the permitting process. (p. 8)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and

Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Cassia County, Idaho Board of Commissioners (Doc. #14972)

1.210 Most importantly, this proposed language seems to be a federal takeover of state's rights regarding water and water rights. We oppose this. It is unlawful and unconstitutional. State regulation of water within the state borders should remain with the state. (p. 2)

Agency Response: Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

National Association of Counties (Doc. #15081)

1.211 Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs (p. 16-17)

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

existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. A detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule can be found in the docket for this rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States.*]

Board of County Commissioners, Richardson, Nebraska (Doc. #15082)

1.212 WHEREAS, this expansion of the EPA and the CORP undermines the authority of the States. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Central Platte Natural Resources District (Doc. #15477)

1.213 Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water. These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as CPNRD, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land

values and potential development. The negative impacts to the local tax base for governmental entities such as CPNRD, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use — a primary responsibility of the States. This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA. As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge. (p. 4)

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

City of Portland, Maine (Doc. #15582)

1.214 How does the Rule apply in a State with delegated authority like the State of Maine? Would this expand EPA's jurisdiction in a delegated state? Which agency would administer this proposed Rule, Maine DEP, or EPA? (p. 3)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Beaverhead County Commissioners (Doc. #16892)

1.215 The State of Montana has jurisdiction over the water in our state; federal agencies lack the authority to usurp that power. (p. 5)

Agency Response: Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Board of Supervisors, Broadwater Conservation District, Montana (Doc. #18819)

1.216 Broadwater Conservation District feels very strongly that state and local control of waters, not already controlled by the federal government, is a much more effective way of ensuring water quality concerns are addressed. Local government agencies and groups can better address compliance issues and ensure programs and projects are put into place

to effectively address any concerns that should arise. And generally, folks are far more willing to comply to local rules and regulations, with effective relationships, than to have additional, unclear, and often unrealistic regulations attached to more and more rules and federal regulations. Furthermore, if an agency feels a new rule is warranted or a clarification to a rule is needed, the legislative process should be used. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I (for legal authority to issue the rule) and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Quay County, New Mexico (Doc. #19558)

1.217 We believe that the Proposed Rule is attempting to establish control over virtually all private, state and public property by regulatory action and is circumventing the Legislative process and authority of the United States Congress and the sovereign authority of the states. It also seeks to disregard the role, authority and majority opinion of the United States Supreme Court.

Although we as Quay County believe the goal of protecting, improving and conserving clean water is valid and necessary we believe those activities and authorities are and should be under the jurisdiction of the states and local government and must not be usurped by federal regulatory excess. Although the statutory authority of the Clean Water Act was granted by the United States Congress most of the following expansion of definitions and enforcement authority and penalties have come from the regulatory process and has been mostly intended to expand the federal authority over private, state and other public lands. This proposed regulation is more of the same. It attempts by regulation to usurp the legislative process and should be terminated immediately. The entire process should be referred back to Congress for a thorough review and rewrite of the Clean Water Act and be removed from regulatory rulemaking. (p. 1-2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I (for legal authority to issue the rule) and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as

"waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

1.218 We believe this rule intends to remove the distinction between what is state and local in role and authority and what is national and leads to what is a completely centralized federal control. We believe that clearly violates and infringes upon the role of county and state governments and threatens to destroy all separation of powers, private property rights and custom and culture of local communities and counties. (p. 4)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I (for legal authority to issue the rule) and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

1.219 The establishment of "automatic jurisdiction" or "jurisdiction by rule" despite any water specific substantiation runs counter to logic, law. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium Topic 2 Traditional Navigable Waters, Interstate Waters, Territorial Seas, Impoundments, Topic 3 – Adjacent Waters, Topic 5 – Significant Nexus, and Topic 8 – Tributaries.

1.220 The Proposed Rule improperly usurps "primary responsibilities and rights of States". (p. 4)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I (for legal authority to issue the rule) and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

1.221 Under the 1977 Amendments, Congress deemed it appropriate and necessary to emphasize the traditional role of the states in the management of land and water resources, and specifically noted its intent to: recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. By proposing and then potentially unilaterally enforcing a regulatory definition so encompassing as to embrace those isolated, unconnected and wholly intrastate wetlands, ponds, oxbow lakes, etc. simply because they fall within a "floodplain"-a term not found in the statutory text-the agencies' Proposed Rule will trample upon the states' and counties traditional land use and water management authority and roles. (p.4)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.**

1.222 The impingement by the federal government on the regulatory and oversight affairs traditionally reserved to the States creates a constitutional concern that must require a clear authorization from Congress. The CWA is devoid of any such authorization and, therefore, the Proposed Rule's implication of federalism concerns and traditional state authority should prompt the withdrawal of the proposed rule/definitions. (p. 4)

Agency Response: **Regarding Clean Water Act legal authority, see Technical Support Document Section I. The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response and Preamble to the Final Rule. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs**

or to other state or tribal programs managing these resources. See Technical Support Document Section II.

Central Flyway Council (Doc. #5578)

1.223 Many people in opposition to the proposed rule consider that wetland regulations should be controlled and managed by states. State regulation of wetlands would be too variable and inconsistent. (p. 2)

Agency Response: The federal interest in protecting waters is strong, and the rule is a reasonable, considered, legally sound and scientifically based delineation of waters subject to the CWA. However, the agencies recognize the states' authority as well. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Pike County (IL) Republican Central Committee, Pike County Republican Party, Illinois (Doc. #7984)

1.224 This proposed rule will give primacy to the federal government over local and State land use rules. When federal agencies have the power to grant, deny or veto a federally enforceable permit to build, plant, fence, apply fertilizer or spray pesticide or disease control products on land managed by farmers, businesses, and municipalities, that is regulatory authority over land use. If a landowner cannot build a house on, build a fence over, or manipulate a jurisdictional wetland or ephemeral drain that runs across his or her land without a federal permit, then that is regulating land use. The federal government has no business regulating land use. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Washington State Association of Counties (Doc. #9976)

1.225 We are very concerned that the proposed rule would modify current regulatory practices which have been in place for 25 years. Washington State is a delegated state water pollution control agency responsible for implementing all federal 10water pollution control laws and regulations through the state's Department of Ecology (Ecology). The proposed Waters of the United States rule could create confusion over interpretation by

federal agencies and Ecology. It is important that Ecology be delegated the ability to determine jurisdiction by EPA. (p. 1)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.**

The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. Additionally, by providing greater clarity regarding what waters are subject to CWA jurisdiction, the frequency with which states and tribes with authorized section 402 and 404 CWA permitting programs will need to make jurisdictional determinations on a case-specific basis is reduced.

Nebraska Association of Resources Districts (Doc. #11855)

1.226 Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[44] These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as NARD's member NRDs, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for governmental entities such as the NRDs, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use - a primary responsibility of the States.[45] This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.[46] As written, the

[44] NEB. REV. STAT. §§ 2-320 1 et seq.; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 el seq., NEB. REV. STAT. § 2-32, 115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2 159; NEB. REV. STAT. § 25-2 160; NEB. REV. STAT. § 37-807; NEB.REV. STAT. § 28- 106; Nebraska Environmental Protection Act. Neb. Rev. Stat. § 81-1501, et seq.

[45] *Hess v Port Authority Trans-Hudson Corporation*. 513 U.S. 30, 44, 115 S.C!. 394, 130 L.Ed.2d 245 (1994) (" [R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 767-768, n. 30, 102 S.C!. 2 126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

[46] *SWANCC. v. U.S. Army Corps of Engineers*, 53 J U.S. 159, 174, 121 S. CI. 675, 683-84, 148 L. Ed. 2d 576 (200 1) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to

Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[47] (p. 8-9)

Agency Response: **The rule does not regulate land use. Regarding Clean Water Act legal authority, see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.**

The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

National Association of Conservation Districts (Doc. #12349)

1.227 The language of the CWA, as ruled by the United States Supreme Court, states that waters subject to CWA jurisdiction are navigable waters, relatively permanent tributaries

recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

[47] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. CI. 675, 684, 148 L. Ed. 2d 576 (2001).

of navigable waters, and certain other waters with a significant nexus to navigable waters. All other waters are left to the jurisdiction of states. Therefore, isolated waters[48] and even those with a minor connection[49] are not, classified as WOTUS. Because many isolated waters and many classes of wetlands are legally excluded from the CWA, NACD supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments; we oppose attempts to expand federal jurisdiction of water resources beyond these decisions. (p. 4)

Agency Response: **Regarding Clean Water Act legal authority, see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document**

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

1.228 The rules fail to appreciate existing State of California constraints upon the flood control system. It is important to note that all waterways in California are already regulated and Central Valley reclamation districts already monitor and report their discharges to the Central Valley Regional Water Quality Control Board. For any projects that require a Central Valley Flood Protection Board permit, California's Title 23 regulations already allow the U.S. Army Corps of Engineers (Corps) to add its own requirements to the Board's permits. Combined, this means that: 1) Discharges affecting California's waters already are regulated and activities related to those waters are already reported; and 2) The Corps already has the authority to add discharge conditions to projects that take place on or near levees if appropriate.

Instead of preserving this adequately functioning system, the proposed regulatory guidance package would add redundant, occasionally arbitrary, and inflexible regulations that would burden public safety projects and Corps permitting staff. (p. 3)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of**

[48] Supreme Court finding that § 404 authority over discharges into "isolated waters" (including isolated wetlands), exceeded the authority granted by that section. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159(2001).

[49] Supreme Court finding that "significant nexus" remains open to judicial interpretation but that isolated wetlands could not be WOTUS. *Rapanos v. United States*, 547 U.S.715 (2006).

the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

County Commissioners Association of Pennsylvania (Doc. #14579)

1.229 In Pennsylvania, there are more than 86,000 miles of waterways, from major rivers to local streams and creeks, to large lakes and small ponds. This commonwealth has a long history of taking our duty to protect water quality seriously. Our state Clean Streams Law, which is older than the federal Clean Water Act, clearly protects all waters of the commonwealth from pollution or potential pollution. Over the years, we have developed a strong set of regulations and permitting programs that are specific to Pennsylvania's needs. In addition, counties and conservation districts make critical front-line decisions related to many aspects of waterway planning and management, including storm water management, flood mitigation and maintenance of dams and levees. We are familiar with the local environmental issues because we are on the ground in our counties every day, providing local response and oversight. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

1.230 With expanded federal jurisdiction under this proposed rule, the permitting and decision making processes will be removed several levels. The benefits of local county and state knowledge working on the ground will be lost, sowing distrust between communities and regulators they never see and with whom they lack a similar relationship. (p. 11)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and

local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

North Carolina Department of Environment and Natural Resources (Doc. #14984)

1.231 The proposed rule extends federal intrusion deeply into matters congressionally mandated to be left to the states. Congress expressly provided in Section 101(b) of the Clean Water Act that:

> "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...."

33 U.S.C. § 1251(b). Section 101(b) was written contemporaneously with the definition of "navigable waters." A fair reading of that purpose, and its explicit reservation of the responsibilities and rights of the states, underscores the limitations on the meaning of the terms "navigable waters" and "waters of the United States."

Section 101(b) places the primary responsibility of managing land and water resources on the states, so that the federal agencies continued intrusion and expansion of the reach of "waters of the United States" is unjustified and unlawful. The State of North Carolina has implemented in an orderly and lawful manner its "primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources," without need for further intervention by the Federal Agencies. North Carolina, like many other states, has a program for protection of water quality that is comprehensive and sophisticated. NCDENR developed, in cooperation with the Wilmington District of the Corps of Engineers, a methodology for wetlands functional valuation. NCDENR staff have also developed a protocol for stream identification. These methods precisely identify and evaluate the connection of lower order waters, including tributaries and wetlands, and their significance to water quality. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.**

Kansas Natural Resource Coalition (Doc. #15009)

1.232 Kansas State Standards render sufficient protection over tributaries, wetlands and connectivity zones to Navigable Waterways, making WOTUS intrusive, invasive and unnecessary, as the attached Kansas Water Appropriation Act and Kansas Water Appropriation Act Rules and Regulations documents illuminate.

US Environmental Protection Agency (EPA) and US Army Corp of Engineers (USACE) must attempt to achieve consistency with Kansas Water Law; failure to attempt consistency with the WOTUS Rule is a 10th Amendment violation. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II.

Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Oklahoma Municipal League (Doc. #16526)

1.233 The sweep of the rule's jurisdictional reach ignores Congress' expressly stated policy to preserve states' primary responsibilities over land use and water resources. *Rapanos*, at p.18. It simply won't matter whether an activity is allowed or a governmental function is

required under state law or local ordinance if the Agencies can deny a permit for that activity. (p. 3)

Agency Response: **The rule does not regulate land use. Regarding CWA legal authority see Technical Support Document at Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Michigan Association of Conservation Districts (Doc. #16583)

1.234 Regarding the Proposed Rule defining Waters of the United States (WOTUS). The language of the CWA, as ruled by the United States Supreme Court, states that waters subject lo CWA jurisdiction are navigable waters, relatively permanent tributaries of navigable waters, and certain other waters with a significant nexus to navigable waters. All other waters are left to the states to regulate. Therefore, isolated waters and even those with a minor connection are not WOTUS. Because many isolated waters and many classes of wetlands are legally excluded from the CWA, we support the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments. We oppose attempts to expand federal jurisdiction of water resources beyond these decisions. (p. 2)

Agency Response: **Regarding CWA legal authority see Technical Support Document at Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Montana Association of Conservation Districts (Doc. #18628)

1.235 Confusion abounds in water cases as can be seen by the fact that these cases have been brought before the Supreme Court. This continues to be an issue at the federal level. Individual states, however, continue to address these concerns at the local level and have resulted in significant improvements in many states. The rules need to include more about the role of state and local governments in the management and conservation of WOTUS. (p. 1)

Agency Response: Regarding CWA legal authority see Technical Support Document at Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. A detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule can be found in the docket for this rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States*.]

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

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

local land use authority that it is difficult to imagine that any discretion would be left to State, county and municipal governments. (p. 1-2)

Agency Response: **The rule does not regulate land use. Regarding CWA legal authority see Technical Support Document at Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

1.237 We believe that the Agencies have not demonstrated that this proposal—as written—is either necessary or desirable, particularly because such a sweeping expansion of federal authority would not actually result in new environmental benefits or increased regulatory certainty. While this revised definition is ostensibly intended merely to clarify the scope of federal jurisdiction, the proposal essentially rewrites the Clean Water Act to make EPA and the Corps a central authority that makes the key decisions on many kinds of land and water uses. Cooperative federalism, which has worked well in the water quality context for over 40 years, would be set aside as the Agencies commandeer State and local agencies to carry out federal directives. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Technical Support Document Section I regarding CWA legal authority**

1.238 The proposed rule is not really about addressing threats to clean water, however. The proposed rule is really about the Agencies' overreaching attempt to replace longstanding state and local control of land uses near water with centralized federal control. (p. 3)

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

1.239 Thus, the Agencies' assertion that the change in the WOTUS definition has no substantive effect is clearly erroneous. The revised definition will have the immediate impact of greatly expanding federal jurisdiction over waters that are currently regulated by the States. In National Association of Home Builders v. Army Corps of Engineers,17 the D.C. Circuit Court of Appeals found that a revised Clean Water Act definition had the effect of restricting developers' eligibility for general wetland permits, forcing them to apply for more burdensome and costly individual permits in many more situations. The court found that the developers had suffered a substantive injury from the definition change. The proposed WOTUS definition rule would have precisely the same kind of immediate adverse effect on a wide variety of business activities, as described below. (p. 7-8)

Agency Response: **Regarding CWA legal authority see Technical Support Document Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Indiana Farm Bureau et al. (Doc. #14119)

1.240 We do not support the expansion of federal regulatory authority for the sheer purpose of control in areas that state and local government are better positioned to administer. The problems to be addressed by this rule are not well defined. (p. 3)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Georgia Chamber of Commerce (Doc. #14430)

1.241 The Chamber believes that the scope and reach of this proposed regulation goes well beyond the statutory scope of CWA jurisdiction as contemplated by Congress and recognized by the Supreme Court. As currently drafted, this proposal would drastically curtail the rights of the states to regulate waters within state boundaries and have a significant direct impact on Georgia's agricultural sector and small businesses. (p. 3)

Agency Response: **Regarding CWA legal authority see Technical Support Document Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

1.242 When Congress passed the CWA, states weren't an afterthought in the regulation of waters, they were seen as being critical to the law's success and implementation.

Preliminary analysis indicates that states could be facing many thousands of additional regulated stream miles as a result of this rulemaking proposed by the agencies. (p. 8)

Agency Response: **Regarding CWA legal authority see Technical Support Document Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs**

managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

1.243 Under current regulation, states have primary responsibility for regulating waters within their boundaries and twice the Unites States Supreme Court has reaffirmed this authority.

The proposed rule strips this balance and can be interpreted to expand federal jurisdiction to nearly every water in the country. The Chamber fully supports the positions espoused by Georgia's Attorney General, Sam Olens and Georgia's Commissioner of Agriculture, Gary Black in their submissions to this rulemaking proposal. See Attachment 1 and Attachment 2.

These officials have articulated the overreach, impact and transgression on the rights of the state of Georgia and its agencies, businesses and communities. We urge you to fully consider the serious issues each of these elected officials have each raised in their submissions. (p. 8)

Agency Response: Regarding CWA legal authority see Technical Support Document Section I. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

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

1.244 The failure of the Proposed Rule to respect Congress' mandate the primary responsibility for oversight and regulation of land and water resources remain primarily with the states. (p. 4)

Agency Response: The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs

or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

1.245 A. Overview

In the midst of the debate regarding the Proposed Rule and the need for more rigorous federal exertion of jurisdiction and regulation, some have contended that lax or inadequate regulation at the state level necessitates the heightened federal involvement. In particular, reference is made to a study by the Environmental Law Institute's State Constraints: *State-Imposed Limitations on the Authority of Agencies to Regulate Water Bodies Beyond the Scope of the Federal Clean Water Act* (May 2013) (ELI Study).[50] Commenters view the ELI Study's claims faulty and misleading as to many states, but will specifically address their concerns as to California (see ELI Study at 52) here.

California has some of the most comprehensive and rigorous water quality and water resource protective regimes in the nation. And any suggestion that California's scope of protection is lacking, leaves resources unregulated relative to the federal regime, or in any way needs oversight and expansion at the federal level knows little or nothing of the multiple layers of protection in California.

B. The Porter Cologne Water Quality Control Act and the Water Boards

California's own "Clean Water Act" is the Porter Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq. (Porter Cologne). It is the primary water quality and resource protective law in the state. It defines "waters of the state" as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e). This definition alone, when compared with the federal definition of "waters of the United States" shows that the scope of resource protection in California is broader and more inclusive. *Compare id.* with 33 C.F.R. § 328.3.

The regulatory regime enforcing Porter Cologne in California is overseen at the state level by the State Water Resources Control Board, composed of five members appointed by the Governor (State Board). Below the State Board, nine separate and largely autonomous Regional Water Quality Control Boards implement Porter Cologne's provisions at the local and regional levels (each a Regional Board). Under the oversight of the respective Regional Boards, and ultimately the State Board, Porter Cologne mandates that any "person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state" must file a report of waste discharge (WDR) or waiver therefrom. Cal. Water Code §§ 13260(a)(1), 13263(a) ("The

[50] The ELI Study is available at: http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters

regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge . . . with relation to the conditions existing in the disposal area or receiving waters upon, or into which the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose . . . ."), 13264(a).

California WDRs issued by a Regional Board to an applicant may include effluent limitations or other requirements designed to implement applicable water quality control plans known as "Basin Plans" that specify beneficial uses and water quality objectives in the region. State Board and California Environmental Protection Agency, *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (May 20, 2004) at 4. The State and Regional Boards do not limit the use of WDRs to discharges into statutory "waters of the state," but require them for *any* discharge, including discharges to uplands, that may affect water quality. Id. at 2 ("The Porter Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution").

As to enforcement, the State and Regional Boards are empowered to oversee implementation of and compliance with the terms of WDRs including the issuance of Cleanup and Abatement Orders, Cease and Desist Orders, assessment of administrative civil liability fines, and pursuit of court-ordered civil and/or criminal liability and injunctive relief. *Id.*

Basin Plans are the regional blueprints for regulation and protections of water resources protected under Porter Cologne. Regional-Board-issued WDRs must be consistent with the applicable Basin Plan for the respective region. *Id.* at 5. Regional Boards use Basin Plans' proscriptions to direct conditions under which and areas within which discharges may or may not be permitted and on what terms and conditions. *Id.* at 5-6.

C. California Environmental Quality Act (CEQA)

CEQA, California Public Resources Code § 21000 et seq., is arguably the most comprehensive and protective environmental review statutory regime in the country. Under CEQA, any "project" must undergo specified analysis to identify impacts to the environment and incorporate any feasible alternatives or mitigation that will avoid any "significant" impacts.[51]

Importantly, CEQA analysis and mitigation of significant impacts applies to "projects" in California above and beyond discipline-specific statutory regimes such as Porter Cologne's regulation of water resources. Said another way, even though a project will have to comply with Porter Cologne, additionally, CEQA will examine that same project to determine if feasible alternatives or mitigation exist to reduce any significant impacts

[51] Presentation of the full breadth and implementation of CEQA is beyond the scope of this comment letter. But illustrative resources are readily available, including: http://resources.ca.gov/ceqa/.

to a level of insignificance. Full compliance with Porter Cologne's provisions in any given instance may or *may not* prove sufficient compliance under CEQA.

D. California's Response to SWANCC and Rapanos

It took the Office of Chief Counsel of the State Board less than three weeks to respond to the Supreme Courts' ruling in *SWANCC*. Memorandum from Craig M. Wilson, Chief Counsel, Office of Chief Counsel, State Water Resources Control Board, to State Board Members and Regional Board Executive Officers, Effect of *SWANCC v. United States* on the 401 Certification Program (Jan. 25, 2001), available at http://www.swrcb.ca.gov/water_issues/programs/cwa401/docs/stateregulation_memorandum.pdf. The memo stated the SWANCC had no effect on California's authority to regulate water resources under Porter Cologne or any other state law. It went on to state explicitly that "waters of the state" are broader than "waters of the United States," not being subject to federal constitutional restrictions. "While all waters of the United States that are within the borders of California are also waters of the state, the converse is not true – waters of the United States is a subset of waters of the state." Id. at 3. States versus waters of the state, the State Board went further in 2004, issuing guidance directing Regional Boards to prioritize regulation of state resources susceptible of being deemed non-jurisdictional under federal law. State Board, Water Quality Order No. 2004-0004-DWQ, available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2004/wqo/wqo2004- 0004.pdf.

More recently, the State Board has launched an ambitious and comprehensive regulatory proposal to overhaul and expand the state's regulation of wetland and riparian areas. State Water Resources Control Board, Resolution No. 2008-0026, *Development of a Policy to Protect Wetlands and Riparian Areas in Order to Restore and Maintain the Water Quality and Beneficial Uses of the Waters of the State* (Apr. 15, 2008), available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2008/rs2008_0026.pdf; State Water Resources Control Board, *Preliminary Draft: Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting* (Jan. 28, 2013), available at http://www.swrcb.ca.gov/water_issues/programs/cwa401/docs/wrapp/policy_draft.pdf .

Suffice it to say that there is no so-called "SWANCC gap" in California, the state's myriad and overlapping protective statutory regimes providing more than adequate authority to regulate any resource that may be beyond the federal Agencies' constitutionally legitimate reach.

E. Streambed Alteration Agreements

Independent of the above noted protective regimes, the California Department of Fish and Wildlife (recently renamed from "Department of Fish and Game") has separate authority under the California Fish & Game Code to require notification and, under some circumstances, an agreement specifying protections, by any person or entity that proposes an activity that will (1) substantially divert or obstruct the natural flow of any river, stream, or lake; (2) substantially change or use any material from the bed, channel, or bank; or (3) deposit debris containing pavement that may pass into any river, stream, or

lake. Cal. Fish & Game Code § 1600 et seq.; see also Ca. Dept. Fish and Wildlife, Lake and Streambed Alteration Program, http://www.dfg.ca.gov/habcon/1600/ .

F. Protection of California Pacific Ocean and San Francisco Bay Shoreline

Although nothing limits or curtails application of all of the above specified regulatory and protective regimes along California's coastline, two additional statutory regimes pile on in those locations. Along the majority of California's coastline, more specifically and legally defined as a "Coastal Zone," the California Coastal Act, overseen by the California Coastal Commission, protects resources in the Coastal Zone. See Cal. Pub. Res. Code § 30000 et seq.

In for the San Francisco Bay Region, individual protections were put in place in the McAteer Petris Act, which Act is implemented and overseen by the Bay Conservation and Development Commission. See Cal. Gov't Code § 66601 et seq.

G. California Affords Overlapping and Comprehensive Protection for Water Quality and Resources in the State

To any degree the Agencies' argue the Proposed Rule's expansive reach is necessitated by inadequate regulatory oversight at the state level, the ELI Study notwithstanding, such an argument is wholly without merit as to California and many other states. Accordingly, a lowest-common-denominator, one-size-fits-all approach that would effectively federalize the landscape when adequate state-based regulatory controls are in place and operating actually works to thwart the Proposed Rule's proffered motive of increased clarity and efficiency. Further, forcing such a regime in the face of adequate and rigorous state controls would trample on Congress' mandate that the CWA first and foremost "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . land and water resources." 33 U.S.C. § 1251(b). (p. 29-33)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I and II. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.**

Resource Development Council for Alaska, Inc. (Doc. #14649)

1.246 The State of Alaska should continue to have existing jurisdiction of waters without a new, additional level of bureaucracy such as this proposed rule. In the CWA, Congress granted the Corps and the EPA jurisdiction over "navigable waters," defined in the Act as "waters of the United States" without further clarification. The Act grants that all waters

not regulated by the federal government fall under the jurisdiction of state and local governments for protection. Maps prepared by the EPA show that the rule will expand federal jurisdiction over waters from 3.5 million river and stream miles to well over eight million river and stream miles, much of which is in Alaska. (p. 3)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority see Technical Support Document Section I.

National Association of Convenience Stores, et al. (Doc. #15242)

The Proposed Rule would assert jurisdiction over waters, including many impoundments, isolated waters, ditches, conveyances, and "other waters" that currently are under state jurisdiction. In fact, the expansive definition in the Proposed Rule would alter the jurisdictional balance between the federal government and the states that is delineated in the Clean Water Act, ultimately impacting state permitting requirements and costs. (p. 4)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX.

Atlantic Legal Foundation (Doc. #15253)

1.247 The proposed rule would bring vast amounts of land under federal control adding unnecessary and redundant regulatory burdens to areas currently adequately regulated by state and local governments. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and

more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Landmark Legal Foundation (Doc. #15364)

1.248 The regulation violates the constitutional principle of federalism. It runs counter to the Congressional admonition that authority to regulate waterways is a joint power to be shared between the federal government and the states. In short, the Agencies will have jurisdiction over any conceivable area of land that holds water (unless that water falls into the "upland" safe harbor provisions. The sweeping authority runs directly counter to Congressional intent elucidated in the Act 33 U.S.c. § l251(b). (p. 9)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.

National Association for Surface Finishing (Doc. #15398)

1.249 The agencies can take the necessary time to redraft the rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, the extra time would allow the agencies to develop a rule that is protective of human health and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable. (p. 11)

Agency Response: The agencies have finalized the rule. See Response to Comments Compendium Topic 13 - Process Concerns and Administrative Procedures. The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.

National Association of Manufacturers (Doc. #15410)

1.250 The proposed rule flips Congress's explicit intent in the Clean Water Act on its head by turning the Clean Water Act into a federal-centric program, where primary responsibility for protecting water resources is found with federal agencies, rather than with the States. Congress explicitly recognized that States have the primary role in regulating land and water resources when enacting the Clean Water Act. Not only do the agencies lack the necessary "clear statement" that they can divest the States as the lead regulatory of water resources, United States v. Bass, 404 U. S. 336, 349 (1971), but Congress has said

exactly the opposite, see 33 U.S.C. § 1251(b) (Clean Water Act seeks to "recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources ….''). The proposed rule should be withdrawn, substantially revised, and re-proposed to be consistent with Congress' intent and the Tenth Amendment. (p. 2)

Agency Response: See Preamble to the Final Rule and Technical Support Document Section I.

1.251 Nowhere in the Clean Water Act did Congress contradict this express statutory policy and provide that waters in the United States should be primarily regulated by the federal government to the exclusion of any state responsibility. But when the proposed rule is taken to its logical conclusion, this is the outcome, as there are few "waters" left for the States to protect. (p. 4)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.

Texas Chemical Council (Doc. #15433)

1.252 The Proposed Rule would grant the federal agencies an inexorable amount of control over both water and land resources that the CWA expressly intended to reserve to the states. These natural resources, and the types of development and uses that could be applied to them, should be left to the states. Not only is this recognized by the U.S. Supreme Court, but it is also iterated in the CWA itself16, and of course strengthened by the commerce clause limitation. (p. 7)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.

United States Steel Corporation (Doc. #15450)

1.253 The proposed rule federalizes waters (and "aquatic systems") not intended to be covered by CWA, thereby impinging on the states' traditional and primary power over land and water use. (p. 2)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.**

1.254 The proposed rule improperly removes jurisdictional authority of local regulatory authorities over their local land and waters. (p. 2)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.**

CLUB 20 (Doc. #15519)

1.255 Our members strongly support clean water as well as states' authority over lands and waters within their borders. The proposed rule appears to attempt to supersede the states' primary responsibility in these areas and replace it with vague rules to be implemented and managed from a top-down federal bureaucracy. The rules defining the "Waters of the United States" appear to be yet another attempt to regulate private land use decisions outside the purview of the states' and our members take exception to efforts usurping the states' authority. (p. 2)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule and Technical Support Document.**

1.256 There are significant concerns that Colorado's stringent water quality standards and permitting will be undermined by federal regulations as a result of the rule, particularly in addressing ditches, reservoirs and other "non-navigable" water. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and**

local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document.

FMC Corporation (Doc. #15533)

1.257 It appears that EPA desires to implement new rules that mirror what is already in place in Wyoming. We are very concerned that the proposed rulemaking will unnecessarily add confusion and cost to what is an established program that has operated for years with the approval of EPA. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document.

1.258 The proposed rule will drive EPA to add extra layers of analyses simply to satisfy a perceived need to clarify jurisdiction, when in the case of Wyoming, such clarification would be redundant, An un-intended consequence might be that jurisdiction in Wyoming would be reduced under this new rule, an outcome that clearly would not serve to advance the goals of the Clean Water Act (CWA). (p. 1)

Agency Response: 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 the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. See Summary Response, Preamble to the Final Rule, and Technical Support Document.

1.259 We also suggest that the rule include a provision for states with regulatory programs that ensure CWA protection above and beyond what is contemplated in this new rule be given an exemption. Specifically, in Wyoming where all waters are covered by established water quality protection programs, any additional interference that might result from this new WOTUS definitional process would be very costly and redundant with little or no environmental gain. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs

managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Business Council of Alabama (Doc. #15538)

1.260 We write to express our serious concerns regarding the Proposed Rule issued by the Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") (collectively "the Agencies"), which seeks to broaden federal authority under the Clean Water Act ("CWA") and which we believe will impose unnecessary barriers to advancing water quality initiatives nationwide. In enacting the CWA, Congress specifically explained that the CWA was designed to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use ... of land and water resources . . . ." 33 U.S.C. § l25l(b). Yet, the Proposed Rule violates these mandatory principles, and seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document I (CWA legal authority) and II.

Minnesota Chamber of Commerce (Doc. #16473)

1.261 As written, the Proposed Rule is likely to have the effect of expanding federal regulatory jurisdiction over many waters that are currently unregulated at the federal level but are or effectively regulated at the state level, including but not limited to ephemeral drainages, ditches (e.g., roadside, flood control, irrigation, stormwater, right s of way, and agricultural ditches), waters in riparian and floodplain areas, industrial ponds, MS4S, water supply and flood control structures, and isolated waters. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

1.262 The Proposed Rule Improperly Impinges on State Authority. The Proposed Rule's jurisdictional expansion extends to many waters not intended to be covered by CWA, the thereby improperly impinging on the states' traditional and primary power over land and water use. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Water Advocacy Coalition (Doc. #17921.1)

1.263 Despite this history, the agencies' proposed rule ignores the limits and structure that Congress put in place, as well as the limits recognized by the Supreme Court, and continues the agencies' practice of overreaching in their assertions of CWA jurisdiction and impinging on the traditional power of the States to regulate land and water. (p. 10)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.

1.264 The proposed rule federalizes waters (and "aquatic systems") not intended to be covered by the CWA, thereby impinging on the states' traditional and primary power over land and water use. (p. 14)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

1.265 The proposed rule improperly removes authority of local regulatory authorities over their local land and waters. (p. 14)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule

puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I and II. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.266 In addition to exceeding the limits of Congress's authority under the Commerce Clause, the proposed rule also runs afoul of the Constitution by encroaching on the traditional power of the States to regulate land and water. "Where an administrative interpretation of a statute invokes the outer limits of Congress's power," the *SWANCC* Court reminded, "we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. This is especially true "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173.

The regulation of land and water use within a State's borders is a "quintessential" State and local function. *Rapanos*, 547 U.S. at 738. The CWA contains no such clear statement that Congress intended to alter that scheme. To the contrary, Congress chose to expressly "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b); see also id. § 1251(g). There was "nothing approaching a clear statement from Congress" that it intended CWA jurisdiction to extend to features like the abandoned sand and gravel pits at issue in *SWANCC*. *SWANCC*, 531 U.S. at 174. Accordingly, the *SWANCC* Court found that permitting the agencies to assert jurisdiction over isolated ponds and mudflats based on their migratory bird theory "would result in a significant impingement of the States' traditional and primary power over land and water use." Id. The *Rapanos* plurality similarly found that the agencies' "any connection" theory of jurisdiction would bring "virtually all planning and development and use of land and water resources by the States under federal control," and therefore could not be a lawful interpretation of "waters of the United States." *Rapanos*, 547 U.S. at 737.

Likewise, the proposed rule's sweeping assertions of jurisdiction over features with little or no relationship to navigable waters (e.g., channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters) raise serious federalism concerns. As was the case with *SWANCC* and *Rapanos*, the proposed rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Most of these areas are already regulated by States as "waters of the State." Contrary to agency statements that States will continue to be the primary regulators of water,[52] many types of waters and

[52] Bryan Schutt, McCarthy outlines EPA methane emissions plans, notes delay in fracking study, SNL (Sept. 2, 2014) (EPA Administrator McCarthy stated, "The states are the primary regulator of water in this country. They will remain so.").

features that were previously regulated as "waters of the State" or that States purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would now be subject to federal regulation as "waters of the United States" under the proposed rule. Accordingly, the proposed rule's interpretation of "waters of the United States" is unlawful because it would result in a "significant impingement" on the States' traditional authority over land and water use. (p. 16-17)

Agency Response: See Summary Response, Preamble to the Final Rule, and Technical Support Document.

1.267 With the proposed rule's treatment of ditches, the federal government encroaches on purely local matters and local decision-making authority in contravention of Congress's clear intent that local governments regulate local land use.[53] Ditches are usually constructed, operated, maintained, and managed at the local level for various beneficial public purposes, including transportation, flood control, and agricultural purposes. State and local regulations require that such ditches be maintained by local authorities, such as water management districts, flood control entities, and drain and road commissions, to assure protection of natural resources and prevent water pollution into such conveyances.[54] Local governments have the most immediate knowledge of the geographic, hydrologic, and geomorphic conditions of the waterbodies within their jurisdictions, and should be given the right to decide how best to regulate their local land and water resources. Because State and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit to be gained by treating the same drainage systems as jurisdictional "waters of the United States," and in many cases it will lead to duplicative regulation. Moreover, defining ditches as "waters of the United States" redirects scarce federal and State funding away from more environmentally sensitive and important resources. By asserting jurisdiction by rule over inherently local conveyances such as ditches, the agencies impermissibly intrude on local land use. (p. 56-57)

Agency Response: The rule does not regulate land use. See Preamble to the Final Rule. Regarding ditches, see Technical Support Document and Response to Comments Compendium Topic 6 – Ditches.

Virginia Manufacturers Association (Doc. #18821)

1.268 VMA is equally concerned with the Agencies' apparent disregard for longstanding Supreme Court precedent and federalism principles. Federalism concerns are at their highest where, as here, "the administrative interpretation [would] alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." Solid

[53] When it enacted the CWA, Congress sought to "recognize, preserve, and protect" the States' primary authority and responsibility over land and water resources. 33 U.S.C. § 1251(b). Accordingly, the Supreme Court recognized in SWANCC that the CWA should not be interpreted so as to "result in a significant impingement" on these traditional State powers. SWANCC, 231 U.S. at 174; see also Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("regulation of land use [is] a function traditionally performed by local governments").

[54] In some States, there is an existing regulatory program to regulate ditches. If, in addition to States and local drain and road commissions, EPA and the Corps have jurisdiction over activities in ditches, there would be three tiers of regulatory permitting.

Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. 159, 173 (2001) ("SWANCC") citing United States v. Bass, 404 U. S. 336, 349 (1971). The Proposal raises significant concerns about federal encroachment on state authority. At a minimum, the Agencies should have sought state input and allowed for state involvement in the development of the Proposal. (p. 2)

Agency Response: **Regarding CWA legal authority see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Georgia Association of Manufacturers (Doc. #18896)

1.269 Despite the insistence that the proposed rule is merely an attempt to clarify confusion created by recent U.S. Supreme Court precedent, the result would be additional layers of federal regulation for commercial and industrial interests across a vast swath of newly jurisdictional areas all around the country. This would usurp the authority of states and local governments, infringe on private property rights and potentially slow economic growth due to confusion, increased permitting costs and the resulting barriers to development. (p. 1)

Agency Response: **Regarding CWA legal authority see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act**

purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Western States Land Commissioners Association (Doc. #19453)

1.270 WSLCA joins with the leaders of other western states in urging the EPA give due regard to the core principles of federalism embodied in the Clean Water Act, which states in relevant part: "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States . .. to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). In conflict with this core principle, the EPA's rulemaking has proceeded without adequate state consultation and without appropriate consideration of local plans and priorities for land and water resources. As a result, the proposed rule is marked by regulatory uncertainty and overreach. If adopted, the rule will significantly interfere with the rights, duties, and economic interests of western states and landowners. (p. 1)

Agency Response: Regarding CWA legal authority see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

1.271 Whereas, the EPA's proposed rule significantly broadens federal jurisdiction over state lands, waterways, and water resources in a manner that disregards sound science, contravenes Supreme Court precedent, and infringes on the constitutional and economic rights of western states and citizens. (p. 3)

Agency Response: Regarding CWA legal authority see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.272 Whereas, many of the provisions of the proposed rule did not receive adequate state or local input, are vaguely written, and leave the regulated community without any clarity as to their regulatory status, thus exposing the regulated community to citizen suits and shifting the burden of proof to landowners to disprove federal jurisdiction. (p. 4)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to

State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, does establish a binding definition of "waters of the United States."

See Summary Response, Preamble to the Final Rule and Technical Support Document.

1.273 Whereas, states have primary jurisdiction for the management of bodies of water within their own borders, and several states have crafted, or are in the process of crafting, their own water management plans based on sound science and local information to conserve and preserve water and waterways while allowing for responsible economic growth within their state. (p. 4)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.274 WSLCA urges Congress to take federal legislative action to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution of waters wholly within a state while allowing responsible economic development of state and private lands and water resources. (p. 4)

Agency Response: This comment is beyond the scope of the rulemaking.

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

1.275 This proposed expansion of jurisdiction goes beyond what Congress intended with the CWA and beyond the Supreme Court's decisions in Rapanos and SWANCC. It seems to ignore the long running control of States to regulate their own land and water (Federalism). In a similar fashion, proposed jurisdiction over features with little or no relationship to traditional navigable waters (such as ephemeral channels, non-navigable ditches, isolated waters, etc.) raises Federalism concerns. Until this Proposed Rule, States have had primary authority to regulate their own water resources. That regulation has included their choice not to regulate what they consider to be non CWA waters. (p. 3)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Houma-Terrebonne Chamber of Commerce (Doc. #19624)

1.276 The proposed rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this proposed rule seeks to cover through federal jurisdiction are currently protected as state waters. A more reasonable and less costly approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps to work with states to improve their water quality programs. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Volusia County Association for Responsible Development (Doc. #1440)

1.277 We add our voice to the many comments you are receiving from national, state, and local associations, corporations, organizations and governmental entities in requesting an extension of the public comment period on your proposed rule. We agree that this is a lengthy and complex rule that will require detailed review and analysis by affected interests nationwide. Furthermore, we believe that the impacts of the change in definition of Waters of the United States (WOTUS) are unknown and unclear, but such impacts could have major consequences in terms of extending federal regulatory authority to extensive amounts of land and water which are presently regulated by state and local governments. This broadening of federal jurisdiction will surely result in increased costs,

confusing or duplicative regulatory oversight and the likelihood of extensive litigation. (p. 1)

Agency Response: **The agencies heard the request to extend the comment period on the proposed rule. The proposed rule was published on April 21, 2014, with a 90-day comment period which was expected to close on July 21, 2014. Numerous requests to extend the comment period were received and on June 24, 2014 the agencies issued an extension of the comment period through October 20, 2014. And, again, on October 14, 2014, an additional extension was issued, through when the comment period closed on November 14, 2014. See Response to Comment Compendium Topic 13 - Process Concerns and Administrative Procedures. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Southern Nevada Home Builders Association (Doc. #3251)

1.278 In adopting these proposed rule changes under the CWA, which will almost certainly result in the expansion of jurisdiction, it appears that the EPA has completely ignored the numerous state regulations that are in place to protect and regulate the lakes, rivers, streams, wetlands and water systems of the individual states. We are particularly concerned that the EPA has not adequately consulted with or sought input from the governors and agencies of the individual states in preparing and promulgating the new CWA regulations. Most states, especially arid states like Nevada, understand very well the need to preserve and protect their water resources and already have extensive laws and regulations in place which adequately manage and protect its streams, rivers, lakes and water systems. Nevada in particular has a very comprehensive regulatory process in place to manage and protect its critical and limited water resources.

The proposed CWA regulations also illustrate the fact that the individual states are often in a much better position than the federal government to analyze and evaluate the various regional and site-specific conditions of the state and adopt appropriate environmental regulations that are tailored to effectively protect its natural resources. In other words, a "one-size fits all" type of regulation, without any analysis or consideration of the unique conditions of the particular state or region impacted, is not reasonable nor does it effectively advance the legitimate purposes that such regulation is intended to protect. Rather, the effect of such a rule is that it disparately impacts certain regions (which in this case is the Southwest) without any justifiable basis therefore. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Coalition of Real Estate Associations (Doc. #5058.2)

1.279 A contrary interpretation – that MS4s are somehow considered jurisdictional WOTUS – would upset the federal-state balance envisioned by Congress to vest in States and localities the "primary responsibilities and rights" to control water pollution, and the use of land and water resources, within their borders.[55] (p. 3)

Agency Response: **See Preamble to the Final Rule and Technical Support Document. The rule excludes from jurisdiction stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.**

1.280 CWA section 101(b) places the "primary responsibilities" on States to address water pollution, and develop plans to preserve and protect land and water resources, within their borders.[56] As the Supreme Court emphasized in one of its seminal cases interpreting

[55] Id. § 1251(b).
[56] 33 U.S.C. § 1251(b).

WOTUS jurisdiction, through section 101(b) Congress preserved the "federal-state balance" in the CWA when it "chose to 'recognize, preserve and protect the primary responsibilities and rights of States to ... plan the development and use ... of land and water resources …."[57] Regulation of water and land use has always been a state function.[58] However, any agency interpretation or field determination that somehow deems MS4s as WOTUS would enormously disrupt State and local government programs and responsibilities to maintain, manage, and treat stormwater discharges under section 402(p).

MS4s are owned and operated by public entities, including states, local governments, and other bodies created under state law, such as sewer districts, flood control districts, or drainage districts. "Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare'), … Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program."[59] States and local government are thus charged with reducing pollution through the NPDES program. No added benefit would be gained by treating MS4 systems permitted under NPDES requirements as federal jurisdictional waters.

Under the Phase 2 stormwater rules, all municipal separate storm sewer systems in "urbanized areas" (as defined by the U.S. Census Bureau)[60] must develop and implement controls to prevent polluted runoff from entering rivers, lakes and coastal waters. Census maps (most recently released in 2010) are used to assist EPA and states to determine which new MS4s are located in urbanized areas and thus require NPDES permit coverage. Municipalities also use these maps to determine which locations within their jurisdiction are located in the urbanized area where the MS4 program would apply. As the U.S. population grows and becomes more concentrated in the nation's urban and suburban growth centers, EPA recognizes that "the universe of the regulated small MS4 program expands every ten years based on the decennial Census definition of urbanized area."[61] Any interpretation that subjects MS4s and the conveyances within them to WOTUS jurisdiction would federalize a vast network of storm sewer systems within

[57] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 151, 166-67 (2001) ("SWANCC") (citing 33 U.S.C. § 1251(b)).
[58] See SWANCC, 531 U.S. at 174 (citing Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).
[59] Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles, 636 F.3d 1235, 1247(9th Cir. 2011). The statement referenced by the Ninth Circuit was made by Senator Wallop: "[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source …. Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare." Id. (citing 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985)).
[60] In its FAQs for the NPDES program, EPA explains that Urbanized Areas (UAs) "constitute the largest and most dense areas of settlement. UA calculations delineate boundaries around these dense areas of settlement and, in doing so, identify the areas of concentrated development. UA designations are used for several purposes in both the public and private sectors. For example, the federal government has used UAs to calculate allocations for transportation funding, and planning Agencies and developers use UA boundaries to help ascertain current, and predict future, growth areas. The Bureau of the Census determines UAs by applying a detailed set of published UA criteria (see 55 FR 42592, October 22, 1990) to the latest decennial Census data." See "MS4: What is an Urbanized Area," at http://cfpub.epa.gov/npdes/faqs.cfm?program_id=6#174.
[61] See "Urbanized Area Maps," at http://cfpub.epa.gov/npdes/stormwater/urbanmaps.cfm.

State and local control – plainly upsetting the goal and policy of federal-state balance that Congress announced in CWA section 101(b). That result can be easily avoided, and the careful balance of authorities maintained, though a simple but important clarification that MS4s are excluded from the scope of WOTUS.

Professor Tribe has explained that the "most important" rule of statutory construction "is the clear statement rule."[62] Where a statutory interpretation "invokes the outer limits of Congress's power" or "overrides ... [the] usual constitutional balance of federal and state powers," Supreme Court cases "expect a clear indication that Congress intended that result."[63] The clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power."[64] There is no statement in the CWA – "clear" or otherwise – that Congress intended WOTUS to reach MS4s (and their roads, pipes, ditches and drains) covered by NPDES permits. Respectfully, EPA and the Corps should thus make it clear in any final rule that MS4s are categorically excluded from WOTUS jurisdiction. (p. 13-15)

Agency Response: **See Preamble to the Final Rule and Technical Support Document. The rule excludes from jurisdiction stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The rule makes no changes to NPDES permitting requirements. The rule recognizes and is consistent with CWA section 101(b).**

1.281 MS4s and their components are typically owned and controlled by municipalities and other government or tribal bodies. Thus, excluding MS4s from WOTUS jurisdiction furthers the CWA's objectives to vest States (and localities) with the primary responsibilities to control water pollution within their borders. (p. 20)

Agency Response: **See Preamble to the Final Rule and Technical Support Document. The rule excludes from jurisdiction stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.**

Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1)

1.282 It is clear that Congress intended to create a partnership between the federal agencies and state governments to jointly protect the nation's water resources. Under this notion, there must be a point where federal authority ends and State authority begins. The Agencies, however, have fashioned a rule so expansive that it all but abandons this precept in favor of a federal government over all approach. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to**

[62] Laurence Tribe, Constitutional Law vol. I, § 5-9 at 853.
[63] SWANCC, 531 U.S. at 172-73; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985)).
[64] SWANCC, 531 U.S. at 173.

implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Home Builders Association of Michigan (Doc. #7994)

1.283 The CWA and its associated permitting process must be consistent, predictable, timely, and focused on protecting true aquatic resources. It must also honor Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts and heed the limits of federal jurisdiction recognized by the Supreme Court in both SWANCC and Rapanos. Unfortunately, the proposal fails to adhere to these tenets and rulings. For these reasons, and the numerous additional shortcomings associated with the proposed rule, the Agencies should withdraw the rule and resubmit it only after its many Constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified. (p. 4)

Agency Response: Regarding CWA legal authority see Technical Support Document Section I. The agencies have finalized the rule consistent with the CWA, case law, and science. See Response to Comments Compendium Topic 13 - Process Concerns and Administrative Procedures.

Webber Land & Development Corporation (Doc. #10944)

1.284 As a local real estate developer, I am concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management. As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. (p. 1)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the

United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

See Summary Response, Preamble to the Final Rule and Technical Support Document.

DreamTech Homes, Ltd. (Doc. #11012)

1.285 Continues to Blur the Line Between State- and Federally-Controlled Waters. It is clear that Congress intended to create a partnership between the federal agencies and state governments to jointly protect the nation's water resources. Under this notion, there must be a point where federal authority ends and State authority begins. The Agencies, however, have fashioned a rule so expansive that it all but abandons this precept in favor of a federal government over all approach. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Scott County Development Corporation (Doc. #11542)

1.286 This proposed rule will give primacy to the federal government over local and State land use rules. When federal agencies have the power to grant, deny or veto a federally enforceable permit to build, plant, fence, apply fertilizer or spray pesticide or disease control products on land managed by businesses and municipalities, that is regulatory authority over land use. If a landowner cannot erect a building on, improve drainage, build a fence over, or manipulate a jurisdiction al wetland or ephemeral drain that runs across his or her land without a federal permit, then that is regulating land use.

The shift from state and local control of water-related land uses to federal control will impact our small towns, townships, road districts, water districts, highway departments, drainage districts, municipal utilities and the county as a whole. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response,

Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Building Industry Association of Washington (Doc. #13622)

1.287 BIAW favors the continued ability to protect the water and environmental resources in this state through private, local, and state means as Washingtonians have done in cooperation with the federal government since the passage of the Clean Water Act (CWA). This is because individual Washingtonians believe in a clean environment and we hold polluters accountable under the law as well. On the legislative side, Washington has proactively protected waterways and wetlands with the passage of protective measures such as the Growth Management Act (GMA), Critical Areas Ordinances (CAO), and the State Environmental Policy Act (SEPA); adopted stringent forestry practices to protect lakes, rivers, and streams; prevented water pollution with comprehensive regulatory controls; and protected fragile shorelines and aquatic life with the Shoreline Management Act. Private industry Private industry has continued to work to promote environmentally friendly practices as well. BIAW's own education programs to teach homebuilders state of the art environmental building and water infiltration techniques that exceed industry regulation.

Consequently, expanding federal jurisdiction with duplicative regulation simply brings with it unintended harm to state and local economies without providing any measurable level of increased environmental protection. In fact, the proposed expansive definition of navigable waters undercuts state laws tailored for local circumstances and deter responsible economic growth and affordable housing with unnecessary confusion over jurisdiction; those wishing to navigate the permitting process and provide jobs, responsible economic activity, and affordable housing will be fearful of investing in geographic areas that before the rule change were not risky ventures. What this means to Washingtonians is less ability to protect the environment because of a stagnant economy less able to adequately support (1) private entities that operate with regulations.

For example, homebuilders in Washington have an interest is ensuring that the GMA is properly applied by jurisdictions and the courts of this state, and ambiguously expanding the definition of navigable waters both conflicts with and unnecessarily complicates enforcement of the state and local protections such as GMA because it was designed to lessen state administrative approval so that local governments may provide bottom up economic and environmental planning. Top down federal regulation is in direct conflict with such grass roots orientated law and can hinder actual protection of environmental sensitive areas. This proposal is undoubtedly a result Congress never meant by the term "cooperative federalism" when it passed the CWA. Worse yet, the EPA has not even consulted with Washington State as required by Executive Order 13132 before proposing this rule change. If the rule goes into effect, Washington State will have to endeavor to rework its laws and policies that were designed to complement a CWA with limited jurisdiction. Such work will be difficult, time consuming, and costly because these laws

were not designed with an administratively amended CWA with near limitless federal jurisdiction in mind. Such reworking will harm the environment not help it and add to the continued uncertainty for residential construction, an industry hard hit by the recession and just beginning to see slow recovery. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

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

1.288 General Comments on the Environmental Law Institute's State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (May 2013) ("ELI Study" or "Study")

The joint commenters would also like to provide comment on the ELI Study referenced above, specifically focusing on its characterization of Arizona law and regulation. We would like to initially commend ELI for undertaking a study of this sort and for adding to the necessary dialogue on what the appropriate limits of federal jurisdiction should be under the Clean Water Act. Because the purpose of the ELI Study appears to be to show

that waters not regulated under the CWA are vulnerable, an accurate description of state law protections is important. To that end, the Study would have benefited from a broader approach to evaluating state-based protection of waters. For example, the Study missed the fact that Arizona's chief environmental regulatory agency, the Arizona Department of Environmental Quality, has the authority to set enforceable standards for protecting "waters of the State," a much broader category than waters of the U.S., and that a water-based regulatory program with no federal involvement or oversight, the Aquifer Protection Permit Program, places substantial limitations on the ability to discharge pollutants into waters left unprotected by federal law. In short, there are significant limitations in State law on the ability of a landowner to "discharge pollutants . . . at will"[65] into waters unprotected by federal law. Attachment 2 to these comments is a memorandum outlining these concerns in more detail. (p. 54)

Agency Response: **See Summary Response, Preamble to the Final Rule and Technical Support Document.**

Associated General Contractors of America (Doc. #14602)

1.289 AGC members are committed to the protection and restoration of America's water/wetlands resources. AGC does not believe, however, that it is in the nation's interest to have federal agencies regulate ditches, culverts and pipes, desert washes, sheet flow, erosional features, and stormwater treatment ponds as "waters of the United States," subjecting such waters to all of the federal regulatory requirements of the CWA. In that regard, the proposal is not really about clean water, it is about replacing longstanding state and local control of land uses near wet areas with centralized federal control. (p. 4)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Commercial Real Estate Development Association (Doc. #14621)

1.290 The rule must also demonstrate the fact that one size cannot fit all, and that the federal government must utilize a definition of WOTUS that allows states and tribes to expand protection of their waterways through either conditions issued under Section 401 of the

[65] ELI Study, at 2

Clean Water Act (CWA), or by adding state or tribal regulation of non-federally regulated waters by enacting separate legislative protections. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Vulcan Materials Company (Doc. #14642)

1.291 The definition of tributary as proposed, specifically the application of "bed and bank and ordinary high water mark" criteria, combined with the inclusion of ephemeral waters, extends CWA jurisdiction by requiring waters to be traced upstream beyond the range of traditional navigable waters (TNW) and historic jurisdiction determinations. These areas are normally reserved for state and local governments to determine the extent of regulatory coverage. The rule includes exemptions for rills and gullies from being considered waters; however, the inclusion of ditches combined with the bed and bank criteria creates uncertainty and confusion regarding the upper reach of jurisdiction that the agencies may pursue. In the case of aggregate mining operations, this extension is unnecessary as the mine sites are subject to National Pollutant Discharge Elimination System (NPDES) permitting for process and storm water discharges either under the federal program or federally delegated state permitting programs. These NPDES permits require aggregate mining sites to employ best management practices to control erosion and sediment discharges and to use water treatment systems with settling ponds and/or other treatment methods to ensure that discharges to surface waters are in compliance with applicable water quality criteria. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the**

relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Maryland Chapters of NAIOP (Doc. #15837)

1.292 The propose definition of WOTUS will overlap existing EPA and state of Maryland water quality regulations that are delivering required results. With the exception of small areas in the western and eastern sections of the state Maryland is subject to the Chesapeake Bay Total Maximum Daily Load (TMDL). In addition Maryland imposes some of the most protective water quality regulations in the country on Waters of the State which are defined in ways that extend beyond the proposed definition of WOTUS. These activities work in conjunction with water quality restoration requirements that are written into the Phase I MS4 stormwater permits of Maryland's 10 largest jurisdictions. By June 2015 Phase II MS4 jurisdictions will also be subject to the same water quality restoration requirements. These actions result in state and local regulatory oversight and pollutant reductions in local creeks and streams as well as the main stem of the Chesapeake Bay.

Together these and other efforts comprise Maryland's Watershed Implementation Plan (WIP) which was approved by EPA as sufficient to restore Chesapeake Bay water quality. As part of the TMDL implementation process Maryland has provided EPA with reasonable assurance that planned water quality improvements will be achieved and the state and EPA continue to work collaboratively on implementation and measuring progress.

The proposed definition of WOTUS may result in a detrimental shift of jurisdiction from Maryland to the EPA. Today projects that are determined to need federal review experience significant delays when compared to the review time required for Maryland review. Given the strength of protection applied through Maryland's regulation of Waters of the State, we do not see justification for an expanded federal role. This will increase uncertainty, undermine predictable permitting and may compromise existing land use techniques that are designed to derive environmental benefits through concentrating growth. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Building Industry Association of Greater Louisville (Doc. #16449)

1.293 The proposed rule redefines and expands the reach of the Clean Water Act (CWA) jurisdiction in that the rule… [ ] increases USEPA control over the state's water quality programs. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Texas Association of Builders (Doc. #16516)

1.294 The proposal continues to blur the line between state- and federally controlled waters. It is clear that Congress intended to create a partnership between the federal agencies and state governments to jointly protect the nation's water resources. Under this notion, there must be a point where federal authority ends and State authority begins. The Agencies, however, have fashioned a rule so expansive that it all but abandons this precept in favor of a federal government over-all approach. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Home Builders Association of Tennessee (Doc. #16849)

1.295 The Proposed Rule Imposes Federal Jurisdiction Over Solely State Waters (e.g., Watercourses With No Designated Use) in Contradiction of the Congressional Intent of Cooperative Federalism

In The Clean Water Act. The Proposed Rule imposes federal control of state land use practices and is contrary to the principle of cooperative federalism inherent in the Clean Water Act. The Clean Water Act is based on principles of cooperative federalism. Ohio Valley Envtl. Coal. v. Coal-Mac, Inc., 775 F. Supp. 2d 900, 920 (S.D. W. Va. 2011). Congress intended for states to develop water quality standards ("WQS") for all waters within its jurisdiction. 33 U.S.C.S. § 1313(c)(1). Water quality standards include designated uses, criteria to protect the uses, and an antidegradation statement. These WQS are evaluated triennially by the states, and EPA is required to review and approve them, or it may reject some or all of the WQS. See also Alaska Clean Water Alliance v. Clarke, 1997 U.S. Dist. LEXIS 11144,45 ERC (BNA) 1664,27 ELR 21330(W.D. Wash.1997). In fact, where EPA is not satisfied that the state has properly developed WQS, it may itself issue WQS for such a state. The language of 303(c)(3) clearly and unambiguously states that "if" EPA approves state standards, they shall "thereafter" be the applicable standards. 40 C.F.R. § 131.21.

The State of Tennessee's longstanding jurisdictional practice is that if a watercourse, even one characterized by a bed, bank and high water mark, does not have established uses, or where it has removed the classified uses, then the jurisdiction of such water shifts entirely to the state (even if it formerly had federal jurisdiction). As part of its WQS Tennessee has designated certain watercourses as wet weather conveyances and has done so since at least 1986. Tennessee intentionally removed all CWA required uses from wet weather conveyances (fish and aquatic life, recreation, irrigation, livestock watering and wildlife) during triennial review of water quality standards in 1986. EPA has approved Tennessee's WQS at every opportunity including the designation of wet weather conveyances with no established uses.

The application of the definition of waters of the United States cannot be read in absence of the water quality standards set out in Section 303 of the Clean Water Act. Particularly where a statute is ambiguous, such as the CWA, rules of statutory construction allow courts to read them *in pari materia*. Where a state, as part of the triennial review of water quality standards, has removed all designated uses for a tributary, and EPA has approved the Water Quality Standards, as a practical and legal matter, the Agencies' jurisdiction is limited to the State's regulation of such tributaries. An interpretation to the contrary reads out Section 303(c) of the CWA. Thus, even if the definition of tributaries encompasses Tennessee wet weather conveyances, such water courses are regulated as waters of the State rather than of the United States. Accordingly, when the Tennessee Board of Water Quality, Oil and Gas adopted the wet weather conveyance rule, which was approved by the United States Environmental Protection Agency ("EPA") in 1986, it removed any established uses for such waters in Tennessee. The Proposed Rule causes confusion with this federal/state partnership by painting such a broad brush on all tributaries, including wet weather conveyances.

In 2009, the Tennessee General Assembly enacted legislation to establish a legal mechanism for making jurisdictional calls on streams. In doing so, the statute refined the regulatory definition of wet weather conveyance to reflect additional biological requirements. In Tennessee, a stream is any watercourse that is not a wet weather conveyance. A wet weather conveyance has hydrogeological and chemical considerations (must be above the groundwater table, flow only in response to precipitation in the

immediate locality, and not suitable for drinking water) as well as hydrological and biological aspects (due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate logic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months). The Board of Water Quality, Oil and Gas has promulgated rules that set out criteria for making the determinations and defining the aquatic organisms that qualify a watercourse as a stream. In addition, the Tennessee Department of Environment and Conservation has developed guidelines to assist in interpreting the statute and the rules. Finally, TDEC has a certification program to train and certify individuals who qualify based on education and experience as well as classroom and field testing to make stream determinations. (p. 5-7)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Maryland State Builders Association (Doc. #17021)

1.296 Thank you for the opportunity to provide comments on the Proposed Rule Definition of "Waters of the United States". Maryland is somewhat unique in that most of the state is subject to the Chesapeake Bay TMDL that will oversee the reduction of nitrogen, phosphorus and sediments within the entire watershed. The latest Chesapeake Bay Agreement was signed earlier this year and demonstrates the commitment of all the states in the watershed to improve water quality. The 92-segment TMDL impacts both the main stem of the Chesapeake Bay and all local waterways that drain into the Bay. The effort to establish load reductions has been extensive and recent water quality monitoring and modeling show that the reductions are having a positive impact to the health of the Bay.

In compliance with the EPA TMDL requirements, Maryland submitted and received approval for their Watershed Implementation Plan (WIP) that outlines the strategy by sector with specific and implementable actions for obtaining pollutant reductions. These actions will impact waterways throughout the state, in particular local creeks and streams that may have impairments that affect downstream water quality. MDE regulations have been established or proposed for the agricultural community, urban point source pollution, wastewater treatment plants and non-point sources like septic systems as well. Together these regulations provide water quality improvements by reducing pollution loads that will improve water quality.

Given the number of regulations already in place in Maryland to implement the TMDL, the proposed definitional changes will likely trigger an expansion of EPA's jurisdiction and will be problematic because they are unclear and subjective. The proposal for the first time defines the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." There is no outlined methodology for determining which areas will fall into these new categories and no guidance for how states should be conducting assessments to determine applicability. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See also Response to Comments Compendium Topic 3 – Adjacent Waters, Topic 4 – Other Waters, Topic 5 – Significant Nexus, Summary Response Introduction and summary response to comments 7 and 8 and Topic 8 – Tributaries.**

Home Builders Association of Mississippi (Doc. #19504)

1.297 It is clear that Congress intended to create a partnership between the federal agencies and state governments to jointly protect the nation's water resources. Under this notion, there must be a point where federal authority ends and State authority begins. The Agencies, however, have fashioned a rule so expansive that it all but abandons this precept in favor of a federal government over all approach. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

National Association of Home Builders (Doc. #19540)

1.298 Second, most of the laws characterized as "constraints" in the ELI Study do not prohibit or limit regulation. The "qualified" stringency provisions claimed to limit water quality laws in 23 states – which ELI admits "stop[] short of creating a bar to state agency action,"[66] are nothing more than procedural requirements common to administrative practice, such as notice-and-comment rulemaking requirements.[67] And many of the other cited provisions are very narrow, focusing on state-specific concerns. They are not across-the-board prohibitions against regulating more broadly than the CWA. For example, Oregon focuses on effluent limitations for nonpoint source pollutants from forest operations, Virginia addresses treatment levels for sewage treatment works, Colorado addresses agricultural irrigation flows, and Minnesota has provisions that would come into effect should Minnesota assume Section 404 permitting authority.[68]

Third, some of the restrictions cited by ELI do not actually restrict state regulation under state law, but merely limit what the state can do when it is exercising delegated federal authority under the CWA.[69] It is hardly surprising that when a state elects to take over the NPDES program, it would also decide that its delegated program should not outrun the CWA unless certain conditions are met.

Fourth, ELI's "property-based" limitations[70] do nothing to limit the ability of state agencies to act[71] – they simply "create additional processes for an agency to follow when a proposed regulation is likely to affect private property rights," and require state agencies to compensate property owners in the event that regulation results in a physical or regulatory[72] taking.[73]

[66] ELI Study at 1.

[67] These provisions include such things as notice-and-comment rulemaking, written justifications of the need for regulation, findings regarding the need to address particular issues, and reports to state legislature. See ELI Study at 13-14. Also, in many instances, these so called "constraints" are irrelevant because expansion of the State program is not necessary to reach non-CWA waters. See, e.g., Craig P. Wilson, Tad J. Macfarlan, Response to ELI Report on State Constraints: The Scope of Regulated Waters in Pennsylvania, at 4 (June 4, 2014).

[68] ELI Study at 12, n. 27.

[69] See, e.g., ELI Study at 169 (The North Dakota Department of Health "is prohibited from adopting a rule for purposes of administering a program under the federal Clean Water Act that is 'more stringent than corresponding federal regulations which address the same circumstances,' or for which there is no corresponding federal regulation—unless the [state] satisfies additional requirements.") (describing N.D. Cent. Code § 23-01-04.1) (emphasis added), 213 (Utah has a similar law).

[70] These limitations "are an outgrowth of 'takings' law," which is "based on the Takings Clause of the Fifth Amendment of the U.S. Constitution." See ELI Study at 20.

[71] As noted by Charles M. Carvell, "During my 26 years as an Assistant Attorney General for the State of North Dakota . . . I don't recall an instance in which a state agency refrained from rule-making due to processes and procedures imposed by the legislature . . . I am unaware of any instance in which an agency backed away from rulemaking because it was required to conduct a takings assessment." Charles M. Carvell, Proposed Federal Rule Defining "Waters of the United States"—Comments on the Environmental Law Institute's Interpretation of North Dakota Law, at 2 (Sept. 2, 2104).

[72] As ELI acknowledges, "most regulations do not meet the threshold constitutional standards that would require compensation under principles of takings law." See ELI Study at 20.

[73] Id. at 20-21.

Fifth, ELI simply misrepresents data from some states. Some states counted in ELI's study as not regulating non-CWA waters actually do regulate non-CWA waters.[74] Finally, and most importantly, ELI misunderstands many of the state laws it references. State experts who have examined ELI's "State Profiles" (contained in the ELI Study's Appendix 2) have identified serious errors in ELI's assessments of their state's laws. In comments submitted to the docket on this proposal, for instance, the Pennsylvania Department of Environmental Protection (PA DEP) noted, "One of [PA] DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is needed because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states. The ELI study fails entirely to identify codified statutes and regulations that have provided the foundation for Pennsylvania's regulatory programs for decades – in some instances for nearly half a century."[75] The letter goes on to describe Pennsylvania's wetlands permitting program and Clean Streams Law and the multiple chapters of Pennsylvania Code that comprise the state's regulatory program, demonstrating that Pennsylvania has a "significant and robust regulatory program that reaches beyond the federal Clean Water Act."[76]

For all these reasons, the ELI Study cannot be relied upon to draw legitimate conclusions about whether states are constrained from regulating non-CWA waters. In fact, states have primary authority to regulate water resources. If states have chosen not to regulate non-CWA waters, it is not necessarily because they are prevented by law. Rather, in many cases, the states have determined that certain non-CWA waters and features do not warrant regulation. Doing so would be resource intensive and states have other mechanisms in place to promote conservation. In sum, the Agencies cannot rely on false claims that states are limited in their ability to protect non-CWA waters to justify their expansive interpretation of "waters of the United States."

What's more, a one-size-fits-all federal approach to protect isolated wetlands, ephemeral drainages, and other remote waters – many of which vary considerably from state to state as a result of diverse geologic, hydrologic, and climatic conditions – is impractical. Indeed, state and local governments are far better equipped to determine how best to manage their land and water resources than bureaucrats in Washington, D.C. Local governments have the most immediate knowledge of the conditions of the water bodies within their jurisdictions, and should be given the right to decide how best to regulate

[74] ELI lists 26 states as having "no" coverage of non-CWA waters, but acknowledges in a footnote that "[e]ven for states [categorized as not regulating non-CWA waters], the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal [CWA]." Id. at 8-9, Table 1 & Note 3. Thus, by ELI's own admission, at least, nine of the states in ELI's "no" columns may, in fact, cover non-CWA waters (Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, and Texas).

[75] Pennsylvania Department of Environmental Protection, Comments on Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880, at 2 (Oct. 8, 2014) (original emphasis).

[76] Id. at 3.

their local land and water resources. Moreover, because state and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit to be gained by treating the same drainage systems as jurisdictional "waters of the United States" and, in many cases, it will lead to duplicative regulation.

Importantly, the proposed rule's interpretation of "waters of the United States" is unlawful because it would result in a significant impingement on the states' traditional authority over land and water use. (p. 29-31)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.299 With new and overbroad definitions of "tributary," "adjacent," and "neighboring," the Agencies arguably have impinged on states' rights to manage their land and water resources (see Section X. d.). By claiming jurisdiction over "other waters" on a so-called "case-by-case" basis, there is absolutely no question that the Agencies are seeking to redefine "waters of the *states*" as "waters of the United States." After asserting categorical federal jurisdiction over (a)(1) through (6) waters and, on a case-by-case basis, federal jurisdiction over "other waters," what waters are left to the states? As is clearly indicated by the plain text reading of the goals and polices enumerated in the CWA, Congress intended "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources."[77] Arguably, under this construct, there must be a point at which federal authority ends and state authority begins. Can the Agencies point to any waters (aside from those explicitly excluded in the proposed rule) that would be a water of the state and not a water of the United States? (p. 99-100)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule

[77] 33 U.S.C § 1251(b).

Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Home Builders Association of Tennessee (Doc. #19581)

1.300 The Proposed Rule imposes federal control of state land use practices and is contrary to the principle of cooperative federalism inherent in the Clean Water Act. The Clean Water Act is based on principles of cooperative federalism. Ohio Valley Envtl. Coal. v. Coal-Mac, Inc., 775 F. Supp. 2d 900, 920 (S.D. W. Va. 2011). Congress intended for states to develop water quality standards ("WQS") for all waters within its jurisdiction. 33 U.S.C.S. § 1313(c)(1). Water quality standards include designated uses, criteria to protect the uses, and an antidegradation statement. These WQS are evaluated triennially by the states, and EPA is required to review and approve them, or it may reject some or all of the WQS. See also Alaska Clean Water Alliance v. Clarke, 1997 U.S. Dist. LEXIS 11144,45 ERC (BNA) 1664,27 ELR 21330(W.D. Wash.1997). In fact, where EPA is not satisfied that the state has properly developed WQS, it may itself issue WQS for such a state. The language of 303(c)(3) clearly and unambiguously states that "if' EPA approves state standards, they shall "thereafter" be the applicable standards. 40 C.F.R. § 131.21.

The State of Tennessee's longstanding jurisdictional practice is that if a watercourse, even one characterized by a bed, bank and high water mark, does not have established uses, or where it has removed the classified uses, then the jurisdiction of such water shifts entirely to the state (even if it formerly had federal jurisdiction). As part of its WQS Tennessee has designated certain watercourses as wet weather conveyances and has done so since at least 1986. Tennessee intentionally removed all CWA required uses from wet weather conveyances (fish and aquatic life, recreation, irrigation, livestock watering and wildlife) during triennial review of water quality standards in 1986. EPA has approved Tennessee's WQS at every opportunity including the designation of wet weather conveyances with no established uses.

The application of the definition of waters of the United States cannot be read in absence of the water quality standards set out in Section 303 of the Clean Water Act. Particularly where a statute is ambiguous, such as the CWA, rules of statutory construction allow courts to read them *in pari materia*. Where a state, as part of the triennial review of water quality standards, has removed all designated uses for a tributary, and EPA has approved the Water Quality Standards, as a practical and legal matter, the Agencies' jurisdiction is limited to the State's regulation of such tributaries. An interpretation to the contrary reads out Section 303(c) of the CWA. Thus, even if the definition of tributaries encompasses Tennessee wet weather conveyances, such water courses are regulated as waters of the State rather than of the United States. Accordingly, when the Tennessee Board of Water Quality, Oil and Gas adopted the wet weather conveyance rule, which was approved by the United States Environmental Protection Agency ("EPA") in 1986, it removed any established uses for such waters in Tennessee. The Proposed Rule causes confusion with

this federal/state partnership by painting such a broad brush on all tributaries, including wet weather conveyances.

In 2009, the Tennessee General Assembly enacted legislation to establish a legal mechanism for making jurisdictional calls on streams. In doing so, the statute refined the regulatory definition of wet weather conveyance to reflect additional biological requirements. In Tennessee, a stream is any watercourse that is not a wet weather conveyance. A wet weather conveyance has hydrogeological and chemical considerations (must be above the groundwater table, flow only in response to precipitation in the immediate locality, and not suitable for drinking water) as well as hydrological and biological aspects (due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate logic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months). The Board of Water Quality, Oil and Gas has promulgated rules that set out criteria for making the determinations and defining the aquatic organisms that qualify a watercourse as a stream. In addition, the Tennessee Department of Environment and Conservation has developed guidelines to assist in interpreting the statute and the rules. Finally, TDEC has a certification program to train and certify individuals who qualify based on education and experience as well as classroom and field testing to make stream determinations.

When EPA Region IV approved Tennessee's water quality standards, those standards took effect for CWA purposes within the State of Tennessee. Those standards included the Wet Weather Conveyance rule which, pursuant to the Tennessee's classification of surface waters, are not assigned any designated uses, including CWA § 101(a)(2) uses required for all "waters of the U.S." Therefore, while wet weather conveyances are waters of the State, by definition they are not "waters of the United States" because they do not support the CWA § 101(a)(2) uses, a statutory requirement for all waters of the U.S.

Based on the foregoing it is clear that designated wet weather conveyances in Tennessee should not be subject to federal jurisdiction. However, the expansive definition of tributary usurps Tennessee's classification of wet weather conveyances and ascribes federal jurisdiction in its place. This usurpation creates substantial uncertainty in the regulated community as to jurisdictional limitations of projects under both Section 404 and Section 402. The action by the Agencies relegates states to merely contract administrators of a federal program rather than a full partner in how our nation's waters will be protected, which contradicts Congressional intent of the Clean Water Act.

We request that the Agencies address the basis for their jurisdiction, if any, over wet weather conveyances in Tennessee. If the Agencies believe such jurisdiction exists, then please state the basis of authority to impose compensatory mitigation on watercourses with no uses. (p. 5-7)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule**

Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

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

1.301 NSSGA recognizes the legitimate objective of the CWA to protect the nation's waters. However, the CWA does not extend federal authority to all wetlands and waters in the nation. Section 101 of the Act specifically limits the authority of federal agencies to intrude into state and local matters.[78] Congress explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters…of such States." 33 U.S.C. 1370(2). Fundamental principles of federalism dictate that control of land use decisions are properly within the purview of State and local governments, indeed, the Supreme Court has recognized that "regulation of land use is perhaps the quintessential state activity." FERC v. Miss., 456 U.S. 742, 767 n.30 (1980).[79] Congress directed the federal agencies to "cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 USC 1251(g).[80] The Court has been very skeptical of EPA's expansion of its long-standing authority. As the Court recently stated, "when an agency claims to discover in a long extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." Utility Air Reg. Gp. v. EPA, 134 S.Ct. 2427, 2444 (2014). (p. 31-32)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule**

[78] Section 101(b) of the Act states that "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution to plan the development and use (including restoration, preservation and enhancement) of land and water resources and to consult with the Administrator in the exercise of his authority under the Act."

[79] See Hess v. Port Auth. Trans Hudson Corp., 513 U.S. 30, 44 (1994). The Supreme Court has long recognized "the authority of state and local governments to engage in land use planning. Dolan v. City of Tigaard, 512 U.S. 374, 384 (1994) (citing Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

[80] The proposed rule would severely undermine the federal /state balance inherent in the CWA. The Supreme Court has long held that "unless congress conveys a purpose clearly, it will not be deemed to have significantly changed the federal/state balance " United States v. Bass, 404 U.S. 336, 349 (1971); see also Rice v. Santa Fe Elevator Corp. 331 US 218, 230 (1947); Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991), ("Congress should make its intentions clear and manifest if it intends to pre-empt the historic powers of the States."). There is nothing in the CWA or its legislative history that would allow the Corps and EPA to override state and local land use primacy as the proposed rule would do.

Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Lyman-Richey Corporation (Doc. #14420)

1.302 By relying on shallow subsurface groundwater connections to justify jurisdiction over otherwise isolated waters, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding:

> [C]lean water is not the only purpose of the [CWA]. So is the preservation of primary state responsibility for ordinary land-use decisions. … It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' It did not do that[.]"

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (bold supplied).[81] The plain language and legislative history of the CWA reject federal jurisdiction over groundwater, and the structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in Washington Wilderness Coal. v. Hecla Min. Co.:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. …The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'[82]

Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.[83]

Indeed: "The agencies have never interpreted 'waters of the United States' to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems."[84] Unfortunately, the

[81] See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); FERC v. Mississippi, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126 (1982); Hess v. Port Authority Trans–Hudson Corporation, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.
[82] 870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739.
[83] See Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir.1994); Kelley v. United States, 618 F.Supp. 1103 (W.D.Mich.1985).
[84] 79 Fed. Reg. 22218.

Proposed Rule does include groundwater, because without groundwater, there is no hydrologic link between many isolated waters and traditionally navigable waters.[85] Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.[86] Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

The Proposed Rule, moreover, disregards all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[87] These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state, local, and private entities, such as LRC, who must account for the application of federal law to every aspect of its operations.

Asserting blanket jurisdiction over any and all waters will result in federal control over regulation of land use – a primary responsibility of the States.[88] This infringement on State responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.[89] As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[90] (p. 6-7)

Agency Response: **The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow**

[85] Comments to the SAB Report indicate that in some cases, the only connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14).
[86] 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.
[87] NEB. REV. STAT. §§ 2-3201 et seq.; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 et seq., NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; NEB. REV. STAT. § 81-1501, et seq.
[88] Hess v. Port Authority Trans–Hudson Corporation, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); FERC v. Mississippi, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)
[89] SWANCC. v. U.S. Army Corps of Engineers, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")
[90] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation. Additionally, the rule does not regulate land use. See Summary Response, Preamble to the Final Rule and Technical Support Document.

Railroad Commission of Texas (Doc. #14547)

1.303 The RRC is concerned that the proposal greatly expands federal jurisdiction under the Clean Water Act and does nothing to clarify the issues with which the courts, the Agencies, the States, and the public have been faced over the years concerning such jurisdiction. Although the Agencies state in the preamble that federal jurisdiction would be limited, the proposed rule, if adopted, would potentially extend the reach of federal jurisdiction to surface waters that have generally not been considered "waters of the United States" and could result in staff at the Agencies exercising open-ended discretion in making such jurisdictional determinations. As such, this expansion of jurisdiction significantly threatens private property rights. In addition, the proposal will further frustrate and open the public to possible enforcement by further obscuring the boundary between what is jurisdictional and what is not. Furthermore, the proposal does not demonstrate sufficient deference to State water protection laws or consideration of additional burdens to state programs. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Tennessee Mining Association (Doc. #14582)

1.304 The Proposed Rule imposes federal control of state land use practices and is contrary to the principle of cooperative federalism inherent in the Clean Water Act. The Clean Water Act is based on principles of cooperative federalism. Ohio Valley Envtl. Coal. v. Coal-

Mac, Inc., 775 F. Supp. 2d 900, 920 (S.D. W. Va. 2011). Congress intended for states to develop water quality standards ("WQS") for all waters within its jurisdiction. 33 U.S.C.S. § 1313(c)(1). Water quality standards include designated uses, criteria to protect the uses, and an antidegradation statement. These WQS are evaluated triennially by the states, and EPA is required to review and approve them, or it may reject some or all of the WQS. See also Alaska Clean Water Alliance v. Clarke, 1997 U.S. Dist. LEXIS 11144,45 ERC (BNA) 1664,27 ELR 21330(W.D. Wash.1997). In fact, where EPA is not satisfied that the state has properly developed WQS, it may itself issue WQS for such a state. The language of 303(c)(3) clearly and unambiguously states that "if' EPA approves state standards, they shall "thereafter" be the applicable standards. 40 C.F.R. § 131.21.

The State of Tennessee's longstanding jurisdictional practice is that if a watercourse, even one characterized by a bed, bank and high water mark, does not have established uses, or where it has removed the classified uses, then the jurisdiction of such water shifts entirely to the state (even if it formerly had federal jurisdiction). As part of its WQS Tennessee has designated certain watercourses as wet weather conveyances and has done so since at least 1986. Tennessee intentionally removed all CWA required uses from wet weather conveyances (fish and aquatic life, recreation, irrigation, livestock watering and wildlife) during triennial review of water quality standards in 1986. EPA has approved Tennessee's WQS at every opportunity including the designation of wet weather conveyances with no established uses.

The application of the definition of waters of the United States cannot be read in absence of the water quality standards set out in Section 303 of the Clean Water Act. Particularly where a statute is ambiguous, such as the CWA, rules of statutory construction allow courts to read them in pari materia. Where a state, as part of the triennial review of water quality standards, has removed all designated uses for a tributary, and EPA has approved the Water Quality Standards, as a practical and legal matter, the Agencies' jurisdiction is limited to the state's regulation of such tributaries. An interpretation to the contrary reads out Section 303(c) of the CWA. Thus, even if the definition of tributaries encompasses Tennessee wet weather conveyances, such water courses are regulated as waters of the State rather than of the United States. Accordingly, when the Tennessee Board of Water Quality, Oil and Gas adopted the wet weather conveyance rule, which was approved by the United States Environmental Protection Agency ("EPA") in 1986, it removed any established uses for such waters in Tennessee. The Proposed Rule causes confusion with this federal/state partnership by painting such a broad brush on all tributaries, including wet weather conveyances.

In 2009, the Tennessee General Assembly enacted legislation to establish a legal mechanism for, making jurisdictional calls on streams. In doing so, the statute refined the regulatory definition of wet weather conveyance to reflect additional biological requirements. In Tennessee, a stream is any watercourse that is not a wet weather conveyance. A wet weather conveyance has hydrogeological and chemical considerations (must be above the groundwater table, flow only in response to precipitation in the immediate locality, and not suitable for drinking water) as well as hydrological and biological aspects (due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate logic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months). The

Board of Water Quality, Oil and Gas has promulgated rules that set out criteria for making the determinations and defining the aquatic organisms that qualify a watercourse as a stream. In addition, the Tennessee Department of Environment and Conservation has developed guidelines to assist in interpreting the statute and the rules. Finally, TDEC has a certification program to train and certify individuals who qualify based on education and experience as well as classroom and field testing to make stream determinations.

When EPA Region IV approved Tennessee's water quality standards, those standards took effect for CWA purposes within the State of Tennessee. Those standards included the Wet Weather Conveyances rule which, pursuant to the State's classification of surface waters rule, are not assigned any designated uses, including CWA § 101(a)(2) uses required for all "waters of the U.S." Therefore, while wet weather conveyances are waters of the State, by definition they are not "waters of the United States" because they do not support the CWA § 101(a)(2) uses, a statutory requirement for all waters of the U.S.

Based on the foregoing it is clear that designated wet weather conveyances in Tennessee should not be subject to federal jurisdiction. However, the expansive definition of tributary usurps Tennessee's classification of wet weather conveyances and ascribes federal jurisdiction in its place. This usurpation creates substantial uncertainty in the regulated community as to jurisdictional limitations of projects under both Section 404 and Section 402. The action by the Agencies relegates states to merely contract administrators of a federal program rather than a full partner in how our nation's waters will be protected, which contradicts Congressional intent of the Clean Water Act.

We request that the Agencies address the basis for their jurisdiction, if any, over wet weather conveyances in Tennessee. If the Agencies believe such jurisdiction exists, then please state the basis of authority to impose compensatory mitigation on watercourses with no uses. (p. 7-8)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Waterton Global Mining Company (Doc. #14784)

1.305 The proposed rule purports to give federal agencies direct authority over land use decisions that Congress intentionally reserved to states- and, in doing so, calls into question the continuing role and discretion left to state, county and other local governments. Such broad expansion of jurisdiction of the CWA is neither contemplated

nor authorized by existing statutes (or interpretive case law) and, therefore, should not be implemented through rulemaking in lieu of what lawfully requires statutory amendment. (p. 2)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Alaska Miners Association (Doc. #15027)

1.306 Also troubling to AMA is that two Federal agencies involved have not consulted with their state partners on this proposed rule. Likewise, the proposed definition has not considered, no consulted with the Alaska Native land owners in Alaska who have been granted 44 million acres of land that Congress intended to be a partial settlement of outstanding Native claims. It is our strong opinion that the new definitions will have the direct result of significantly undermining the intent of Congress for these 44 million acres be available for responsible resource development, including minerals, now owned in fee title by the Alaska Native Corporations established by the Alaska Native Claims Settlement Act. Furthermore, the rule encroaches on the traditional power of the states to regulate land and water within their borders. Coordination and consistency are crucial for any proposed rule defining waters of the U.S., and it is just as vital to ensure states' rights are not being violated. It is statutorily mandated, and affirmed by our legal system, that regulation of interior waters is a quintessential state function.

In the proposed rule, the agencies imply that states lack mechanisms and regulation to protect aquatic resources. In fact, the State of Alaska has a regulatory framework that meets or exceeds all federal water quality standards and a legal framework to support those standards. (p. 2)

Agency Response: **In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.**

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal issues and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process. The agencies have prepared a report summarizing their consultation with tribal nations,. This report, Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule (Docket Id No EPA-HQ-OW-2011-0880), is available in the docket for this rule.

The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

1.307 "Federalizing" waters not intended to be covered by the CWA. Local regulatory authorizes should retain jurisdictional authority over their local waters. They better understand local conditions than the federal government which is why traditionally they have had authority over land and water use. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that

clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Halliburton Energy Services, Inc. (Doc. #15509)

1.1 State programs provide substantial environmental benefit that is not appropriately acknowledged and respected by this proposal, and land use regulation of the type that would occur under the proposed rule belongs at the state level. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

American Gas Association (Doc. #16173)

1.308 The Proposed Rule does not discuss which federal and state-delegated programs might be affected, and what those effects would imply for the state-federal relationship that currently exists over the permitting of isolated waters, state-regulated features in uplands, and the many "adjacent" wetlands and waters that would be regulated federally for the first time and require companion water quality certifications under state-administered programs. Even where the Agencies propose to exclude or make case-based exclusions from jurisdiction for non-categorical "other waters", this flexibility only exacerbates the potential for regulatory staff and field inspectors to arbitrarily, inconsistently, and subjectively make jurisdictional findings based on their personal understanding of the Agencies' legal definition of "significant nexus." (p. 6)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document Sections I, II, VII, VIII and IX.

ConocoPhillips (Doc. #16346)

1.309 The economic analysis assumes that federal jurisdiction is required because streams are not being regulated by states. It is our experience that state regulators have the expertise

to address issues related to the geology, hydrology, geography, and cultural conditions within a particular state and is already regulating waters of the state. Extending federal jurisdiction to these state protected waters would result in regulatory uncertainty concerning NPDES permits, including storm water permits; Section 404 permits; Spill Prevention, Control, and Countermeasure (SPCC) plans and containment requirements; and the jurisdictional status of ephemeral streams, dry ditches and arroyos, and isolated ponds. (p. 2)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

1.310 EPA is relying on inaccurate and inadequate information regarding Pennsylvania's environmental laws. Pennsylvania has primacy with respect to the NPDES program, as well as other water programs. However, EPA has instead chosen to rely upon the 2013 Environmental Law Institute (ELI) report entitled, "State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act" as support for their actions.

The ELI report mischaracterizes Pennsylvania's authority to regulate waters, basically indicating that Pennsylvania's program is lacking, which is entirely inaccurate. ELI states: "State laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace . . . [and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently 'filling the gap' left by US Supreme Court rulings . . ., and face significant obstacles in doing so."10 The report belittles not only the existing statutes and laws of Pennsylvania, many of which have been on the record for over 50 years, but also the work of the PA Department of Environmental Protection.

Agency Response: **Additionally, EPA has not taken into consideration the significant impact on the states' available resources to implement the proposed requirements, particularly given the lack of clarity and the ambiguousness of the proposed rule. (p. 4)**

See Summary Response, Preamble to the Final Rule and Technical Support Document.

Interstate Mining Compact Commission (Doc. #16514)

1.311 EPA states that an important objective of the rule is to protect the 60 percent of the Nation's stream miles that flow only seasonally. However, the Commonwealth of Pennsylvania is not a state in which the majority of stream miles only flow seasonally. To the extent that Pennsylvania streams have seasonal flow, they are protected under state law. Administering a detailed and specific "one-size-fits-all" definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snow melt characteristics, will be difficult. Such a rule may in fact undermine existing state law protections.

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 scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not**

establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Iron County Commission, Iron County (Doc. #17033)

1.312 Previous acts of congress (Acts of 1899, 1870, and 1877) divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. The only specific exemption from this authority is water appropriation under state law. Therefore, non-navigable waters of the West are still under the authority of the States, and are beyond the Agencies jurisdiction. Multiple court cases support this authority and define clearly what is meant by "waters of the United States". Iron County feels that this rule has a specific purpose to expand the Agencies authority beyond that which is provided for by Congress. (p. 2-3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. In particular with respect to CWA legal authority, see Technical Support Document Section I.

1.313 The Agencies attempt to minimize the scrutiny of the proposed rule by insinuating in the above reference, that the rule does not supersede Congressional policy or direction to preserve state authorities to under CWA is misleading. Clearly, the lead-in paragraph in Section 101 of the CWA gives direction to federal agencies that their action not interfere with States rights and States responsibilities to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. Iron County believes that the true intent of the rule is to do just what it indicates it will not do — provide a new rule that does supersede states authorities under CWA in managing land and water resources as was intended by Congress.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended of the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all states and across the entire nation. (p. 3)

Agency Response: The Rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that

clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding CWA legal authority, see Technical Support Document Section I.

Petroleum Association of Wyoming (Doc. #18815)

1.314 PAW's concerns discussed above are not exhaustive. Because it is unclear how the proposed rule would be specifically implemented, it is likely that other programs under the CWA would be affected in ways we cannot immediately foresee. For example, the categorical definitions of WOTUS for tributaries and adjacent waters could be read to limit the state's flexibility in performing Use Attainability Analysis or exercising its authority under CWA § 303 to make site-specific decisions on whether to protect for aquatic life or recreational uses in certain waters. Certainly, the states are in a better position to make these determinations within their boundaries on a site-specific basis, but if the definitions preclude the state from exercising its discretion, such a result would be unwarranted.

Similarly, the proposed definition is problematic with respect to differentiating between "state waters" and WOTUS for regulatory purposes. For example, the proposal would create uncertainty with respect to oil and gas produced water discharges to non-WOTUS waters. The State of Wyoming regulates and permits discharges to both WOTUS and non-WOTUS waters. State permitted discharges to non-WOTUS state waters are not subject to federal jurisdiction. However, under the proposed definition, it appears some permitted discharges to non-WOTUS state waters could become subject to agency jurisdiction. While unclear under the proposed rule, it is conceivable that the assertion of federal jurisdiction in such a scenario could extend beyond the drainage itself, and subject an operator to federal jurisdiction over the process, facility, or even the wellhead remotely situated in an otherwise arid and isolated landscape. As discussed above, such assertions of jurisdiction, should they occur, would exceed any permissible interpretation of CWA jurisdiction or WOTUS. In addition, there would be uncertain and potentially conflicting requirements depending on whether a water were determined to be a state water or WOTUS, should the proposed rule be interpreted to apply in this manner. (p. 12-13)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA,**

Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.315 The expansion of the agencies' authority that would result from adoption of the proposed rule is so extensive that it impermissibly impinges on authority granted to the State of Wyoming under the CWA and Wyoming's Constitution. By claiming authority that appears to expand to the upper reaches of headwater drainages and over remote wetlands and ill-defined floodplains, PAW is left wondering what would constitute "waters of the state" as opposed to WOTUS. Congress never intended the agencies to regulate every drop of water within a state's borders. Wyoming's constitution provides that the waters of all natural streams, springs, lakes or other collections of still water within the boundaries of the state * * * are declared to be the property of the state." Wyoming Constitution, Article 8, § 1. Moreover, in enacting the CWA, Congress was doubtlessly aware of the constitutional provisions declaring ownership of water in Wyoming and several other states. CWA Sections 101(b) and (g) recognize congressional intent that the primary responsibilities for reduction and elimination of pollution and restoration, preservation and enhancement of land and water resources should lie primarily with the states.

The breadth and scope of the proposed rule fails to recognize these constraints on federal authority. *SWANCC* and *Rapanos* both resulted in a defeat of the agencies' attempts to broaden the exercise of federal jurisdiction. In light of this, PAW finds it remarkable that the proposed rule actually seeks to enlarge federal jurisdiction well past the point the agencies have ever previously regulated. Rather than set the agencies up for protracted further litigation over the scope of jurisdiction, PAW urges the agencies to withdraw the rule and consult with the states and other stakeholders in a meaningful and honest way, prior to moving forward with further attempts to define and expand WOTUS through regulations.

As noted, PAW is concerned with an expansion of federal authority into areas that have been traditionally regulated by the state in a predictable and effective manner. From a review of comments submitted by various states, it is evident that the states perceive they were cut out of the agencies rulemaking process. The CWA was envisioned as a model of cooperative federalism, under which states would retain primary authority to regulate waters within their boundaries. The lack of state participation in the development of the proposed rule is certainly troubling to PAW, as the state is in the best position to regulate waters within its boundaries and to interact with the regulated community.

As a trade organization with members that rely on predictable, consistent regulation, PAW finds the process utilized in the development of the proposed rule to be problematic. A review of the authors and reviewers of the Connectivity Report reveals that members of organizations traditionally associated with the environmental community and academia were included in the review of the document as it was developed. However, not a single member of any state environmental or water agency is included among the reviewers or contributors to the report. Nor are members of any industry or related trade association. For a report prepared to further a regulatory program implemented ostensibly through Federal-State cooperative federalism, the absence of state agency participants in the development and review of the Connectivity Report seems wholly inappropriate. PAW urges the agencies to heed the recommendations and

requests of the State of Wyoming and other states to withdraw the rule and start over; this time involving the states, as well as relevant stakeholders in a meaningful way. It is only by involving the state partners and stakeholders that a WOTUS rule that makes sense for the federal government, the states, and the regulated community can be developed. (p. 14-15)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule. Regarding CWA legal authority, See Technical Support Document Section I.

Snyder Associated Companies, Inc (Doc. #18825)

1.316 When Congress passed the Clean Water Act in 1972, it let the states protect their own waters, and reserved for the federal government the authority to regulate waters used in interstate or foreign commerce, i.e., "navigable waters." The proposed rulemaking would bring into jurisdiction water features that have no substantial impact on traditional "navigable waters." (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer

waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Greybull Valley Irrigation District (Doc. #1438)

1.317 GVID urges you to change course by committing to operating under the limits established by Congress, recognizing the states' primary role in regulating and protecting their streams, ponds, wetlands and other bodies of water. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Washington Cattlemen's Association (Doc. #3723)

1.318 There is no provision for a state to ask to be omitted from the rule. There is nothing in the proposed rule to recognize the rights of States in water issues. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical,

physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Wheatland Irrigation District (Doc. #5176)

1.319 We respectfully submit that this extensive regulation of water should be left up to the states. The Senate and Congressional Western Caucuses have stated that this rule will negatively impact farms, small businesses, energy production, commercial development and substantially interfere with the ability of individual landowners to use their property and urge Congress to "[recognize] the states' primary role in regulating and protecting their streams, ponds, wetlands, and other bodies of water. The Supreme Court has recognized the states' right in regulating their own bodies of water. The states and local communities should have more of a voice in such a matter than can drastically impact local economies. The lack of adequate consultation with states and local communities by the EPA is disconcerting. Ultimately, the states, not the EPA, should have the final say in how their farms and ranches are regulated. (p. 4)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments

for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

Oregon Cattlemen's Association (Doc. #5273.1)

1.320 The proposed rule is also contrary to the text of the CWA and in that it infringes on the rights and responsibilities of States to oversee the management and use of lands found within their jurisdictions.

In enacting the CWA, Congress set out to simultaneously achieve two goals. On the one hand, the CWA provides the Federal government with tools and resources to promote the "[r]estoration and maintenance of chemical, physical, and biological integrity of [the] Nation's waters." 33 U.S.C. § 1251(a). On the other hand, the CWA clearly states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.. . ." *Id*. at § 1251(b).

Under the expansive jurisdictional scope of the proposed rule, the Federal government, through the EPA and Corps, would have the "primary responsibility" of carrying out the directives of the CWA; the States having only that authority delegated to them by the Agencies.

Justice Scalia notes in the *Rapanos* plurality that the "[r]egulation of land use, as thorough the issuance of ... development permits ... is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (citing *FERC* v. *Mississippi*, 456 U.S. 742, 767-768, n. 30 (1982); *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994). One primary reason for this is the inherent difficulty that exists in enacting nationwide regulations for land use due to the wide variety of geographic features , landscapes, climates , etc. that exist within the borders of the United States. State and local governments are belter-suited for the task of regulating land use because government officials at these levels of governments have a much better, more intimate understanding of the landforms found within their jurisdictions.

The proposed rule should be as narrow as possible to reflect the CWA's intent that States retain jurisdiction over local activities that may impact waters within their respective boundaries. (p. 3)

Agency Response: **The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Pike and Scott County Farm Bureaus (Doc. #5519)

1.321 Furthermore, this expansion of federal authority will override State authority making null and void statewide permits for minor activities in waters of the state. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Colorado Livestock Association (Doc. #7930)

1.322 The Clean Water Act authorizes no jurisdiction for any federal agency over groundwater. Within the Proposed Rule, a significant nexus may be defined by "shallow, subsurface connections" between wetlands and waters. Whereas alluvial groundwater resources are often found in shallow, subsurface locations, the jurisdiction of same becomes unclear between state and federal authorities.

Point: Jurisdiction between state and federal agencies should be clarified in the Proposed Rule. Including the connectivity of subsurface waters and their flow in the Rule presents a challenge to state authority for groundwater regulation and would exceed the intent and congressional authority granted to EPA by the Clean Water Act. (p. 3)

Agency Response: The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of "waters of the United States." While groundwater is excluded from jurisdiction, the agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. When assessing whether a water evaluated in (a)(7) or (a)(8) performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater are themselves "waters of the United States." The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and

near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation.

Coon Run Levee and Drainage District (Doc. #8366)

1.323 Through easements, landowners relinquished "control" of their ditches to local drainage districts many years ago. The ditches are privately owned. The drainage district assumes general maintenance of the ditch to provide appropriate drainage of the land through a formal legal easement. In other words, the local levee and drainage district, a municipality duly constituted by the state, comprised of commissioners duly elected by local landowners, have jurisdiction over these district ditches. Amending the definition of "waters of the United States" would completely undermine the very essence of the local levee and drainage districts, Jurisdiction originally entrusted to local officials would be usurped by the Federal Government. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. See also Response to Comments Compendium Topic 6 – Ditches.

Cattle Empire (Doc. #8416)

1.324 We believe that this definition of WOTUS as proposed is illegal based on the Commerce Clause of the U.S. Constitution, the framework and goals of the CWA, Congressional intent and Supreme Court rulings. Each places a limit on federal jurisdiction over the states' waters. Currently, this proposal has practically no limit whatsoever. The inclusion of agricultural ditches into the category of "tributaries" is concerning and inappropriate. The two exclusions provided in the proposal are not adequate to alleviate the enormous burden placed on the entire agriculture community.

The proposed definition also annihilates the federalist system that underpins the CWA. The states must be allowed to regulate the waters within their borders without threat of takeover by the federal government. The proposal states that the States may continue to more broadly regulate waters within their borders, but under this proposal, there would be no other waters that are not under the jurisdiction of the federal government! (p. 5)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See also Response to Comments Compendium Topic 6 Ditches and Topic 8 Tributaries.

Ventura County Coalition of Labor Agriculture and Business (Doc. #8662)

1.325 The proposed rule exceeds the EPA's authority under the Clean Water Act as it violates the plain language of the statute and impinges on the State's traditional and primary authority over land and water use. These waters are already within the jurisdiction of state and local Water Quality Control Boards that regulate runoff under a Total Maximum Daily Load (TMDL). This duplication and over lap of jurisdictions is unnecessary and harmful, causing another layer of regulatory time and expense for no apparent gain. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Michigan Farm Bureau, Lansing, Michigan (Doc. #10196)

1.326 While EPA and USACE have stated this rule will offer clarity, simplify the regulatory process, and improve protection of water resources in the United States, the proposed rule in fact does none of those things . Instead, this rule will hurt the agriculture industry as well as many other businesses, and damage the American economy that depends on the services agriculture and other industries provide. Further, it will interfere with states' efforts to develop successful water protection programs which do not depend on such burdensome regulation. (p. 11)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.327 Congress intended states to have the authority to make their own land use and water quality decisions, and for the EPA and USACE to ride roughshod over state programs is a gross overreach of the agencies' authority. Further, and specific to Michigan, this proposed rule may contradict Michigan's Wetlands Law and cause the EPA to consider Michigan's assumption of delegated authority over Section 404 of the CWA to be out of compliance. If we lose our delegated authority, we lose the ability to manage a program that Michigan has used for 30 years to provide valuable protection of wetlands through agencies that have local contact with farmers. (p. 12)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

In the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. See also State Assumption Section below.

1.328 (Waters of the U.S.) There is no thing as waters of the U.S., all waters within a State belong to the people of that State. (p. 1)

Agency Response: **"Waters of United States" is a term describing the waters subject to Clean Water Act protections. Congress expressly used this term in the Clean Water Act, and the United States Supreme Court and numerous other courts have recognized and interpreted the scope of this term. States also have a crucial role in protecting state waters. See Preamble to the Final Rule and Technical Support Document.**

1.329 In conclusion, I am opposed to the EPA and the CORPS of ENGINEERS intrusion upon the individual state rights where the states have laws in place to protect the safety and wellbeing of the citizens and those adjoining states. (p. 1)

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

existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Montana Farm Bureau Federation (Doc. #12715)

1.330 MFBF understands that when the Clean Water Act became law in 1972, it set in place a system of cooperative federalism which allowed federal agencies jurisdiction of navigable waters and left control of smaller waters to the states. In the state of Montana, abundant statue, agency resources, and voluntary best management practices employed by farmers and ranchers exist to protect state and federal waters. Additionally, there are two state agencies tasked with managing state waters. Montana's farmers and ranchers pride themselves in keeping and improving water quality and do not believe federal management is necessary for further improvement or protection. (p. 8)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Nebraska Cattlemen (Doc. #13018.1)

1.331 Clearly, states have an important and congressionally recognized role to play in water quality regulation. Unfortunately, EPA's proposed rule unlawfully expands their authority by obliterating this federal-state partnership and claiming all waters as subject to federal agency jurisdiction. As discussed previously, the proposed rule makes federal agency jurisdiction over waters for purposes of the CWA limitless. This violates the text and spirit of the CWA itself. If Congress intended for the federal government to regulate all waters under the CWA why would it have included language such as that above? (p. 12)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing

regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.332 The reason that there is a difference in use and application of the same definition in the CWA is easily explained. Other than the §404 program and the §311 oil spill program, the CWA is essentially administered by the states with delegated programs. All but a handful of states have CWA programs delegated to them. In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has been delegated all CWA programs other than §404 and §311 since the mid-1970s. In order to have an approved program, EPA must determine the state's laws are consistent with the CWA. That would include an evaluation of the state equivalent definition of water bodies covered. In Nebraska, the definition of "waters of the state" is found in Neb.Rev.Stat. §81-1502(21) which was reviewed and approved by EPA. The wording of that definition is not identical to the wording of the definition of "waters of the United States" in the CWA. In fact, the wording is quite different. Wisely, Congress allowed states to craft their programs to be the most fitting to the state so long as the provisions were at least as stringent as the federal counterpart. The concept was one of "cooperative federalism" in which the federal government sets the broad goals and individual states reach the goals in a manner most appropriate for its citizens and based on its physical characteristics. (p. 12-13)

Agency Response: **See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Iowa Corn Growers Association (Doc. #13269)

1.333 This proposed rule does not take into account both the State of Iowa's responsibilities and their input. Instead of building off of the public-private partnerships already in place to advance water quality, the Agencies failed to consult any of our state officials at all during the development of the proposed rule.

A key goal of this proposed rule should be to empower the states to develop and implement programs that move water quality efforts forward, not back. But the rule dismantles preservation of primary state responsibility for ordinary land use decisions. States should have the primary role in protecting their water resources, but this rule ignores that and replaces it with Federal oversight. The CWA allows the Agencies the ability to clarify their jurisdiction over perennial and navigable waters, but the states should be left to address their unique situations for waters beyond these features.

The State of Iowa is a national leader in water quality as we were the first in the Mississippi River Basin to implement a statewide nutrient reduction strategy. The Hypoxia Task Force and EPA asked twelve states to write strategies to specifically address each state's unique challenges. Iowa answered that call. However, this rule will greatly impact the ability of Iowans to implement the strategy that we have invested countless resources into.

In order to meet the strategy's ambitious goals, conservation practice implementation will need to greatly accelerate. Conservation practice adoption will require more resources than state and federal agencies can provide. Farmers, landowners, and private sector businesses will all have a hand in contributing these resources for enhanced conservation activities, including those that may not improve their farm productivity such as wetlands. Iowa State University houses both the Iowa Nutrient Research Center and the science assessment team that conducted most of the initial research into the Iowa strategy. These two groups continue to research the best practices for water quality, social sciences of practice adoption, and ways to make the approved practices work more effectively and efficiently. (p. 6)

Agency Response: **In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.**

The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See

Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

PennAg Industries Association (Doc. #13594)

1.334 Pennsylvania has an extensive set of regulatory perimeters to follow related to protecting our waters. This may or may not be the case in other states. If it is the intentions of EPA and the Army Corp of Engineers to craft a general rulemaking applicable across the United States without giving necessary attention to existing state programs, that approach is flawed. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

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

1.335 This "other waters" category reveals that the federal government does not trust the states to protect their own resources. But states are more than capable of filling any perceived gaps in Clean Water Act jurisdiction. See State Practitioners' Response to ELI Report (Attachment D). Florida, in particular, is well-equipped to regulate waters that might fall outside the federal government's jurisdiction. See id. at 25-34 (discussing protections under Chapters 373 and 403 of the Florida Statutes); ELI, State Wetland Program Evaluation: Phase II at 30 (praising Florida's state-specific wetland program for its "comprehensive wetland protection strategy"). Federal duplication of these efforts would contravene the Clean Water Act's "national policy . . . to . . . prevent needless duplication and unnecessary delays at all levels of government." 33 U.S.C. § 1251(f). Federal distrust – particularly unsubstantiated distrust – would contravene the Congress's intent to "recognize, preserve, and protect the primary responsibilities and rights of the States." 33 U.S.C. § 1251(b). (p. 9)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under

the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Kansas Agriculture Alliance (Doc. #14424)

1.336 In proposing this rule, the agencies ignore statutory directives to respect state rights of primacy over intrastate water and even certain wetland regulation. In the process, the proposed framework over-reaches into areas historically within the purview of the state and effectively interjects the federal government into land use regulation, as well. That is detrimental to the economic underpinnings of the state's economy as it creates uncertainly for businesses, developers, and agricultural producers. (p. 8-9)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Mississippi Farm Bureau Federation (Doc. #14464)

1.337 We are very concerned that the proposed rule significantly expands the scope of EPA's jurisdiction under the Clean Water Act (CW A), undermines successful and important state water programs, and essentially changes the CW A from a "water protection" bill to a "land use" bill. The proposed rule does not clarify, but rather confuses, the boundaries of state vs. federal jurisdiction over waters and appears to completely ignore state authority over solely isolated state waters. (p. 1)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and

more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

North Dakota Soybean Growers Association (Doc. #14594)

1.338 The combined agencies proposed actions go far beyond the original scope of the Clean Water Act and its amendments, Federal Court decisions, and more-recent Congressional action on similar proposals. The revision, for the first time, attempts to give Federal agencies direct authority over water and private land use decisions that Congress reserved to the States in the Clean Water Act. We find no evidence in the agencies offered plausible reasons for, or the public desirability of, the sweeping changes proposed. (p. 2)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

1.339 The ND Soybean Growers Association strongly believe the Agencies proposed rules are an unlawful intrusion on the State jurisdictions intended by Congress in the original Act and subsequent revisions. Strong evidence exists that Congress has adamantly resisted proposed changes to the CWA similar to the Agencies overreaching rulemaking proposal.

More importantly, the proposed rule has already created pushback and raised the ire farmers and ranchers Statewide. The proposed centralized and distant control, threatening to discard specific local nuance understanding and needs in favor of the typical dreaded "one size fits all" - for bureaucratic ease approach - will derail decades of progress and a growing acceptance of our individual need to understand and expend precious financial resources to successfully employ more complex environmental steward practices moving forward. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule, and Technical Support Document.

The Mosiac Company (Doc. #14640)

1.340 The agencies cite a study published by the Environmental Law Institute (ELI) in May 2013, which concludes that "State laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace ... [and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that state s are not currently 'filling the gap' left by US Supreme Court ruling s ..., and face significant obstacles in doing so."[91]

However, reliance on the ELI Report, which fundamentally misunderstands States' authority to regulate waters, is misplaced. Based on the ELI Study, EPA expresses concern that "36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act."[92] But ELI incorrectly describes the scope of States ' regulatory authority. The "constraints" cited by ELI that exist under state law have little bearing on whether the state regulates waters that are not regulated by the CWA.[93] Indeed , roughly half of the states in each category (constraint or no constraint) regulate non-CWA waters. Id. Moreover, data from some States is not correctly evaluated by ELI, as: some States counted in ELI's study as not regulating non-CWA waters actually do regulate non-CWA waters.[94] More importantly, ELI misunderstands many of the State laws it references. For example, the ELI study presents Florida's coverage of non-CWA waters as much more limited than it is. It does not acknowledge that Florida regulates far more waters, and far more activities in those waters, than does the CWA. Moreover, ELI scarcely mentions Florida's Environmental Resources Permitting (ERP) program. By contrast, a report issued by ELI in 2006 praised the ERP program for its "comprehensive wetland protection strategy." See ELI, State Wetland Program Evaluation: Phase II, at 30 (June 2006). And the State's wetland program has expanded since the 2006 report was issued. In sum, EPA's concerns that States are constrained from regulating non-CWA waters is unfounded.

States have primary authority to regulate water resources, and have many mechanisms in place to protect waters regardless of whether they are deemed "waters of the U.S." for purposes of the CWA. Thus, the agencies' expansive interpretation of "waters of the U.S." is unjustified and unnecessary. (p. 32-33)

[91] Environmental Law Institute, State Constraints: State- Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 2 (May 2013), available at http://www.eli.om/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-water. (hereinafter, ELI Study) .

[92] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (last visited: August 12,2014).

[93] ELI's data indicate a near- even split among states that regulate non-CWA waters and those that do not, regardless of whether a "constraint" exists under state law. Of the 36 jurisdictions ELI characterizes as having constraints, 17 (47%) regulate non-CWA waters and 19 (53%) do not. See ELI Study at 2, 34-35. And of the 15 states without constraints, 8 (53%) regulate non-CWA waters and 7 (47%) do not. Id.

[94] ELI lists 26 states as having "no" coverage of non-CWA water s, but acknowledges in a footnote that "[e]ven for states [categorized as not regulating non-CWA waters], the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal [CWA) ." Study at 8-9, Tab le 1 & Note 3. Thus, by ELI 's own admission, at least, nine of the states in ELI 's "no" columns may, in fact, cover non-CWA waters (Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, and Texas) .

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Chilton Ranch, LLC (Doc. #14724)

1.341 The proposed rule does not clarify anything; it just massively expands federal jurisdiction while nearly *eliminating local intrastate water authority*. Local and state rights will be curtailed beyond even the superficial meaning of the proposed rule change because states and local governments will be hesitant to incur the expense of defending their constitutional rights. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Great Plains Canola Association (Doc. #14725)

1.342 The ambiguity of the Proposed Rule set forth by the EPA and the Corps of Engineers which defines the Waters of the U.S. that are protected under the Clean Water Act is extremely concerning to GPCA producers. With the proposed change, GPCA producers believe that the Corps will be unencumbered in overriding state and local control of these water management activities and subject these activities, many of which occur on an ongoing basis, to a National Pollutant Discharge Elimination System (NPDES) and/or a Section 404 permitting process. Based on past experience with the Corps, GPCA producers believe that if such control is gained over routine farming activities by the Corps, significant areas of productive land in the southern Great Plains could become un-farmable due to the inability to apply timely water management practices. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

Farm Credit Illinois (Doc. #14767)

1.343 The proposed rule improperly disregards the statutory requirement mandating State control over many areas of land and intrastate water and instead seeks to make the federal government the primary regulator of much of intrastate waters and occasionally wet land in the United States. FCI and its borrowers (as well as Congress) believe local officials, who live in the area and know the proper local farming practices and the quality of local waterways, are better able to appropriately regulate the flood plains and riparian are as located on farmers' land. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Washington Farm Bureau (Doc. #14783)

1.344 Given the Washington State Department of Ecology's broad water quality authority to regulate nonpoint agriculture (as affirmed by the Washington Supreme Court), duplicative state and federal jurisdiction would waste taxpayer dollars and compound regulatory uncertainty. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and**

local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Monarch-Chesterfield Levee District, St. Louis, Missouri (Doc. #14904)

1.345 Under the proposed rule it is not clear that states will retain that authority, or if unfunded mandates for enhancing water quality will be imposed. By not clarifying in the proposed rule that CWA programs beyond Section 404 would not be impacted by the new definition, the Agencies have left open that possibility. Then, not addressing potential cost impacts to those programs consistent with how the Agencies have described them evolving, especially implementation of TMDLs, leaves the Agencies negligent and at best inaccurate in their estimation of the financial impact of the proposed rule on local entities and businesses. (p. 6)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final Rule and Technical Support Document. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction.

The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Preamble to the Final Rule Sections III and IV.

This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

Kansas Cooperative Council (Doc. #14938)

1.346 The proposed rule is also flawed from a procedural aspect. Contrary to the CWA, the agencies advanced the rule without adequate consultation with the states. The CWA articulates Congress' clear intention that state authority over certain lands and water be respected as the act notes agencies must "recognize, preserve, and protect the primary responsibilities and rights of State…to plan the development and use…of land and water resources…" Failure to enter into meaningful dialogue with states in preparation of the proposed rule is just one more reason why the agencies must with withdraw this proposal. (p. 2)

Agency Response: The agencies have finalized the rule. See Response to Comments Compendium Topic 13 - Process Concerns and Administrative Procedures.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

1.347 We believe that consultation with the states would have revealed to the agencies that states are having much success in addressing water quality initiatives through public-private partnership. This is certainly the case in Kansas. Instead, the over-reaching aspect of the proposed rule and the potential for additional federal intervention under the proposal threatens to disrupt cooperative efforts between landowners/businesses and the state entities charged with protecting water resources. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some

existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

Tennessee Farm Bureau Federation (Doc. #14978)

1.348 Tennessee's Water Quality Control Act of 1977 has evolved over the years and it works for Tennesseans. We have a statute, regulations, and guidance that is understood by farmers, business, and industry. Tennessee has been successful in restoring water back to functional status and meeting designated users through a variety of means. Tennessee's Board of Water Quality, Oil and Gas is made up of Tennesseans representing business, agriculture, industry, local government, and conservation interests. They set the standards for our state and focus our state resources and personnel toward protecting waters with a use. This proposal upends much work by our legislature, the Tennessee Department of Environment and Conservation, and the regulated community to protect Tennessee's waters while simultaneously reducing regulatory burdens and promoting economic development. (p. 2-3)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters

under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Oregon Forest Industries Council (Doc. #15028)

1.349 Oregon has a sophisticated clean water program that, in many ways, mirrors the federal program. The difference is that Oregon's regulatory reach extends to "waters of the state" beyond the reach of federal regulators. It is not true that, without federal regulation, waters will be compromised or left unregulated. To the contrary, Oregon has a strong interest in maintaining clean water, as evidenced by its extensive state regulatory program. Even were it within the Agencies' statutory authority under the federal CWA, expanding federal jurisdiction to include such things as distant "tributaries," all "adjacent" waters, and non-tidal ditches, would be duplicative of Oregon's state program and, ultimately, counterproductive. (p. 5)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Colorado Cattlemen's Association (Doc. #15068)

1.350 Colorado has its own system of water law that governs public and private water rights within their borders and has adopted a prior appropriation doctrine (prior appropriation), or time, first in right, regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. Under the prior appropriation doctrine, water rights are obtained by diverting water for "beneficial use", which can include a wide variety of uses such as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, among others, depending on state law. The extent of the water right is determined by the amount of water diverted and put to beneficial use. Any imposition by the federal government that infringes on property rights based on settled state water law would constitute takings under the Fifth Amendment to the United States Constitution and would require just compensation. (p. 8)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights

to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). See also summary response below.

Florida Fruit & Vegetable Association (Doc. #15069)

1.351 Due to the fact that FDEP's water quality program has already been deemed consistent with the CWA, there is no reason to add another redundant layer of cost-prohibitive, Federal permitting requirements that will result in absolutely no environmental benefit. There is great concern over how Florida's existing water quality programs will be impacted should the proposed WOTUS rule be implemented. As previously mentioned, when the EPA tried to promulgate unreasonable, blanket NNC rules within the state, our water quality programs were detrimentally affected, impeding TMDL development and BMAP implementation. (p. 4-5)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Oklahoma Cattlemen's Association (Doc. #15176)

1.352 The rule also seems to ignore the significance of state's jurisdiction and local efforts to maintain and improve water quality. Note this statement posted by the Oklahoma Conservation Commission in March of this year, "*The U.S. Environmental Protection Agency (EPA) has removed four Oklahoma streams from its impaired water or 303(d) list, state conservation leaders announced at a press conference at the Capitol on Feb 2. Efforts by farmers, ranchers and other landowners, in cooperation with the Oklahoma Conservation Partnership to address nonpoint source pollution through voluntary,*

locally-led means has resulted in the streams being removed from a federal list of impaired water bodies and in even more streams never going on this list, they (EPA) said." The agency itself acknowledged the positive and good work done by Oklahomans! Why then should a federal proposed rule that is vague and over-reaching be needed? (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Great Lakes Timber Professionals Association (Doc. #15219)

1.353 Healthy forests and sustainable forest management are crucial in providing clean water here in our states. Michigan and Wisconsin can better manage and protect our water resources at the state and local level just as we have proven to be able to better manage our forest resources at the state and local level. Federal level authority is not the answer when it comes to natural resource management issues. Any federal oversight of water resources should be strictly limited to waters supporting interstate commerce. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Responses, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Missouri Farm Bureau Federation (Doc. #15224)

1.354 We acknowledge that EPA has ultimate approval authority over various state management plans, water quality standards, and total maximum daily loads. Fundamentally, however, the regulation of state land and water resources resides with state regulatory authorities, not with the federal government. The proposed federal rule overrides state jurisdiction and imposes extreme standards in complete disregard for efforts successfully conducted by state regulatory authorities and stakeholders in Missouri and other states to advance water quality goals. (p. 6)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of

the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Beet Sugar Development Foundation (Doc. #15368)

1.355 The proposed rule would directly extend federal jurisdiction to regulatory areas reserved for the states, such as land and water use.[95] As discussed above, the Supreme Court has twice rejected such jurisdictional extensions under the CWA. If enacted, the proposed rule faces the same legal flaw encountered in *SWANCC* and *Rapanos*—expanding jurisdiction in direct contradiction to the CWA's recognition of state regulatory power. (p. 9)

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (Doc. #15440)

1.356 By expanding their regulatory control over more waters by, e.g., using the subjective regulatory standard of having a "significant nexus" between intermittent and isolated water bodies and intrastate wetlands and traditional navigable waters, as well as by

[95] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001) (citing *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 40, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")); see also *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality opinion) ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power.").

explicitly including tributaries dissected by natural breaks such as wetlands, EPA et al. are directly infringing on the rights of States to self-governance.

Similar to the discussion in Section II. A. above, EPA et al. provide no evidence that the respective States in the United States are not already restoring and maintaining the chemical, physical and biological integrity of some if not most of the waters within their borders or that federal control over the waters currently under state jurisdiction is needed to restore and maintain such integrity even in instances where a state may have identified a contamination problem in need of mitigation and future prevention. Again, it simply is not self-evident that EPA et al.'s proposal to greatly expand its jurisdiction, including jurisdiction over waters currently under the jurisdiction of a particular State, would have any effect at all on improving the integrity of the waters in that State. (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 5 – Significant Nexus. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Iberia Parish Farm Bureau (Doc. #15585)

1.357 We are deeply concerned that this rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this proposed rule seeks to cover through federal jurisdiction are not unprotected. They are currently protected as state waters. Surely, a better approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps to work with states to improve their water quality programs. Assertion of federal jurisdiction over these waters should be a last resort and not the first course of action. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters

under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Riverport Levee District (Doc. #15655)

1.358 Efforts to analyze application of the proposed rule have found that it will significantly expand jurisdiction, and in some areas the amount of jurisdictional waters (river miles and number of ponds) may more than double. This Federal overreach by the Agencies will usurp any meaningful authoritative role for the states and put in place an approach that can be used to exercise Federal control over any and all waters, including those that have been traditionally identified and regulated as "Waters of the State." (p. 4)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Wisconsin Farm Bureau Federation (Doc. #16166)

1.359 Under the proposal, many current Wisconsin "Waters of the State" would no longer by regulated by the Wisconsin Department of Natural Resources (DNR), but instead would be considered a "Water of the United States" falling under the jurisdiction of the EPA or Corps. This change does nothing to better manage or protect our natural resources. This is solely a change in jurisdiction which is unnecessary, duplicative and adds an additional layer of federal bureaucracy to resource management that is already being well regulated by our state agency.

Wisconsin State Statute 283.01(20) defines "Waters of the State" *mean[ing] those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays , rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are entirely confined and retained completely upon property of a person.*

This current state definition addresses many of the changes that are proposed in the new definition of "Waters of the United States" by the EPA and Corps. In Wisconsin, this authority is already delegated to the DNR. Therefore, the only significant change for the EPA and Corps is control over the jurisdiction of water regulations and enforcement. What it changes for farmers and landowners is an increased exposure to additional federal regulation, enforcement and oversight. It would also expose farmers to unwarranted and unfounded citizen lawsuits as allowed under the Clean Water Act. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Wisconsin County Forests Association (Doc. #16341)

1.360 We believe the proposed definition, through expansion of federal jurisdiction, defies constitutional and lawful limits established by Congress and recognized by the U.S. Supreme Court. It is fundamentally wrong for a federal agency's authority to supersede that traditionally and intentionally granted to state and local governments who are certainly more attuned to their communities' natural resource issues. (p. 1)

Agency Response: **See Preamble to the Final Rule and Technical Support Document Section I.**

Kansas Corn Growers Association (Doc. #16398)

1.361 Following the withdrawal of the 2000 proposal, the State of Kansas adopted legislation in 2001 defining a classified stream to apply the CWA water quality standards and an implementation plan for our state. Since the adoption of the 2001 legislation, Kansas has spent over four million dollars to conduct use attainability analyses on 2,222 stream segments allowing the state to focus resources on areas which are truly waters of the U.S. EPA approved the Kansas Water Quality Standards in 2005 with updates through 2011, and therefore approved this system of implementation of the Clean Water Act. As with any regulatory effort, this process has not always been popular with certain stakeholders at times, but we believe it has been carried out as efficiently and effectively as possible.

Kansans are proud of the carefully constructed framework that led to science-based field work conducted by our Kansas government and regulatory agencies to carry out the goals of the Clean Water Act. EPA asked for comments on approaches that would "save time and money and improve efficiency for regulators and the regulated community in determining which waters are subject to CWA jurisdiction." We ask EPA to understand that our state is already doing this work and is committed to carrying out the intent of the Clean Water Act. It is misguided for a federal regulatory agency override these state efforts for the sake of "efficiency". Kansas has boots on the ground to make these determinations, something that cannot be done from a desk in Washington, DC. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science.**

As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Lake DeSmet Conservation District (Doc. #16441)

1.362 The Supreme Court, to the Association understanding, did not condition federal jurisdiction based on whether EPA or a Law Institute felt a state did or didn't have adequate regulatory authorities. The jurisdiction issue is unrelated to a state's current regulatory scheme and should be based on whether a specific water has a "significant nexus" or impact to a "traditionally navigable water". Not on whether the agency felt that regulatory controls in the state are adequate or not. How to regulate and protect non-jurisdictional waters is an authority retained by the respective state. (p. 9)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Western Landowners Alliance (Doc. #16553)

1.363 The Agencies should assure that individual states are prepared and not over-burdened as a result of the Proposed Rule, and that this proposal truly improves resource protection. The Agencies should provide assistance and resources for each state to assess their own statutory authorities over waters and wetlands, and whether this Rule or a related one affects or could improve protections of these resources in these states. For example, Wisconsin feels they are completely capable of protecting their resources irrespective of where CWA jurisdiction extends, while some feel Idaho needs more encouragement to protect water quality. Each state must assess their jurisdiction and its relation to the WOTUS definition and related protections. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of

the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Ohio Farm Bureau Federation (Doc. #16609)

1.364 States, not the Federal government, have the lead for advancing water quality through the CWA and more importantly through state-local-private sector partnerships. Section 101(b) of the CWA clearly states that, "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources...".

In Ohio, successful water quality management efforts have been developed and are being implemented by engaged stakeholders who have close relationships with state and local officials, not by Federally-prescribed directives. State and local officials have been left out of the drafting of the proposed rule, a rule which if implemented, will impede ongoing efforts to advance innovative, state-based water quality initiatives, such as Ohio's holistic watershed perspective in water resource management. the State of Ohio Nutrient Reduction Strategy, recently passed legislation (S8 150) to require state certification for agricultural fertilizer application, the Director's Agricultural Nutrients and Water Quality Working Group and on the ground edge of field research to discover and evaluate management measures that help reduce the off-site transport of nutrients. (p. 1-2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Montana Water Resources Association, (Doc. #16889)

1.365 MWRA expresses concern and opposes implementation of the proposed rule. MWRA opposition is predicated upon adverse implications to private property rights, confusing and costly regulatory burdens that will negatively impact agricultural producers and the overall economy of the state, as well as circumvention of authority and rights of the state of Montana. The rules, including assertions and provisions as proposed, ignore Congressional intent regarding an appropriate balance between state and federal jurisdiction and are an over reach of the federal jurisdiction authorized within the Clean Water Act. (p. 1)

Agency Response: See Summary Responses, Preamble to the Final Rule and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Montana Stockgrowers Association (Doc. #16937)

1.366 Our organizations have strong concerns that this proposal, much like the Migratory Bird Rule at issue in SWANCC, goes too far in "impinging" on State's rights when it comes to regulation of water and land use. Any proposal of this nature must not infringe upon the rights of states to allocate quantities of water and the rights of individuals, acquired under state law, to use that water." (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Greenfields Irrigation District (Doc. #17022)

1.367 The uncertainty created by the new rules infringes on the rights and the responsibilities of the States to oversee the management and use of lands found within their jurisdictions. The CWA itself states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . ." See 33 U.S.C. Sec. 1251(b). The obvious reason for this federal deference to the States is that it is impossible and improper to establish a single set of

federal regulations for land use nationwide. Instead, the wide variety of geographical features, climates, and terrain that exists across the nation requires State and local government regulation, where the legislators and regulators have a much better and more intimate knowledge and understanding of the features of their State and locales. (p. 2)

Agency Response: The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final rule and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Iowa Soybean Association (Doc. #17175)

1.368 We believe this rule supersedes states rights to plan the development and use of land and water resources, and will result in lawsuits to attempt to clarify the rule, negatively impacting both a farmers ability to make a living and water quality efforts in the landscape. (p. 2)

Agency Response: The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Earth City Levee District (Doc. #18910)

1.369 It is to be expected that data in existing records would be what was relevant under the existing rule, rather than that required for a determination under the proposed rule. Efforts to analyze application of the proposed rule have found that it will significantly expand jurisdiction, and in some areas the amount of jurisdictional waters (river miles and number of ponds) may more than double. This Federal overreach by the Agencies will usurp any meaningful authoritative role for the states and put in place an approach that can be used to exercise Federal control over any and all waters, including those that have been traditionally identified and regulated as "Waters of the State." (p. 4)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer

waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, seeTechnical Support Document Section I.

Iowa Poultry Association (Doc. #19589)

1.370 One of the underlying premises in the CWA is a partnership between the federal government and state governments to protect and preserve water resources.[96] The proposed rule completely undermines the intention of the CWA that the federal government work with the states by taking away most, if not all, of the state's jurisdiction over waters. The proposed rule is all encompassing, including a catch all jurisdictional provision of "on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas." While EPA and the Corp have been unable to provide any guidance as to what waters this catch all provision may include, it seems to include most, if not all of the waters, including those that have traditionally not fallen under the jurisdiction of the CWA and instead left to the states. The proposed rule provides no clear jurisdictional limits to determine where the EPA and Corps' jurisdiction ends and the state's jurisdiction starts, stripping authority specifically provided to the states by Congress in enacting the CWA. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. See also Response to Comments Compendium 5 – Significant Nexus. Regarding federalism concerns, seeTechnical Support Document Section I.

New Mexico Cattle Growers Association et al. (Doc. #19595)

1.371 As noted by the Court in both SWANCC and Rapanos, the impingement by the federal government on the regulatory and oversight affairs traditionally reserved to the States creates a constitutional concern that usually requires a clear authorization from Congress. Id. at 172–74; Rapanos, 547 U.S. at 738. The CWA is devoid of any such authorization and, therefore, the Proposed Rule's implication of federalism concerns and traditional

[96] It is the "policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution…" 33 U.S.C. §1251

state authority should prompt the re-development of a rule/definition that stays within the confines of the authority granted to the agencies by Congress under the Act. (p. 9)

Agency Response: The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. Regarding federalism concerns, see Technical Support Document Section I. See also Summary Response and Preamble to the Final rule.

Clearwater County Highway Department, Minnesota (Doc. #1762)

1.372 We are all for clean waters and protecting the environment. I myself have worked as an environmental engineer prior to becoming a County Engineer, so I understand the environmental issues and the related cost to the environment, industry, and the public. However, I am concerned with over regulation. It is not that I don't think permits are necessary, just that we are being over regulated and having to jump through hoops for various regulators to get permits to address the same issue. For an example, a typical road reconstruction project, we obtain water related permits from the Minnesota Pollution Control Agency for a NPDES permit, the Minnesota Department of Natural Resources for protected waters, Clearwater County who implements the Minnesota Wetland Conservation Act locally, the Minnesota Board of Water and Soil Resources who administers the Minnesota Wetland Conservation Act statewide, the U.S. Corps of Engineers for discharge of dredged or fill materials, and local watershed districts. I don't understand why one agency cannot address all water related permits.

It appears to me that the proposed rules will greatly expand the Corps of Engineers jurisdiction way beyond what the federal laws where intended to do. The rules should be changed for the Corps of Engineers to only regulate traditional navigable waters and leave the remaining wetland impacts to other agencies to regulate. This would prevent some overlapping of water related permits. We have other agencies that regulate waters that are above and that drain into navigable waters. The EPA regulates runoff from our construction sites through the authority they gave to the MPCA to issue NPDES permits, our local LGU and various state agencies regulate the Wetland Conservation Act which is stricter than the federal regulations. I believe the Corp of Engineers provide an important role in keeping our nations navigable waters in a navigable condition for commerce and that the EPA provides an important role in protecting our nations waters in keeping our waters clean. It just does not make sense to me to expand the Corps of Engineers role when others are addressing the all-important water quality impacts to our waters. (p. 1-2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters

under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Minnesota County Engineers Association (Doc. #6996.2)

1.373 We highly value and certainly recognize the need to preserve, protect and where feasible enhance the waters of the United States. Although Minnesota has three very rigorous and somewhat redundant State programs protecting these waters (MnDNR Public Waters, MnBWSR Wetland Conservation Act, MPCA Storm Water Discharge), we know some States do not and see the wisdom in having a program to ensure all the waters of the United States are protected. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

New Salem Township (Doc. #8365)

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

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. See Summary Response, Preamble to the Final rule and Technical Support Document.

North Dakota Soybean Growers Association (Doc. #14121)

1.375 The ND Soybean Growers Association strongly believes that the agencies' proposed rules are an unlawful intrusion on state jurisdiction that was intended by Congress in the original Act and subsequent revisions. Strong evidence exists that Congress has adamantly resisted proposed changes for the CWA that are similar to the agencies' overreaching rulemaking proposal. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer

waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Texas Farm Bureau (Doc. #14129)

1.376 Justification for the proposed rule also fails to acknowledge that practically every state already has state programs to address discharges to those waters not currently regulated by the Clean Water Act. As such, the stated benefit of the proposed rule is inflated. (p. 2)

Agency Response: See Summary Response, Preamble to the Final Rule, and Technical Support Document.

Union Pacific Railroad Company (Doc. #15254)

1.377 The Proposed Rule also violates Constitutional limitations and protections by encroaching on the traditional power of the States to regulate land and water, once again ignoring the directives of the Supreme Court in *SWANCC* and *Rapanos*. The CWA statute itself acknowledges the States' primary role and provides as one of its objectives:

[T]o recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources.

See 33 U.S.C. §1251(b). As the Supreme Court observed, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," especially "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-173; see also, *Rapanos*, 547 U.S. 738. The Supreme Court recognized that the Agencies' expansive interpretation of CWA jurisdiction "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738. There was "nothing approaching a clear statement from Congress" that it intended CWA jurisdiction to extend to features like the abandoned sand and gravel pit at issue in *SWANCC*. *SWANCC*, 531 U.S. at 174. Accordingly, the Supreme Court found that permitting the Agencies to assert jurisdiction over isolated ponds and mudflats was impermissible. Id. The *Rapanos* plurality similarly found that the Agencies' expansive theory of jurisdiction, "rather than 'preserv[ing] the primary rights and responsibilities of the States,' would have brought virtually all 'plan[ning] of the development and use . . . of land and water resources' by the States under federal control," which is not a permissible interpretation of "waters of the United States." *Rapanos*, 547 U.S. at 737-38.

The Proposed Rule's expansive assertion of jurisdiction is equally – if not more – impermissible than the Agencies' assertion of jurisdiction in *SWANCC* and *Rapanos*. This attempt to impose control over features with little or no relationship to navigable waters raises serious federalism concerns. In fact, the Proposed Rule would assert federal

jurisdiction over essentially all intermittently wet areas, including ditches with ephemeral flow, depressions that collect stormwater, and industrial ponds. Such expansive jurisdiction is contrary to the limitations recognized in *SWANCC* and *Rapanos*, contrary to the objectives recognized by the CWA statute, and unlawful because it would result in a "significant impingement" on the States' traditional authority over land and water use. (p. 10-11)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.**

Southern Illinois Power Cooperative (Doc. #15486)

1.378 The proposed rule federalizes waters and "aquatic systems" not intended to be covered by CWA, thereby impinging on the states' traditional and primary power over land and water use. (p. 10)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.**

National Association of Clean Water Agencies (Doc. #15505)

1.379 NACWA members have expressed unease that the WOTUS rulemaking may impinge on the states' water quality management authority as delegated under the CWA. Differences in how states have implemented CWA jurisdiction in the past raise legitimate concerns about how the new rule will interface with existing state practice. The resulting perception is that the rule is, contrary to the Agencies' claims, expanding federal jurisdiction. When finalizing the rule, EPA and the USACE should include clarifying language in the rule preamble reaffirming the authority provided to the states by the CWA. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters**

under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Western States Water Council (Doc. #9842)

1.380 WSWC Policy #369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations. Specifically, the WSWC urges BPA and the Corps to ensure that the rule:

… [ ]

F. Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection. (p. 1-2)

The preamble for the rule should also recognize that the states have authority pursuant to their 'waters of the state" jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters. (p. 21)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Duke Energy (Doc. #13029)

1.381 Duke Energy contends that State and local governments have the most immediate knowledge of the geographic, hydrologic, and geomorphic conditions of the water bodies within their jurisdictions, and should be given the right to decide how best to regulate their local land and water resources. It is illogical for waters that are not currently determined to be "waters of the United States," but are covered under State and local permitting programs, to be required to undertake duplicative, and in some cases contradictory, permitting actions. This is especially true for waters that may have only a marginal to no connection to traditional navigable waters such as ephemeral drainages, industrial water storage and treatment entities and isolated waters. (p. 58)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under

the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

San Juan Water Commission (Doc. #13057)

1.382 The expansion of federal jurisdiction over intrastate waters that would result from adoption of the WOTUS Rule will intrude on the rights of states to regulate water and land use activities-a duty the states are not shirking. The New Mexico Water Quality Control Commission and the New Mexico Environment Department regulate all state waters, and thus there is no need to overlay federal Clean Water Act jurisdiction to regulate dry arroyos, isolated private ponds, stormwater drains, irrigation ditches or other non-navigable intrastate waters. (p. 4)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.

Florida Power & Light Company (Doc. #13615)

1.383 The proposed rule would result in significant encroachment upon the states' traditional and primary jurisdiction over land and water use. In Florida, Florida law already prohibits discharge of pollutants into "waters of the state" without a permit. "Waters of the State" are broadly defined in Section 403.031(13), F.S., and encompass most water bodies not regulated as WOTUS. If any pollutants are discharged into waters that deviate from permits approved by state or local regulatory agencies, the person or entity discharging into a water body must provide notification to the appropriate agency/agencies about the unapproved discharge within a specific time frame that is included in the permit. The proposed rule appears to encroach on the state's primary jurisdiction over these types of waters. (p. 2)

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

1.384 Likewise, the proposed rule's sweeping assertions of jurisdiction over feature s with little or no relationship to navigable waters (e.g., channels that infrequently host ephemeral flows, non navigable ditches, isolated waters) raises serious federalism concerns. As was the case with SWANCC and Rapanos, the proposed rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet areas. Most of these areas are already regulated by States as "waters or the State." Many types of waters and features that were previously regulated as "waters of the State" or that States purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral now, arroyos, industrial ponds) would now be subject to federal regulation as "waters or the United States" under the proposed rule. Accordingly, the proposed rule's interpretation of "waters of the United States" would result in a "significant impingement" on the States' traditional authority over land and water use. (p. 8)

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

1.385 One issue the agencies claim drives the need for this rule is the need to broaden the definition of "waters of the United States" because the States cannot be relied upon to

"fill the gap" in CWA coverage that would result from faithful interpretation of *SWANCC* and *Rapanos*.[97] In support of this assertion, they cite a study published by the Environmental Law Institute (ELI) in May 20 13, which concludes that "State laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace ... [and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently "filling the gap" left by US Supreme Court rulings ..., and face significant obstacle s in doing so."[98] The agencies' reliance on this concern over "filling the gap" in CWA coverage essentially functions as an admission that the proposed rule overreaches and seeks to take on a role previously considered to be solely within the authority of the States.

EPA expresses concern that "36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act."[99] However, the result s of the Study do not support ELI's conclusions. To the contrary, they indicate that whether a "constraint" exists under state law has little bearing on whether the State regulates waters that arc not regulated by the CWA.[100] Indeed, roughly half of the States in each category (constraint or no constraint) regulate non-CWA waters. *Id*. If States have chose n not to regulate non-CWA waters, it is not necessarily because they are prevented by law. Rather, in many case s, the States have determined that certain non-CWA waters and features do not require regulation. In sum, the agencies cannot rely on claims that States are limited in their ability to protect non-CWA waters to justify a rulemaking that captures such an expansive scope of "waters of the United States." (p. 8-9)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

[97] EPA, Waters of the United States Proposed Rule Website. httn://www2.cpa.gov/usw8tcrs (last visited: August 12, 2014).

[98] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 2 (May 20 13), available at http://www.eli.org/rescarch-report/state-constraints-state-imposed-lirnitations-authority-ageneies-regulate-waters (hereinafter, ELI Study).

[99] EPA Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters .

[100] ELI's data indicate a near-even split among States that regulate non-CWA waters and those that do not, regardless of whether a "constraint" exists under State law. Of the 36 jurisdictions ELI characterizes as having constraints, 17 (47%) regulate non-CWA waters and 19 (53%) do not. See ELI Study at 2, 34-35. And of the 15 States without constraints, eight (53%) regulate non-CWA waters and seven (47%) do not. Id.

Nebraska Public Power District (Doc. #15126)

1.386 Expanded federal jurisdiction would pre-empt traditional state and local government authority over land and water use decisions and alter the balance of federal and state authority. (p. 3)

Agency Response: The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Association of Fish and Wildlife Agencies (Doc. #15399)

1.387 It appears coordination and consultation between the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (ACOE), and the state agencies in drafting the rule was less than robust, which we find concerning, especially considering the diversity of state agencies and their publics which will be affected by its implementation. Improved coordination with state agencies, as a whole, is needed to ensure the rule doesn't provide adverse unintended consequences and appropriately considers the states' terminology and laws as well as the diverse geographical and hydrological landscapes relevant to the Definition of WOUS and the proposed rule. (p. 1)

Agency Response: See Preamble to the Final Rule and Technical Support Document. See also Summary Response. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this

rule.] The agencies will continue to work closely with the states to implement the final rule.

Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407)

1.388 Based upon the legal analysis fully articulated in the comments of the Utility Water Act Group, of which We Energies is a member, a water body must meet each of the following prerequisites to qualify for federal jurisdiction:

* A water that is a standing water must be relatively permanent;

* A water that is a stream must have a continuous flow;

* A water that is a wetland must have a continuous surface connection to an otherwise jurisdictional water; and

* A water must have a significant nexus to a traditional navigable water.

Evaluation of the above criteria for purposes of a jurisdictional determination often requires detailed mapping, GIS resources and field reconnaissance work. We Energies position is that in cases where jurisdictional determinations require an evaluation of whether the above prerequisites are met, the Corps and State agency field staff need to make a case-specific determination. Both Wisconsin and Michigan have the types of CWA delegated permit programs noted above. Therefore, to implement these programs, State agency staff, along with regional Corps staff, has the detailed knowledge of the local conditions required to evaluate questions related to navigation or whether a water body is "adjacent" or has a "significant nexus" to a water of the United States. (p. 3)

Agency Response: See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Washington County Water Conservancy District (Doc. #15536)

1.389 The Proposed Rule is also inconsistent with the CWA policy to preserve the primary responsibilities and rights of states over land and water resources. The rule asserts that it "does not affect" this policy because states "retain full authority to implement their own programs to more broadly or more fully protect the waters in their state."[101] This

[101] Id. at 22,194.

statement ignores the scope of Congress' policy statement, which applies not only to the rights of states "to prevent, reduce, and eliminate pollution," but also to state's rights "to plan the development and use . . . of land and water resources."[102] While the Proposed Rule may preserve states' rights to address pollution by adopting more stringent regulations than the Agencies, it does not preserve the primary authority of states to plan the development and use . . . of land and water resources," as Congress intended when it adopted the CWA. On the contrary, the Proposed Rule asserts authority over isolated, non-navigable water bodies and land areas that Congress never intended to be regulated under the CWA. By eliminating the discretion of states to leave such areas unregulated, the Proposed Rule would invade the primary authority of states to plan for the development and use of these resources. As such, the rule is contrary to CWA as well as the state consultation criteria set forth in Executive Order 13132. As explained by the Western States Water Council and many other parties,[103] the statement in the Proposed Rule that Executive Order 13132 "does not apply" is simply incorrect, and the Agencies' "voluntary federalism consultation" regarding the Proposed Rule was clearly inadequate, as reflected in the surprise and concern being expressed by states across the country.[104] (p. 9-10)

Agency Response: **In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.**

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state,

[102] 33 U.S.C. § 1251(b).
[103] See, e.g., Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Testimony Before the Subcommittee on Water Resources and Environment (June 11, 2014), available at http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf (statement of J.D. Strong, Western Governors' Association, Western States Water Council).
[104] Proposed Rule, 79 Fed. Reg. at 22,220-21.

tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Massachusetts Water Resources Authority (Doc. #15546)

1.2 Other commentators have indicated that the WOTUS rulemaking raises questions regarding potential federal interference with state water quantity management. As this rule is designed to clarify historic practice in the context of recent court rulings, EPA and the Corps should clearly indicate that the states have ultimate regulatory authority over water quantity under CWA section 101(g). (p. 4)

Agency Response: See Summary Response, Preamble to the Final Rule and Technical Support Document. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Irrigation & Electrical Districts' Association (Doc. #15832)

1.390 Congress assumed that the states had that competence and would employ it and the states have done so.

Arizona is a prime example. When we initially legislated our State Clean Water Act, we inserted two definitions that aptly demonstrate the ability of the State of Arizona to deal with the subject. The first is the federal definition of navigable waters as being the Waters of the United States. Our initial permit program was based on mirroring that definition as to what would initially be regulated in Arizona and would allow Arizona to achieve delegation of the National Pollutant Discharge Elimination System (NPDES) program.

The second definition was waters of the state. Waters of the state are: "all waters within the jurisdiction of this state including all perennial or intermittent streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, aquifers, springs, irrigation systems, drainage systems and other bodies or accumulations of surface, underground, natural, artificial, public or private water situated wholly or partly in or bordering on the state." From this second definition, you can easily see that Arizona is prepared and has been for nearly four decades ready, willing and able to regulate water quality issues beyond the reach of the federal permit program as it determines is necessary. We are not alone. This is exactly the federal state partnership that Congress envisioned in passing the law in the first place. And the subsequent amendments to the Act have not in any way altered that assumption. (p. 3)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

1.391 Because the Proposed Rule would place virtually all planning of the development and use of land and water resources under federal control,[105] the Proposed Rule goes against the express intent CWA, which EPA and the Corps recognize, as indicated by their following statement in the preamble to the Proposed Rule:

Section 101(b) of the C\VA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator' s authority under the CWA.... [106]

Although EPA and the Corps recognize that Congress intended for the CWA to leave to the states the primary responsibility to protect land and water resources, the Proposed Rule would have the opposite effect of giving the EPA and the Corps the primary responsibility to protect land and water resources. (p. 12)

[105] !d., at 737. (emphasis not added)(internal citations omitted)

[106] 79 Fed.Reg. 22 194; see also !d., at 722-23, citing 33 V .S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.").

Agency Response: **The rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.**

Battelle Energy Alliance, LLC (Doc. #16448)

1.392 States have traditionally had the right to regulate the allocation, management, and use of water. The proposed rule interferes with that right by placing a myriad of "other waters" under CWA jurisdiction. Additionally, the rule fails to acknowledge how the waters may already protected by other regulations. The biological, ecological, and chemical integrity of navigable water may be protected under other laws such as the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act, state water quality standards, and other water laws. An acknowledgement and discussion of other legal protections as well as state sovereignty would better inform the proposed rule and help to alleviate the fears that the proposed rule is a needless and wholesale extension of CWA jurisdiction. (p. 7-8)

Agency Response: **Regarding CWA legal authority, see Technical Support Document Section I. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish

State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

American Public Gas Association (Doc. #18862)

1.393 The proposed rule increases the number of water features that would be subjected to federal permitting standards. These water features have been traditionally regulated at the local level. This system of shared responsibility, consistent with basic principles of federalism,[107] has resulted in effective environmental protection without imposing unnecessary federal controls (or expending federal dollars) where they are not needed. APGA believes that the Agencies should focus on maintaining a proper balance between Federal and State oversight of nonnavigable waters ...

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Hickory Underground Water District 1, Texas (Doc. #18928)

1.394 Western water law has traditionally been the province of state courts and legislatures, except for interstate waters and Federal reclamation projects, for good reason. The proposed rule would inevitably seriously disrupt important state water planning strategies and agricultural production, resulting not only in economic impairment to many areas of the state, but also in permanently entrenching the "have" and 'have-not" water status of many regions of the state. (p. 2)

[107] The CWA recognizes the "primary responsibilities and rights of States to prevent, reduce and eliminate pollution, ... " *Rapanos* at 722-23.

Agency Response: **Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Summary Response, Preamble to the Final Rule, and Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).**

National Agricultural Aviation Association (Doc. #19497)

1.395 Most states have delegated authority for CWA permitting responsibilities, including PGPs. The types of pesticide uses covered and compliance requirements of PGPs vary remarkably from state to state, affecting aerial applicators who routinely work across state lines. Furthermore, many state PGPs regulate pesticide discharges into, over or near "waters of the state," instead of WOTUS, which could establish tensions between the agencies' proposed rule and state statutes and regulatory policies for water and pesticide programs. No doubt delegated states would have to adapt to the agencies' proposed rule, which could severely strain their budgets and manpower resources. In arid and semi-arid regions of the West, and throughout the country, policy makers and pesticide users likely will be scrambling to unravel the complex net of overlapping jurisdiction proposed by the agencies. It is not surprising that many state and local governmental organizations, agricultural and environmental commissioners, governors and Congress have called on the agencies to withdraw the proposed rule. We echo their statements, and urge the rule be withdrawn. (p. 5)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule**

Sections III and IV and Technical Support Document. The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures.

Environmental Council of the States (Doc. #15543)

1.396 We write on behalf of states and territories (hereinafter, "states") who are coregulators with EPA and the Corps jointly seeking to deliver the nation's environmental protection system of laws, regulations, programs, research, and services. States have many laws that protect waters and wetlands, and implementing the Clean Water Act (CWA) is a fundamental responsibility of states. States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules, as stated in ECOS Resolution 11-1. ECOS believes that EPA and the Corps must engage states as co-regulators prior to and during the rulemaking process. While ECOS appreciates the time and effort spent on calls and outreach to states regarding this proposal, some states find that these efforts do not rise to the level of consultation that should occur between the states and federal agencies in developing comprehensive regulations with such significant impact.1 Recent calls held answered many state questions about the proposed rule, but many questions remain. (p. 1)

Agency Response: See Summary Response and Preamble to the Final Rule. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

1.397 Continuing diligent and frequent communication with states will be critical to developing and implementing an effective final rule on this difficult subject matter. EPA and the Corps must maintain regular forums and contact with states leading to any finalization of the proposed rule. EPA has been the main communicator and participant in outreach forums. A concern of states throughout the process has been the lack of Corps participation. States ask that the Corps engage meaningfully in the process of developing a final rule as co-regulators.

Uncertainty about the effects of the proposed rule still exists among states, largely due to regional, geographic, and climactic differences around the country. Cost impacts may

differ from state to state depending on legislative and administrative process differences. States ask EPA and the Corps to consider variations in state implementation costs as appropriate, and structure any final rule to "provide the maximum flexibility possible that is still consistent with underlying statutory objectives" (ECOS Resolution 12-2). (p. 2)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

The Nature Conservancy (Doc. #17453)

1.398 Protection of our water resources under the federal Clean Water Act is one of the most fundamental and important environmental protections in the United States. This federal statute establishes the national standards for the protection of water resources. Many rivers, streams, wetlands and other waterbodies cross state lines and the Clean Water Act helps ensure these shared waters are protected so that downstream states are not unduly burdened. In addition, half of all states have no state-level wetlands protection beyond

that provided by the Clean Water Act under Section 401[108] – the authority of states to review and approve federal permits. Therefore, it is critical that the rulemaking ensures that our water resources are protected in a manner that meets the goals of the Act, in an equitable and sustainable way that includes states retaining the ability to have their own statutes that parallel and complement the federal statute. (p. 2)

Agency Response: See Preamble to the Final Rule and Technical Support Document. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

Association of State Floodplain Managers, Inc. (Doc. #19452)

1.399 We strongly urge that the federal agencies emphasize and increase coordination with state and tribal co-regulators in development of the final rule and associated guidance, and in implementation.

Numerous states and tribes have developed effective and proven technical and field methods to document many of the connections and types of waters defined in the rule. We believe that where such procedures are consistent with the overall requirements of the rule, they should be readily accepted.

Numerous states and tribes also have existing agreements with Corps Districts and other agencies regarding regulatory procedures that are addressed by or may be affected by the proposed rule. To the extent that such agreements can be maintained (recognizing the need for consistency with the overall rule), regulatory delays will be minimized. (p. 5)

Agency Response: The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to state, local and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

[108] America's Vulnerable Waters: Assessing the Nation's Portfolio of Vulnerable Aquatic Resources since *Rapanos v. United State*s, 2011 Environmental Law Institute, Washington, D.C.

The final rule does not establish any new 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. It also does not upset the cooperative federalism of the Act that has been undertaken to implement the Clean Water Act. The agencies respect states' critical roles in protecting water quality and this rule does not supplant that role or their authorities. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Southeastern Legal Foundation (Doc. #16592)

1.400 The Proposed Rule is an Unconstitutional Expansion of Federal Authority Into an Area Previously Reserved to the States.[109]

The CWA provides a balance of state and federal control over water. Congress recognized the need for state regulation over certain waters. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[110] The CWA explicitly gives the Agencies jurisdiction over certain and limited waters. All other waters are state waters. In *SWANCC*, the Supreme Court stated that "[p]ermitting [the Agencies] to claim federal jurisdiction over ponds and mudflats ... *would result in a significant impingement of the State's traditional and primary power over land and water use*."[111] Some of the waters that the Agencies are trying to subsume in the Proposed Rule share the same infirmities as the *SWANCC* ponds - they are state waters not subject to federal jurisdiction.

Where an agency interprets a statute in a manner that "invokes the outer limits of Congress's power" or "overrides ... [the] usual constitutional balance of federal and state powers" - such as the Agencies are doing in the Proposed Rule - the Supreme Court "expect]s] a clear indication that Congress intended that result."[112] The Supreme Court requires this because of its "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not causally authorize administrative agencies to interpret a statute to push the limit of congressional authority."[113] Importantly, "this

[109] Because the Proposed Rule involves federalism and the balance of power between state and federal governments, Executive Order 13132 is implicated. While the Agencies purport to have engaged in a "voluntary federalism consultation," SLF questions whether the consultation fulfilled the requirements of E.O. 13132. Because SLF was not a part of the consultation, SLF hopes that states comment on the comprehensiveness of the consultation.
[110] 33 U.S.C. § 1251(a).
[111] SWANCC, 531 U.S. at 174.
[112] Id. at 172.
[113] Id. at 172-73.

concern is heightened where the administrative interpretation *alters the federal-state framework by permitting federal encroachment upon a traditional state power*."[114]

While the line between state and federal waters may not always be clear, there is a line. The farther upstream the Agencies attempt to regulate water, the closer they get to crossing that line. The Proposed Rule eliminates that line by making all waters federal. This cannot be the case because the CWA and state regulations across the country tell us that state waters exist. By definition, those state waters are not federal, therefore those state waters cannot be WOTUS. Yet, the Proposed Rule provides no exception for state waters, but instead subsumes them in its overly broad definitions of "tributary," "adjacent," and "significant nexus." Not only is there no "clear indication" that Congress intended that result, but there is statutory language to the contrary. Because the Proposed Rule violates the principles of state's rights, it must be withdrawn. (p. 24-26)

Agency Response: **The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

Protect Americans Now, Board of Directors (Doc. #12726)

1.401 The Proposed Rule improperly impinges upon the "primary responsibilities and rights of States" under the Act Under the 1977 Amendments, Congress deemed it appropriate and necessary t o emphasize the traditional role of the states in the management of land and water resources, and specifically noted its intent to:

> recognize, preserve, and protect the primary responsibilities and rights of States to prevent , reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b) (emphasis added). Yet, by drafting a regulatory definition so encompassing as to embrace those isolated, unconnected and wholly intrastate wet lands,

[114] Id. (emphasis added)

ponds, oxbow lakes, etc. simply because they f all within a "floodplain" -a term not found in the statutory text- the agencies' Proposed Rule is sure to impinge upon the states' traditional land use and water management authority. See SWANCC, 531 U.S. at 174.

As noted by the Court in both SWANCC and Rapanos, the impingement by the federal government on the regulatory and oversight affairs traditionally reserved to the States creates a constitutional concern that should require a clear authorization from Congress. Id. at 172-74; Rapanos, 547 U.S. at 738. The CWA is devoid of any such authorization and, therefore, the Proposed Rule's implication of federalism concerns and traditional state authority should prompt the re-development of a rule/definition that stays within the confines of the authority granted to the agencies by Congress under the Act. (p. 10-11)

Agency Response: The agencies have finalized the rule. See Response to Comments Compendium Topic 13 – Process Concerns and Administrative Procedures. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Colorado Wastewater Utility Council (Doc. #13614)

1.402 Based on the expanded definition of waters of the U.S., CWWUC members have to now reevaluate the regulatory status of waters located on their property or near their activities irrespective of the location or disposition of that water. Even then, members will not be sure what are considered "waters of the U.S." without further clarification from EPA. To add yet another layer of confusion, this new federal definition would need to be integrated with the "waters of the state" definition currently in place. An expansion of "waters" should be enacted at the state level as a state prerogative to better address the issues associated with the particular region. This has already been done in Colorado. (p. 2)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Edison Electric Institute (Doc. #15032)

1.403 The agencies also rely on the phrase "biological integrity" to justify a claim of jurisdiction over features that hold water and prevent flow from reaching navigable water. See, e.g., 79 Fed. Reg. 22247. In so doing, however, the agencies ignore another CWA policy: the reservation of the rights of states to control water supply. CWA § 101(g). As EPA recently noted in a brief filed in federal court:

> The Act is a complex statute with a "welter of consistent and inconsistent goals." Catskilll, 273 F.3d at 494. To be sure, the Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987). As this Court has acknowledged, the CWA also reflects Congress's desire to limit interference with traditional state control of water use and allocation. Catskill II, 451 F.3d at 79. Thus, the statute states "the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. 33 U.S.C. § 1251(g). More broadly, Congress emphasized its policy "to recognize, preserve, and protect the primary responsibilities and rights of States .. . to plan the development and use (including restoration, preservation, and enhancement) of ... water resources ...." Id. § l251(b). Elsewhere in the statute, Congress prohibits construction of the Act "as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Id. § 1370(2). These provisions do not, of their own force, "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." PUD No.1 of *Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720-21 (1994). They do, however, show that one of Congress's purposes was to avoid interference with state water allocation decisions.[115]
>
> Thus, the agencies cannot stretch the meaning of one goal of the Act to expand their authority so broadly that other goals of the Act are overridden. In this context, the agencies are impacting the primacy of states in regulating land and water use and controlling water supply by too broadly defining waters of the U.S. The scope of jurisdiction under the Act must be consistent with the authorities granted to the agencies under the Act and therefore must be limited to waters that must be regulated to protect the quality of navigable water used as an avenue of interstate commerce. (p. 11-12)

Agency Response: **The final rule does not regulate land use. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than**

[115] *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. EPA*, Docket No. 14-1823 (2d Cir), Brieffor Defendant EPA, et al. (Sept. 11,2014), at 29-30.

that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Texas Agricultural Land Trust (Doc. #15188.1)

1.404 The definition proposed by the Rule is illegal based on the Commerce Clause of the U.S. Constitution, the framework and goals of the CWA, Congressional intent and Supreme Court rulings. Each places a limit on federal jurisdiction over the nation's waters. Currently, the proposed rule has practically no limit whatsoever and exceeds the intent of the CWA and reasonable boundaries for federal jurisdiction. (p. 1)

Agency Response: The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.

Texas Agricultural Land Trust (Doc. #15188.2)

1.405 The proposed definition annihilates the federalist system that underpins the CWA. This proposal has obliterated the important and fundamental line separating federal and state interests and oversight. By expanding the definition of tributary, expanding the definition

of "adjacent", expanding the category of "adjacent wetlands" to "adjacent waters," and including "other waters," the proposed rules dramatically expand federal oversight beyond traditional navigable waters, as originally intended, and will have major impacts for private landowners without an adequate federal interest. (p. 1)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, Technical Support Document Section I.**

Delaware Riverkeeper Network (Doc #15383)

1.406 The majority of the States (46) have been delegated Clean Water Act permitting and enforcement responsibilities through "parallel" state laws and delegation agreements with EPA. Adoption of this proposed rule will have a significant and adverse effect on those 46 states. While the Federal Register Notice (P22194) provides that "[s]tates and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state", it ignores two critical problems created by this proposed rule.

First, while states may be free to more broadly or more fully protect the waters in their state, if the proposed rule is adopted it will mean the 50 states and territories will be required to introduce and pass new laws that protect "waters of the State." This puts an enormous burden on each state and it is unlikely in this current legislative climate that any such legislation will be adopted. The proposed rule would also unnecessarily abdicate EPA's existing uniform federal scheme and potentially establish 50 disparate and potentially unenforceable state approaches.

While it is suggested that a state can provide stricter requirements than the CWA, it is unclear whether there is a valid argument, potentially raised by defendants, that a jurisdictional change in the federal law would preempt new state laws which provide broader coverage than the current proposed rule because of the proposed rule's overarching federal determination of jurisdiction. While states are free to legislate in the absence of a federal pronouncement, (e.g. groundwater) they are not free to legislate once there has been an overarching federal law or enacted regulatory scheme. DRN is concerned that the proposed definition may preempt a state's ability to implement a broader definition of jurisdiction because the new rule will be the assertion of federal jurisdictional authority to regulate waters not defined as waters of the U.S. If so, this will harm every state's ability to effectively protect its water quality beyond what EPA is now legislating as a jurisdictional assertion.

Second, states share land and water boundaries and many have different interpretations of the law. Take for example, New Jersey's and New York's shared borders. If there is a newly excluded treatment system, lagoon, or ditch in New York that will no longer be

regulated, and it breaches or drains into a previously jurisdictional water in New Jersey, the CWA may no longer offer a remedy for enforcement mechanisms that were previously available. EPA is now leaving states and citizens vulnerable to water pollution with no recourse under the CWA.

In order to remedy both of these issues, EPA should include specific language in the response to comments and in the proposed rule that clearly states that EPA is not asserting an over-reaching federal scheme as it relates to a state's ability to legislate broader terms for their own state jurisdictional determinations for waters in their states and boundary waters. EPA should also provide guidance that addresses potential state to state disputes clarifying that the more protective state law governs. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding Interstate Waters, see Technical Support Document Section IV.**

Sierra Club, Cumberland Chapter (Doc. #15466)

1.407 Kentucky farmers are already subject to the requirements of - and entitled to the protections afforded by - the Kentucky Agriculture Water Quality Act.

The proposed rulemaking will not alter any of the provisions and safeguards of that Act. Much of the criticism of the WOTUS proposed rule has come from the American Farm Bureau Federation. However, the WOTUS rule should have little or no effect on Kentucky farmers. That is because all Kentucky farmers are already require to have a Kentucky Agriculture Water Quality Plan for their farm. That Act requires farmers to have installed Best Management Practices that depend on the nature of that farming operation. It also provides a "permit shield" for the farmer, to protect the farmer from the so-called "regulatory over-reach" claim against EPA and the Corps. The Act is found at KRS 224.71-100 through 224.71-140. See attached KRS 224.71-130 concerning noncompliance. (p. 4)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters**

under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.

Citizen's Advisory Commission on Federal Areas, State of Alaska (Doc. #16414)

1.408 The proposed rule mischaracterizes the state of the law and unwarrantedly interferes with state authorities and private property rights. (p. 1)

Agency Response: See Preamble to the Final Rule and Technical Support Document and summary response below.

1.409 Despite the agencies' and the preamble's protestations, the proposed rule would inarguably increase the acreage and linear measure of waterbodies subject to federal permitting authority under the CWA. A determination there will be no or negligible increases in jurisdiction is naive, unimaginative and misleading. Under the proposed rule, the possibility of Alaska being designated as one large, interconnected watershed is not farfetched. The fact that the proposed rule overlooks the complexity of exclusively Alaskan features, such as permafrost and muskeg, underscores the validity of this as a concern.[116]

While some clarification may be needed for efficient implementation, the CWA seems very clear on one point: the people who care and know the most about the water should be in charge of its care. Those people are the ones who drink it, swim in it and fish in it. Those are the people with rights, duties and obligations to manage and protect their lands and waters. And yet those are the people most disenfranchised, most burdened and most at risk from the proposed rule's "clarification," which dismissively quashes any recognizable homage to the CWA's reverence for the merits, common sense and practicality of local knowledge and control. (p. 2)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

[116] Comments from the Alaska Department of Environmental Conservation expand on these and other points and are wholly incorporated here by reference.

Ruby Valley Conservation District, Montana (Doc. #16477)

1.410 The Ruby Valley Conservation District Board of Supervisors considers Waters of the U.S. (WOTUS) to be a very significant expansion of Federal jurisdiction over waters in this country. Traditionally, most of the waters are protected by state and local entities. As a grass roots organization, we believe good conservation and protection of water resources can be better accomplished locally. (p. 1)

Agency Response: The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.

Montana Land and Water Alliance, Inc. (Doc. #18890)

1.411 The EPA, as a federal agency, does not have the authority to usurp the sovereign prerogatives of state government. We urge you to drop this effort immediately and stop wasting taxpayer dollars. (p. 1)

Agency Response: See Preamble to the Final Rule and Technical Support Document.

New Mexico State University, The Linebery Policy Center for Natural Resource Management (Doc. #7336.2)

1.412 The implications of this report are alarming. The Desert Land Act of 1877[117] states: "if not before, all *nonnavigable* waters then a part of the federal domain became. . . Subject to the *plenary*[118] control of the designated states ...[119])." The Supreme Court recognized that *nonnavigable* waters were severed from the federal domain by Congress, allowing the states the power to administer the appropriation of those waters for beneficial use[120]. In light of this study however, federal agencies could attempt to claim jurisdiction over

[117] 43 USC 641
[118] Unqualified; absolute
[119] Id. at 163.64.
[120] Identifying the Reclamation Act of 1902 and the Indian Appropriation Act of 1909 as two pieces of legislation that verify congressional recognition of the supremacy of state law with respect to the acquisition of water located on public domains

non-navigable waterways without the "significant nexus tests"[121] established by the Supreme Court ruling in *Rapanos*[122]. In other words federal agencies may attempt to use the report to argue that all streams, arroyos , or washes are navigable irrespective of the flow rate and thus under the jurisdiction of the federal government and not the states: This would effectively circumvent the Desert Lands Act[123] without the need for Congressional action to amend or repeal the Act: Using the reserved rights doctrine, any and all senior water rights could be forfeit, with the federal government assuming senior appropriator status. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding federalism concerns, see Technical Support Document Section I.**

Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, Section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The rule is entirely consistent with these policies. The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule alter the CWA's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. See Technical Support Document Section I for further discussion including regarding *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

University of Missouri (Doc. #7942.1)

1.413 Further, despite many states (including Missouri) hard work to improve soil conservation and water quality standards, the new ruling would in many cases override state

[121] The words "significant nexus" was used in the *Rapanos* decision to differentiate navigable from non-navigable waters. It intended to address only those standing or continuously flowing waters i.e. oceans, rivers, and lakes forming geographic features as waters of the U.S., and not the Connectivity of Streams and Wetlands to Downstream Waters.
[122] 547 U.S. 715,62 ERC1481 (2006)
[123] 43 USC 641

jurisdictions and impose federal standards in many locations that may not be practicable for application. (p. 2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

John Wood Community College (Doc. #11770)

1.414 I am concerned that under the proposed rule many ordinary activities undertaken by local governments such as a community college would I immediately become subject to a wide variety of federal regulation, including permitting requirements, notifications and recordkeeping, modeling and monitoring, and use approvals that are now under state or local jurisdiction. These requirements would impose direct costs, delays, and uncertainty in planning. (p. 1)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Water Environment Federation Member Association Governmental Affairs (GA) Committees Representing EPA Region 7 (Doc. #15185)

1.415 The proposed rule does not address parallel "Waters of the State" authority already in place for various States as to which entity will likely have primary responsibility for program management and enforcement. For example, the Nebraska Department of Environmental Quality has legislation in place that already deals with all of the key elements contained in the Proposed Rule, plus it also includes groundwater nexus considerations, which the Proposed Rule excludes. Similar to above, it is suggested that

EPA clearly state its intent on the issue of either independent EPA or parallel authority among States, in order to avoid unnecessary confusion over the basis for program control; especially where States already possess similar or even greater authority. (p. 1-2)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

Water Environment Federation (Doc. #16584)

1.416 A parallel authority issue with "Waters of the State" may be created in this proposed rule. The proposed rule does not address parallel "Waters of the State" authority already in place for various States as to which entity will likely have primary responsibility for program management and enforcement. For example, the Nebraska Department of Environmental Quality has legislation in place that already addresses the key elements contained in the Proposed Rule, including groundwater nexus considerations, which the Proposed Rule excludes. Similar to above, it is suggested that EPA clearly state its intent on the issue of either independent EPA or parallel authority among States, in order to avoid unnecessary confusion over the basis for program control; especially where States already possess similar or even greater authority. (p. 3)

Agency Response: **The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document.**

American Legislative Exchange Council (Doc. #19468)

1.417 As currently written, the proposed redefinition of "waters of the United States" offers EPA and the Corps virtually unlimited regulatory authority over water resources.

Whereas in the past, federal jurisdiction was based upon site-specific analysis, the new rule employs an aggregate watershed analysis to determine whether isolated waters have a "significant nexus" to navigable waters, and therefore subject to federal regulation. This test is so ambiguous that every ditch, vernal pool, dry lake, mudflat, sandflat, drainage ditch, and irrigation from farming operations could easily fall under EPA and the Corp's jurisdiction. Furthermore, the proposed rule also expands federal regulatory authority over waters with a "confined surface or shallow subsurface hydrologic connection to such a jurisdictional water." This is significant since Congress never intended for the CWA to apply to the management of groundwater in the states. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document Sections I, II, VII, VIII and IX. See also Response to Comments Compendium Topic 3 – Adjacent Waters, Topic 4 – Other Waters, Topic 5 – Significant Nexus, Topic 6 – Ditches, Topic 7 – Features and Waters Not Jurisdictional and Topic 8 – Tributaries.**

John Barrasso et al., Congress of the United States (Doc. #4901)

1.418 We urge you to change course by committing to operating under the limits established by Congress, recognizing the states' primary role in regulating and protecting their streams, ponds, wetlands and other bodies of water. We also again ask that you consider the economic impacts of your policies knowing that your actions will have serious impacts on struggling families, seniors, low-income households and small business owners. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. Regarding the economic analysis see Preamble to the Final Rule Section V.**

Patrick E. Murphy, Member of Congress, Congress of the United States, House of Representatives (Doc. #15371.1)

1.419 Federal Regulation of Minor Waters Is Unnecessary for Environmental Protection

- The State of Florida already regulates work in all waters of the state, no matter how small
- Florida law has rigorous environmental protections for State waters, and neither the Corps nor EPA have claimed that Florida's regulatory criteria are inadequate

- Expanding federal Clean Water Act jurisdiction in Florida simply increases the level of duplication of agency oversight, which increases costs for landowners and delays in the permitting process (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources.**

United States Senate (Doc. #19301)

1.420 Finally, I am deeply concerned that this rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this proposed rule seeks to cover through federal jurisdiction are not unprotected They are currently protected as state waters. Surely, a better approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps work with states to improve their water quality programs. Assertion of federal jurisdiction over these waters should be a last resort and not the first course of action. (p. 2)

Agency Response: **The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. Regarding federalism concerns, see Technical Support Document Section I.**

Wetland Science Applications, Inc. (Doc. #4958.2)

1.421 Since 2007, the EPA and COE have maintained that they can follow the migratory molecule of water if it theoretically will reach a water body that is determined to be jurisdictional. This is inconsistent with Sec 101(b) of the CWA and is unconstitutional because it usurps States' rights and responsibilities to conduct land management. Any

surface of land that is not perfectly level can upon sufficient volume of water being placed upon it transmit that water down slope and may ultimately reach a legitimate jurisdictional water of the U.S. With this proposed definition of tributary, water from a puddle with no OHWM could traverse the landscape by sheet flow and end up being identified as a tributary. This is an inappropriate expansion of federal land management. (p. 9)

Agency Response: The rule does not regulate land use. The scope of regulatory jurisdiction for Clean Water Act purposes in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction. See Summary Response, Preamble to the Final Rule Sections III and IV and Technical Support Document. The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. Regarding federalism concerns, see Technical Support Document Section I.

The Property Which Water Occupies (Doc. #8610)

1.422 Expanding state title to property beneath smaller headwater streams transfers jurisdiction within National Parks and Forests from Federal agencies to State agencies. This issue is not considered in the Rules. The Rules also undermine title and rights to privately held lands. The Rules undermine property grants and deed conveyances, transferring property title worth billions of dollars to individual States. Unsettling property title initiates enormous costs to affected farmers, landowners, taxpayers, financial institutions and insurers; these costs are not included in the associated economic analysis. The multi-billion dollar regulatory taking of property[124] unsettles the clear delineation between state-owned lands -those submerged by navigable waters, and private/federal property. Thousands of miles of land below smaller streams, ephemeral streams, wetlands and drainage ditches, are declared 'navigable' by the Rules and therefore state-owned property. Even the choice of the rules vocabulary *Waters of the United States*[125], removes the modifier *navigable* from the often used judicially phrase "*Navigable Waters Of The United States* "[126] that has been used to establish the limit of federal authority. The US

[124] The Cost of such a potential liability is not addressed or considered as required under NEPA and multiple executive Orders.

[125] "of" being a possessive modifier within the phrase "waters of the United States", as if the water itself is property belonging to the United States. This, rather using descriptive 'within the United States'. Although a limited form of jurisdiction may extend beyond navigable waters when necessary to fulfil purposes of the CWA, neither the Water nor Air 'belongs to' the United States under common law, but are rather part of the negative estate associated with the land.

[126] The Daniel Ball .77 US 557(1870), Kaiser Aetna v. United States 444 US 164 (1979), Gibbons v. Ogden, 22 US I (1824), US v. Appalachian Power Co. 311 US 377 (1940), The Montello, 11 Wall. 411-414,(1870), United States v.

Supreme Court noted: "*The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.*" Solid Waste Agency of Northern Cook City. v. Army Corps of Engineers, 53 1 US 159,172, (2001). The Rules denigrate this Supreme Court Decision.

The proposed Rules ignore property ownership and circumvent the due process owed those holding title to real property[127], lenders with leans against this real property and insurers of title. They burden the judiciary and taxpayers accountable for compensation regulatory taking and sorting out the mess created by these Rules. None of these costs are represented in the Rules economic analysis. The Rules adversely affects property interests, property rights in real property across this country, mistakenly based upon the location of water. The proposed rule misrepresents well settled law defining the contours of real property.[128] (p. 4-5)

Agency Response: See Preamble to the Final Rule and Technical Support Document and summary response below.

1.423 By explicitly stating that property title, property rights and public rights of access remain unaffected because navigability can only be determined by a Federal court would the Rules avoid unsettling property title creating constitutional chaos for the judiciary. (p. 9)

Agency Response: See Preamble to the Final Rule and Technical Support Document and summary response below.

1.1.1. 404 Assumption

Agency Summary Response

States and tribes play a vital role in the implementation and enforcement of the CWA. The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule recognizes the unique role of states as confirmed by section 101(b) of the CWA which clearly states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce and eliminate pollution to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. Under section 510 of the CWA, 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. Congress has also

Rio Grande Dam & Irrigation Co., 174 US 690,687 (1899), and more recently Solid Waste Agency of Northem Cook Cty, v. Army Corps of Engineers, 531 US 159,169, (2001).

[127] Allowing deed holders the right to be heard at a meaningful time and in the appropriate forum before they are divested of their property is a fundamental property right codified in almost every State.

[128] Rights in water follow the grant to soil below; the presence of water provides no basis for claiming rights. Blackstone Vol II pg. 18.

provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to assure compliance with the goals of the CWA (see 33 U.S.C. § 1377; 56 FR 64876, 64878-79 (Dec. 12, 1991)). Where appropriate, references to states in this document may also include eligible tribes. Essay 1.1 provides additional discussion on the role of states.

Some comments raised concerns that this rule would usurp, limit or preempt state and tribal rights to manage waters within their jurisdiction. Consistent with the CWA, and as is the case today, nothing in this rule limits or impedes any existing or future state or tribal efforts to protect their waters. States and tribes retain full authority to implement their own programs. As cited in the preamble, the agencies commit to working with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in their states. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters.

Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of CWA section 402 and 404. Several commenters raised concerns that this rule would adversely affect the ability of states and tribes to assume administration of and continue implementation of section 404 of the CWA. Section 404(t) of the CWA states that "Nothing in this section shall preclude or deny the right of any state or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such state . . ."

The CWA identifies the waters over which states may assume permitting jurisdiction. *See* CWA section 404(g)(1). 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).

At the request of the Association of Clean Water Administrators, the Environmental Council of States, the Association of State Wetlands Managers (letter April 30, 2014) and several states, 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).

Specific Comments

Michigan Department of Environmental Quality (Doc. #5462)

1.424 Because Michigan administers the Sections 402 and 404 Programs under state law, the proposed rule will not significantly impact Michigan. Michigan has been administering

the Section 402 Program for over 40 years, during which time we have been a leader in improving and maintaining water quality through both regulatory and non-regulatory initiatives in the program. Although we do not believe the proposed rule will impact Michigan's administration of the Section 402 Program because of the widespread controversy and confusion about this issue, we recommend the USEPA clarify the impact of this rule on activities regulated under the Section 402 Program, specifically regulated agricultural activities.

Michigan's Section 404 Program, with its clear definition of wetlands and other waters, provides a superior jurisdictional framework for the regulated community (i.e., provides predictability and certainty for the regulated community regarding the waters that are regulated) than the federal program does. Furthermore, having administration of the federal program has insulated most of Michigan’s citizens from the many jurisdictional process changes over the years at the federal level. However, clarification of the Waters of the United States through a rule would benefit Michigan citizens who need permits from the United States Army Corps of Engineers (USACE) in areas of the state 1 where the USACE has retained administration of the Section 404 Program. In those areas, it has been Michigan's experience that the current jurisdictional determination process at the federal level results in significant delays for the regulated community.

Michigan has administered the Section 404 Program for 30 years. In 2008 following a ten-year review of Michigan's program, the USEPA issued its report identifying issues needing to be addressed in order for Michigan's program to remain consistent with federal regulations. Although Michigan 's jurisdictional framework for regulating waters was determined to be consistent with federal regulations and the federal Rapanos guidance, other deficiencies were identified that the USEPA stated needed to be addressed. As a result, Michigan's Legislature created the Wetland Advisory Council (WAC) to evaluate the findings of the report and propose solutions to align Michigan's program with the requirements of the CWA. The WAC had broad stakeholder participation, including business groups; drain commissioners; local, state and federal agencies; and conservation and environmental groups. The 2012 recommendations from the Michigan Wetland Advisory Council and eighteen months of debate in the Michigan Legislature resulted in the passage of 2013 PA 98, which narrowed and clarified the exemptions in Michigan 's Section 404 Program. These changes are intended to address the 2008 program review findings and modernize the program to allow Michigan to continue to be a leader in protecting and managing water and wetland resources, while being tailored to appropriately regulate Michigan's land-based industries. Michigan is seeking confirmation from the USEPA that the proposed rule will not impact the progress made in 2013 PA 98.

Although Michigan must stay consistent with the provisions of the CWA, having administration of the Sections 402 and 404 Programs has allowed Michigan to develop innovative approaches to provide a streamlined regulatory process while still protecting Michigan's water resources. It has also provided more clarity for the regulated community, so compliance can be achieved in a more timely manner than federal law currently provides. We believe it is critical for the USEPA and USACE to continue to work collaboratively with states and tribes to continue to administer the CWA. One area of particular concern is the potential impact the proposed rule may have on the scope of

waters for which jurisdiction may be assumed by states under the Section 404 Program. Although it is stated in the preamble and USEPA staff have stated in various forums that it is not the intent of the rule to impact assumable waters, the current language could be misinterpreted otherwise. Michigan does not support any changes to the scope of assumable waters and urges clarification of this issue before promulgation of the final rule. (p. 1-3)As stated in the summary, EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and recommendations on how the EPA can best clarify assumable waters for dredge and fill permit programs pursuant to the Clean Water Act section 404(g). Clarification of assumable waters will not be completed prior to the finalization of this rule; however, the timing of the clarification of assumable waters should not affect Michigan's current approved program or EPA's review of PA 98 as assumable waters is a question of who is the permitting authority, not whether or not the water is covered under the CWA which is the scope of this rule.

Agency Response: Approval of any proposed changes to Michigan's approved CWA section 404 program will be based upon EPA's review of PA 98's consistency with the CWA and its implementing regulations. This review has not yet been completed. EPA is working with Michigan's Department of Environmental Quality to understand the proposed changes to Michigan's CWA section 404 program, so that a decision can be made to approve those consistent with the CWA. See also the summary response.

As stated in the summary, EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and recommendations on how the EPA can best clarify assumable waters for dredge and fill permit programs pursuant to the Clean Water Act section 404(g). We welcome Michigan's participation in this effort

New Mexico Department of Agriculture (Doc. #13024)

1.425 Despite reference to a DEA prepared by the Corps for Section 404 aspects of the proposed rule on page 22222 in the Federal Register notice, NMDA has not been able to locate this National Environmental Policy Act documentation. Such an important document should have been made publicly available on the EPA's Waters of the US. website. NMDA submitted a Freedom of Information Act (FOIA) request on October 27, 2014, for these documents. This FOIA request can be found in Appendix B. (p. 17-18)

Agency Response: The Army has prepared a final environmental assessment and Findings of no Significant Impact in accordance with the NEPA. See Preamble for discussion.

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

1.426 One issue that the guidance does not address but is most relevant in throughout the west is water rights and state sovereignty. SWANCC, dispelled Army corps and EPA's policy's asserting that virtually all U. S. wetlands were, at least theoretically, subject to regulation under section 404. It was stated that primacy of wetland analysis falls on states primarily and local governments. State and local wetlands regulatory programs focus primarily upon navigable waters, tributaries, and adjacent wetlands. In many cases they

are a superior substitute for federal jurisdiction. At present 14 states have regulatory programs for freshwater wetlands. These programs are variable and need to be considering the differences that exist because of various wetland types and the major uses within the range of each drainage or HUC. The comprehensiveness of state programs and regulations are assessed on a case by case basis that considers wetland size, mapping requirements, and can in some cases include exemptions for specified activities. According to the Association of State Wetland Managers (ASWM), state regulations do not generally apply to federal lands. This is true because the overreach of the federal agencies trump state sovereignty by using the interstate commerce clause in a manner that would sicken the founding fathers. In reality, the federal government could save billions of dollars by returning regulatory responsibility back to the states; especially those with the largest isolated wetland acreages. At present these states provide little or no protection realizing they have no acknowledged authority and regulatory attempts on their part would instigate additional state expenses from mute duplication. However, it is reasonable to understand that legislative inaction continues to add to the federal tax burden and only serves overreaching federal agencies that continue to gain more power and autonomy from an inactive Congress. (p. 3-4)

Agency Response: **See summary response above as well as summary response under section 1.1 *Comments on State/Tribal Authority.* The EPA cannot speak to what ASWM may have advised states**

1.427 States do not have the constitutional constraints that the federal government does in enacting legislation (i.e., whether a legislative action exceeds Congress' power under the Commerce Clause). Also, CWA section 404(t) expressly provides that the existence of section 404 does not preempt state law governing the discharge of dredged or fill material. However, whether states will take steps to expand wetlands protection in response to the need is a political and resource need question (e.g., budget and staffing). It is quite likely that among states, most will do it. Utah already does. (p. 4) It is quite likely that among states, most will do it. Utah already does. (p. 4)

Agency Response: **See summary response above and under section 1.1 Comments on State/Tribal Authority. Nothing in this rule changes this fundamental CWA right of states and tribes to regulate discharges of pollution and dredge or fill material into their waters and is consistent with CWA section 404(t).**

Landmark Legal Foundation (Doc. #15364)

1.428 It usurps state authority in contravention of section 404(g) of the Clean Water Act's (33 USC § 1251 et. seq., 'TWA" or "the Act") (p. 1)

Agency Response: **As stated in the summary above, this rule does not affect state's rights pursuant to section 404(g) of the CWA. States, or tribes, wishing to administer their own CWA section 404 dredge and fill permitting program, may seek to have their program approved by the EPA. Michigan and New Jersey are currently the only two states who have sought to assume these permitting responsibilities.**

USA Rice Federation (Doc. #13998)

1.429 The proposed exemptions are supported by the statute and agency policy. Water is used extensively by municipalities, industries and agriculture. The right to use water is the subject of state water law, and is not addressed by the Clean Water Act. CWA § 101(g).[129] Following use, water may be discharged to a water of the U.S. Such water may carry pollutants to a navigable water, but that discharge into a water of the U.S. is regulated under section 404 or 402 (or is exempt by statute). The water itself is not regulated until it is discharged.[130] (p. 10)

Agency Response: See summary response above under section 1.1 *Comments on State/Tribal Authority*. This rule recognizes the unique role of states related to water quantity and is con consistent with section 101(g) of the CWA.

Tennessee Farm Bureau Federation (Doc. #14978)

1.430 Tennessee should not be in a subservient role in protecting upstream, non-navigable waters. Congress established numerous programs and incentives for states to protect smaller, non-navigable waters. This design would ensure the protection downstream of larger, navigable waters under jurisdiction of the Agencies. Many of these programs were structured for land use activities like farming. Sections 208 and 303(e) require management plans for nonpoint sources. Section 319 provides funding for states like Tennessee to control and prevent nonpoint sources. These programs have worked and are taken seriously in Tennessee to ensure we do our part protecting the total network of waters throughout this state from impairment. Why after decades of proven success of these programs propose a rule that would place all water features in Tennessee under federal jurisdiction. Why did Congress implement these programs if they intended for the Agencies to exercise control over all water features? Today watersheds receive 319 funding if nonpoint sources are causing impairment that needs to be addressed. Under this proposal the heavy hand of the federal government will require section 404 permits to do the job. We believe this is a contradiction of Congress' intent. (p. 4)

Agency Response: See summary response above as well as under section 1.1 Comments on State/Tribal Authority.

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

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

[130] See, e.g., National Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir. 2011) (water in a lagoon is not regulated under the CWA until it is discharged); American Iron and Steel Inst. v. EPA, 155 F.3d 979, 996 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

understand, more predictable, and more consistent with the law and peer-reviewed science.

Environmental Council of the States (Doc. #15543)

1.431 ECOS also appreciates the EPA and the Corps' recognition in the proposed rule preamble that the issue of state assumption of CWA Section 404 authority is a distinct issue that that should be addressed in a separate process for this specific topic:

> "This proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under section 404(g) of the CWA. See CWA section 404(g). 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 7 between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). Clarification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g)." (79 Fed. Reg. 22200)

States agree that Section 404 assumption is an important matter which should be treated separately from any final rule on the definition of Waters of the United States. ECOS supports state assumption of the Section 404 program by interested states (ECOS Resolution 08-3) and recently wrote to EPA requesting that efforts be undertaken to clarify several ambiguities surrounding the assumption process. States emphasize that a final rule should add such clarity that the need for implementation guidance is minimized. To the extent that guidance is needed, it should be developed with state involvement and published concurrently with any final rule. (p. 2-3)

Agency Response: In response to ECOS's request and the request of other states and state associations, EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) which will provide advice and recommendations on how the EPA can best clarify assumable waters for state and tribal dredge and fill permit programs pursuant to the Clean Water Act section 404(g). The EPA welcomes participation from ECOS and others in this effort. See summary response above.

Association of State Floodplain Managers, Inc. (Doc. #19452)

1.432 We urge the federal agencies to continue attention to distinguishing between the jurisdictional definition of Waters of the United States, and the waters that are assumable by states under §404(g) of the CWA.

The preamble to the proposed rule includes the statement:

> *"Today's proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under Section 404(g) of the CWA. ... The*

scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language of the CWA. ..."

We concur with this statement, but also are of the opinion that a more definitive clarification of the scope of assumable waters is needed to facilitate ongoing development of state-federal coordination. It has become apparent that there is not a clear understanding between states interested in assumption and the federal agencies regarding the means by which assumable waters are to be identified. Therefore, ASFPM requests that EPA and the Corps consult with the states and tribes to revise the existing assumption regulations to clarify this issue, preferably through formation of a FACA subcommittee to develop consensus and provide transparency. (p. 5)

Agency Response: EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) which will provide advice and recommendations on how the EPA can best clarify assumable waters for state and tribal dredge and fill permit programs pursuant to the Clean Water Act section 404(g). The EPA welcomes participation from ASFM and others in this effort. See summary response above.

1.433 Other provisions of the CWA also lose significance in the proposed rule. For example, there is scope for assumption of significant responsibilities by state agencies in the primacy provisions of §404. Were the proposed rule to be adopted and implemented, it is unclear whether primacy would have any practical application potential, as the waters available for assumption could readily shrink to a level inconsistent with, for instance, the expense, logistics and administrative burden that would necessarily attend a state permitting program. This consequence of the proposed rule is not lost on Alaska and its state regulatory agencies, who have been actively cooperating with the agencies to evaluate assumption of §404 permitting.

The CWA very attentively contemplates an oversight role for the federal government. This responsibility, for example, spare s states from a race to the bottom and attendant river fires. This role does not, however, deem the EPA and ACOE the sole sufficient protectors and stewards of clean water. In fact, the CWA explicitly includes congressional intent to "recognize, preserve, and protect the primary responsibilities and right s of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use .. . of land and water resourccs[.]"[131] The CWA also "expressly provide[s]" for all instances where federal authority could "be construed as impairing or in any manner affecting" state authority.[132] Yet, the agencies have not cited any express provision that supports the majority of jurisdictional assumptions in the proposed rule. (p. 2-3)

Agency Response: See summary response above. The Agencies recognize the important role states and tribes have in managing the aquatic resources within their jurisdiction. This rule does not limit a state or tribe's ability to manage these resources under state or tribal programs. With respect to assuming the CWA section 404 permitting responsibilities, EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT)

[131] 33 U.S.c. § 125 1(b).
[132] 33 U.S.c. § 1370

which will provide advice and recommendations on how the EPA can best clarify assumable waters for dredge and fill permit programs pursuant to the Clean Water Act section 404(g). The EPA welcomes participation from the state of Alaska and others in this effort to clarify for which waters a state or tribe assumes CWA section 404 permitting responsibility.

The Association of State Wetland Managers (Doc. #14131)

1.434 We urge the federal agencies to continue attention to distinguishing between the jurisdictional definition of Waters of the United States and the waters that are assumable by states under §404(g) of the CWA.

The preamble to the proposed rule includes the statement:

"Today's proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under Section 404(g) of the CWA. ... The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language of the CWA. ..."

We concur with this statement, but are also of the opinion that a more definitive clarification of the scope of assumable waters is needed to facilitate ongoing development of state-federal coordination. (p. 4)

Agency Response: See summary response above. In response to ASWM's request and the request of other state associations (letter April 30, 2014) and states, 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). The EPA welcomes participation from ASWM and others in this effort.

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

1.435 State Sovereignty

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Each state can establish regulations for water bodies within their borders that are not "waters of the U.S.," which is to say those waters related to navigability, interstate commerce, and the federal government's scope of powers. As the extent of "waters of the U.S." is expanded, the regulatory control reserved solely to the states is diminished and, potentially, becomes nonexistent. This is not consistent with the CWA's stated purpose of recognizing, preserving, and protecting the "primary responsibilities and rights of the States…to plan the development and use…of land and water resources…." SWANCC, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)).

Within the bounds of the federal government's enumerated powers, there is the concept of "cooperative federalism," which is a term used to describe those spheres where federal and state authorities share a degree of regulatory authority over a particular area of

law.230 Under this construct, the federal government establishes a minimum level of regulation and the state assumes responsibility for administration of the federal program to standards at least at the federally-set floor; beyond that states may also implement stricter regulations. For instance, the CWA limits states to issuing permits for "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction. 33 U.S.C. § 1344(g)(1) (emphasis supplied). The parenthetical carves out an exception, apparently reserving those specified waters for federal jurisdiction; however, if that is the case, it also seems that if the term "navigable waters" is amended by the proposed rule, the cooperative intent is thwarted as the term "navigable waters" encompasses a much wider subset of waters, infringing on and at least partially obliterating the jurisdiction of the states. The proposed rule offers little cooperation; rather, it expands federal jurisdiction and marks no limit as to the waters the CWA may reach, leaving uncertainty as to what the states will be left to regulate. (p. 78 – 79)

Agency Response: **See summary response above. The agencies disagree that the rule covers a "much wider" group of waters. The rule is narrower than current regulations, and does not differ significantly from how the Act is administered in current practice. Moreover, the Agencies recognize the important role states and tribes have in managing the aquatic resources within their jurisdiction. The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule does not limit a state or tribe's ability to manage these resources under state or tribal programs. Florida raised concerns that the rule infringes upon and limits the scope of waters a state may assume permitting responsibility for per 33 U.S.C. § 1344(g)(1). The scope of waters a state, or tribe, may assume CWA section 404 permitting responsibility for is a separate issue and one the EPA has committed to seek to clarify through another process. The EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) which will provide advice and recommendations on how the EPA can best clarify assumable waters for dredge and fill permit programs pursuant to the Clean Water Act section 404(g). The EPA welcomes participation from the state of Florida and others in this effort.**

Association of Clean Water Administrators (Doc. #13069)

1.436 ACWA requests that the rule clarify that the definition of navigable waters does not affect the ability of states to assume the 404 program. (p. 3)

Agency Response: **In response to ACWA's request and the request of other states and state associations, EPA is convening a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) which will provide advice and recommendations on how the EPA can best clarify assumable waters for state and tribal dredge and fill permit programs pursuant to the Clean**

Water Act section 404(g). The EPA welcomes participation from ACWA and others in this effort. See summary response above.

1.1.2. Water Supply and Allocation

Agency Summary Response

A number of commenters expressed concerns that the proposed rule would impair States' rights to allocate quantities of water and to manage their water resources. Various commenters also stated that the proposed rule would infringe on private property rights in violation of the United States Constitution.

The rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Nor does the rule violate the U.S. Constitution.

Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

The rule is entirely consistent with these policies. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate.

Even if the rule were to have an incidental effect on water quantity or allocation, which it does not, the rule would still be consistent with section 101(g) of the CWA. In PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 720, 114 S.Ct. 1900, 1913, 128 L.Ed.2d 716, 733 (1994) the United States Supreme Court held, "Sections 101(g) and 510(2) [of the CWA] preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." See the Technical Support Document for a discussion of state water allocation and the CWA jurisdiction.

Under the rule, States, tribes, and local governments, consistent with the CWA, retain full authority to implement their own CWA programs to protect their waters more broadly or more fully than under the CWA. According to section 510 of the CWA, unless expressly stated in the CWA, nothing in the CWA precludes or denies the right of any State, tribe, or political subdivision to establish its own standards or limits, as long as these standards and limits are at least as protective as those under the federal CWA. Many States and tribes, for example, protect groundwater. Others protect wetlands that are vital to their environment and economy but are outside the regulatory coverage of the CWA. Nothing in the rule limits or impedes any existing or future State, tribal, or local efforts to further protect waters. In fact, by providing greater clarity regarding what waters are subject to the CWA, the rule will assist States and tribes

authorized section 402 and 404 CWA permitting programs, because it will reduce the need for case-specific jurisdictional determinations.

The rule gives full force and effect to State authorities. It has been developed in furtherance of the Congressional policy, as articulated in section 101(b) of the CWA, to recognize, preserve, and protect the primary responsibility of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement of land and water resources), and to consult with the EPA Administrator in the exercise of the Administrator's CWA authority. The rule is also in keeping with the directive of section 501(2) of the CWA that unless otherwise expressly provided in the CWA, nothing in the CWA is to be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The rule does not constitute a taking of private property rights. As a matter of law, an agency's determination of jurisdiction, by itself, cannot constitute a regulatory taking. *See, e.g.*, U. S. v. Riverside Bayview Homes, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Even if there is a finding of jurisdiction there can still be no taking unless and until the owner is prevented from using the property. The rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the U.S." consistent with the CWA, U.S. Supreme Court precedent, and science. It does not alter the underlying regulatory structure of the CWA. Under the CWA, any person discharging a pollutant from a point source into navigable waters must obtain a permit.

Courts have consistently upheld the constitutional authority of federal agencies to regulate activities causing air or water pollution. Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 282-283, 101 S.Ct. 2352, 2363, 69 L.Ed. 2d 1 (1981); , 332 F.3d 698, 704, 707 (4th Cir. 2003), cert. den. 541 U.S. 972, 124 S.Ct. 1874, 158 L.Ed.2d 466 (2004); U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1329 (6th Cir. 1974); See also U.S. v. Cundiff, 555 F.3d 200, 213, n. 6 (6th Cir. 2009), cert. den. 558 U.S. 818, 130 S.Ct. 74, 174 L.Ed.2d 27 (2009).).

Specific Comments

Arizona Game and Fish Department (Doc. #15197)

1.437 The draft Connectivity report describes in Section 4.8 a connection between the quantity of water delivered by a watershed from ephemeral and intermittent tributaries to WUS as defined in the proposed Rule. The Department believes that water conservation or water supply augmentation projects seeking to capture sheet flow and surface water run-off for augmentation of local water supplies might deprive downstream channels of their physical and hydrological connection to WUS. It is unclear as to how the proposed Rule would affect local water quantity management practices, the exercise of which is reserved to the States. (p. 2)

Agency Response: Please see the summary response, regarding States' roles in water quantity management.

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

1.438 We are unaware of any consultation that has taken place with state and regional entities that own and manage these water supply facilities with respect to any changes that may occur as a result of this proposed rule. We urge the agencies to carefully consider the impact of this rule on water supply systems and make the appropriate changes in the final rule to ensure that the public can continue to rely upon these sources for dependable and affordable water supply. (p. 4)

Agency Response: During the development of the rule, the agencies consulted with state and local governments. Please see section VI.E., entitled "Executive Order 13132: Federalism" in the preamble to the final rule for more details. The agencies expect that the rule will assist state and local agencies in managing water supply facilities, inasmuch as the rule will clarify the scope of water resources subject to CWA protection.

Energy Producing States Coalition (Doc. #11552)

1.439 In essence, water allocation and water itself is the property of a state. Without a clear limiting principle under the rule, there is no defined demarcation of where the federal jurisdiction ends and where the state's begins. We have trouble understanding how such a regulatory posture I0.can be construed as anything other than an arbitrary agency takings that not only usurps well-established state rights under the 10th Amendment , but the personal property rights of individuals that will be denied beneficial use of their own land or legally acquired water rights. (p. 2)

Agency Response: The EPA is responding to the comments about the Tenth Amendment in the Legal Comment Response Compendium.

Western Urban Water Coalition (Doc. #15178)

1.440 Western municipalities have acquired most, if not all, of their water portfolios under the prior appropriation system administered by their respective states. However, in order to put those waters to beneficial use, they must divert or store that water and subsequently deliver it through a complex set of collection and distribution infrastructure. Congress, through sections 101(g) and 510(2) of the CWA, has afforded an appropriate measure of deference to state water allocation decisions. Given the expansive reach of the Proposed Rule, including its determination as to what constitutes waters that are "jurisdictional by rule," infrastructure related activities of the municipal water providers could become subject to federal oversight. If the proposal had this outcome, it would effectively remove the concept of "navigable" from the Act contrary to the Supreme Court's admonition in SWANCC that this term must be accorded some effect. SWANCC, 531 U.S. at 172 ("We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute.") Certainly in an area of traditional state primacy, such as the allocation and distribution of essential water supplies, the federal agencies should be reluctant to expand federal jurisdiction in the absence of a clear Congressional directive to do so. No such directive exists here. (p. 6)

Agency Response: **Please see the summary responses, above, including regarding States' roles in allocating water supplies. The agencies' revised definition of "waters of the U.S." is consistent with the text of the CWA, Supreme Court rulings, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the CWA over the past four decades.**

Washington State Water Resources Association (Doc. #16543)

1.441 The potential effects of the proposal's expanded jurisdiction are not limited to water recycling and groundwater recharge projects. It would also directly impact efforts to construct and maintain traditional water supply infrastructure. The Agencies' proposal would capture larger areas within the CWA's jurisdiction, making it much more likely that infrastructure work could fall into the CWA's purview. Many of our members have decades of on the ground experience constructing water delivery systems. Their experience shows that when the CWA is triggered it is not a trivial matter. Depending on project size, triggering CWA jurisdiction can add a decade or more to the permitting process and tens of millions of dollars or more in project costs.

Our members are very conscious of the cost of water. Providing access to an affordable water supply is something that is of the utmost importance to our members. It is an irreplaceable resource that is vital for health and safety needs. It is also something that the United Nations has recognized as a basic human right. In addition some western states have adopted measures that also recognize access to affordable water as a human right. Despite our members' best efforts, access to affordable water is not universally available in the United States. NWRA's members remain committed to working to meet this need and are confident that the Agencies share this commitment. Unfortunately, the proposal in its current form stands to make providing affordable water supplies more challenging. (p. 13-14)

Agency Response: **As indicated in the preamble, the revised rule narrows the scope of regulatory jurisdiction. The rule provides greater clarify regarding which waters are subject to the CWA. The agencies expect that the rule will promote state and local efforts in providing clean, affordable water supplies.**

Alameda County Cattlewomen (Doc. #8674)

1.442 States have their own system of water law that governs public and private water rights within their borders. The western states in particular have adopted some form of the prior appropriation doctrine (prior appropriation), or "first in time, first in right," regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. Under the prior appropriation doctrine, water rights are obtained by diverting water for "beneficial use", which can include a wide variety of uses such as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, among others, depending on state law. The extent of the water right is determined by the amount of water diverted and put to beneficial use.

Any imposition by the federal government that infringes on property rights based on settled state water law would constitute takings under the Fifth Amendment to the United States Constitution and would require just compensation. (p. 25)

Agency Response: **Please see the summary response, above.**

Relief Ditch Company (Doc. #11977)

1.443 Additionally, we are very concerned about priority water rights. The state of Colorado should continue to manage water rights under Colorado law as they have done for over 150 years. Please consider the impact on all regions before moving forward. (p. 1)

Agency Response: **Please see the summary response, above.**

Kentucky Farm Bureau (Doc. #14567.1)

1.444 The Agencies propose to assert jurisdiction over features that can store water, arguing that the ability to store water creates a nexus to a downstream water that might otherwise receive flows. This authority would give the Agencies the ability to control the expansion or removal of water storage units, such as reservoirs or ponds, and the installation of pipes in a reservoir or pond needed to remove water from storage. The result would be federal control over the use of that water. However, the Clean Water Act expressly reserves that authority to states. (p. 3)

Agency Response: **Under the existing rule, impoundments of "waters of the United States" remain "waters of the United States." See 33 C.F.R. § 328.3(a)(4). The rule does not change the existing regulatory language for impoundments. Under the rule, states will retain their authorities to manage water storage units. Please see the summary response, above.**

Western Governors Association (Doc. #14645)

1.445 In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. The Western Governors emphasize the importance of state primacy in water management, including management of ephemeraal streams. State water agencies are well-equipped to provide tailored approaches that reflect the unique management of ephemeral streams. (p. 8)

Agency Response: **The agencies agree that it is appropriate for States to manage ephemeral streams. By providing predictability and consistency, the rule will assist State in managing and protecting these waters.**

Association of Metropolitan Water Agencies et al. (Doc. #15157)

1.446 The transfer of water for purposes of water supply is an essential element of water resource management and that management warrants close attention and clarity as to the jurisdiction of the CWA. In defining WOTUS, EPA and the Corps should be clear that waters transferred from one water body to another without intervening municipal, industrial, or agricultural use should not be subject to WOTUS restrictions for purposes of water utility operations and maintenance.

The WOTUS rulemaking also raises questions regarding federal recognition of state water quantity management. Again in keeping with the rule's purpose of clarifying historic practice in the context of recent court rulings, when finalizing the rule, EPA and the Corps must explicitly defer authority over water quantity to states, as required by

CWA section 101(g). The rule language must give full force and effect to and not diminish or detract from States' authority over water allocation and water rights administration. (p. 2)

Agency Response: Transfers of water from one water body to another without intervening municipal, industrial, or agricultural use are addressed in 40 C.F.R. § 122.3(i) and 73 Fed. Reg. 33697-33708 (June 13, 2008) and are outside the scope of this rule. With regard to State roles under section 101(g) of the CWA, please see the summary response, above.

Western Resource Advocates (Doc. #16460)

1.447 Some opponents of the rule have suggested that it conflicts with state water allocation systems, especially in the west, and would constitute a taking of private property rights. This concern is inapt. Indeed, the Clean Water Act makes clear that its implementation should not supersede, abrogate or impair the exercise of water rights under state water allocation law.[133] Interpreting this language, courts have consistently upheld agency efforts to enforce Clean Water Act requirements on water rights holders whose actions discharge pollutants or dredged and fill materials to WOTUS, including wetlands.[134] Clarifying the definition of what constitute WOTUS may affect individual water rights holders insofar as a proposed discharge may be to a waterbody or wetland that is now jurisdictional – or that now is no longer jurisdictional. However, a refined WOTUS definition does not affect settled law that water rights holders are subject to Clean Water Act regulation when the exercise of their water rights may result in a discharge of pollutants or dredged and fill materials to jurisdictional waters. (p. 27)

Agency Response: See summary responses above.

Ducks Unlimited (Doc. #11014)

1.448 Similarly, it is also desirable to be very clear that the proposed rule has no impact on states' authorities to regulate water from the standpoint of addressing quantity and allocation issues. We believe the new rule could and should actually benefit those efforts by helping to maintain water flows in "waters of the U.S.," particularly if findings of significant nexus are scientifically justified and jurisdiction by rule is extended to the "other waters" in ecoregions in which wetlands and other waters contribute to base flows and are important components of the ecosystem. (p. 35)

Agency Response: See summary responses above. With respect to water quantity and allocation issues, please see the agencies' other comments regarding section 101(g) of the CWA.

[133] 33 U.S.C. § 1251(g).
[134] See PUD #1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994); U.S. v. Akers, 785 F.2d 814 (9th Cir. 1986); Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).

1.1.3. Property Rights

Agency Summary Response

Please see the summary responses above in this section. The preamble and Technical Support Document provide additional information.

Specific Comments

Mike Holmes, Representative, Alabama State House D-31 (Doc. #1151)

1.449 As a small tree farmer in Elmore County, Alabama, this threat of morel federal intrusion into our private property rights as provided in our Constitution is very threatening. We need much less government in our lives and livlihoods, not more! (p. 1)

Agency Response: Please see the summary responses, above.

Richard F. Colburn, The Senate of Maryland (Doc. #4870)

1.450 I represent a District consisting of many streams, creeks and rivers that would now be under EPA control should these regulations b e approved. These regulations would force the property owners I represent to be subject to rules and regulations that should not be governed by any federal agency. (p. 1)

Agency Response: Please see the summary responses above.

Attorney General of Texas (Doc. #5143.2)

1.451 Under the federal agencies' proposed rubric, the first six categories would effectively establish a set of "waters of the United States" by rule, while the final category would grant the agencies authority to determine all "other waters" by using the highly subjective "significant nexus" analysis on a case-by-case basis. As we noted in our letter to the EPA regarding its 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act, the result of this ad-hoc analysis will be that landowners will often not know (or even know to consider) whether bodies of water on their private properties-potentially even dry fields and creek beds- are subject to Clean Water Act jurisdiction until a federal field agent arrives to conduct this highly subjective "significant nexus" analysis. The proposed rulemaking makes no mention of.-and it appears the federal agencies have not even considered-the rule's potential effect on the market value of land that is clouded by the uncertainty created by the agencies' new approach. Nor do the federal agencies appear to have considered the chilling effect the proposed rulemaking could have on the economic development of private property that, depending on an individual field agent's future determination, may be deemed subject to federal regulation. (p. 2)

Agency Response: The rule will provide increased clarity and consistency regarding the definition of "waters of the US." Please see the summary responses above.

State of Tennessee, House of Representatives (Doc. #5597)

1.452 We believe the proposed rule defines "waters of the United States" in a manner that increases burdensome and costly permitting requirements, infringes on private property rights, and circumvents the legislative process. EPA's jurisdiction is expanded to waters previously not regulated as "waters of the United States". (p. 1)

Agency Response: Because the rule will increase clarity and consistency regarding the definition of "waters of the U.S.," the agencies expect that it will decrease burdens and costs associated with permitting requirements. Please also see the summary responses above.

Wyoming House of Representatives (Doc. #14308)

1.453 In essence, water allocation and water itself is the property of a state. Without a clear limiting principle under the rule, there is no defined demarcation of where the federal jurisdiction ends and where the state's begins. I have trouble understanding how such a regulatory posture can be construed as anything other than an arbitrary agency takings that not only usurps well-established state rights under the 1Oth Amendment, but the personal property rights of individuals that will be denied beneficial use of their own land or legally acquired water rights. (p. 2)

Agency Response: Please see the summary responses above.

Anonymous (Doc. #1371)

1.454 WHEREAS, the proposed rule, if adopted would infringe on private property rights, impairing land management activities such as urban development and agriculture production; (p. 1)

Agency Response: Please see the summary responses, above.

Kimble County Commissioners' Court, Kimble County, Texas (Doc. #4534)

1.455 WHEREAS, the proposed rule is an attempted end-run around Congress and two Supreme Court rulings and would grant authority to the EPA/CORE that would infringe upon private property rights as well as the Rights of the Individual States. (p. 1)

Agency Response: Please see the summary responses above.

Warrick County Board of Commissioners, Boonville, IN (Doc. #5145)

1.456 The over-broad definition of small waters to include "significant nexus" can be interpreted to include virtually every low-lying area, ditch, floodplain, or natural rainwater runoff path without respect to the frequency of water in these areas. This will certainly expand the jurisdiction of the EPA and Corps, directly impacting the local farming community by increasing costs for permits and mitigation and decrease revenues due to delays while waiting approval for permits and farming techniques. Indeed this increase in cost will be felt beyond the local fanning community in the form of higher prices for consumers. We also believe this expanded definition could result in restrictions and directives ordering local fanners to refrain from farming portions of their land. This

invasion into the private property of local property owners is against the spirit of the CWA, Congressional exemptions to the CWA, and recent U.S. Supreme Court opinions. (p. 1)

Agency Response: As indicated in the preamble, the rule narrows the scope of CWA regulatory jurisdiction. Please also see the summary responses above.

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

1.457 The proposed changes are only an attempt by federal agencies, the Environmental Protection Agency (EPA) and the Army Corps of Engineers, to expand their jurisdiction and control over dry land and non-navigable waters. These changes would drastically increase the scope of navigable waters making small, remote waters, and even portions of dry land subject to the clean water act. We believe this is a violation of the U. S. Constitution and an infringement on private property rights. (p. 1)

Agency Response: As indicated in the preamble to the final rule, the rule narrows the scope of CWA regulatory jurisdiction. Please also see the summary responses above.

Owyhee County Board of Commissioners (Doc. #12725)

1.458 Both of the above actions resulting from the proposed rule will be a taking of the private property rights of the landowner. Such infringement of State and County authority and such taking of private property rights greatly exceed the scope and intent of the CWA as passed by the Congress. (p. 3)

Agency Response: As indicated in the preamble to the final rule, the rule narrows the scope of CWA regulatory jurisdiction. Please also see the summary responses above.

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

1.459 The guidance is nothing short of a license to allow EPA and the Corp of Engineers to dictate all land-use across the nation. Much of the document assumes to takeover of State's water right authority. In one portion of the document EPA gives itself authority to make overriding determinations without a mechanism for appeal or public hearing. Outright litigation to protect property rights would be the only avenue for someone who was impacted by this administrative fiat. However, many of those impacted would have no ability seek justice in court due to the extreme expenses of defending their property rights in a series of expensively debilitating court battles. (p. 2)

Agency Response: The rule does not change the scope of, and in fact narrows, CWA regulatory jurisdiction. Other CWA processes are outside the scope of this rule. Please also see the summary responses above.

Pocahontas County, IA (Doc. #13666)

1.460 This board is very concerned that the rights of farmers across the country to continue improvements to private drainage systems on the long-cropped lands of the county not be materially impaired. These private drains are essential to the successful farming of most of the soils in the county and are essential to maintaining the tax base of the county.

These private drains and their outlet drainage district mains are not static and must be periodically repaired, replaced and improved. (p. 1)

Agency Response: See summary responses above. Improvements to private drainage systems are not within the scope of this rule.

Chaves Soil & Water Conservation District, New Mexico (Doc. #13953)

1.461 We believe this is an outright violation of the US Constitution and an intrusion on private property rights, and is nothing short of a license for these agencies to micromanage land-use. (p. 1)

Agency Response: Please see the summary responses above.

Pima Natural Resource Conservation District (Doc. #14720)

1.462 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. (p. 3)

Agency Response: Please see the summary responses above.

1.463 Private property is not a utopian concept. It is the bedrock of American productivity and the best hope for conservation of natural values. It is the basic right of our Cooperators who own the land and who wish to conserve its productive value while preserving the culture, community and traditions of the generations that passed that heritage on to them.

The right to hold private property is the most powerful tool for motivating human ingenuity to improve landscapes. Free people, vested with the security of private property and the rule of moral law, have natural incentives to enhance the value of land that belongs to them. An improving natural world order occurs because of freedom, not in the absence of freedom. And as George Washington said, "private property and freedom are inseparable." Our District Cooperators rely on that property and on the right to produce products without undue burdens exceeding rational respect for the equal rights of their neighbors. (p. 4)

Agency Response: Please see the summary responses, above.

Republican River Water Conservation District (Doc. #15621)

1.464 The proposed rule's practical effect on property rights cannot be reconciled with Section 101(g) of the Act, which states that "nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state," or the U.S. Supreme Court's decision in SWANCC. (p. 8)

Agency Response: Please see the summary responses, above.

Pike County Economic Development Corporation (Doc. #5460)

1.465 This proposed rule will give primacy to the federal government over local and State land use rules. When federal agencies have the power to grant, deny or veto a federally

enforceable permit to build, plant, fence, apply fertilizer or spray pesticide or disease control products on land managed by businesses and municipalities, that is regulatory authority over land use. If a landowner cannot build a house on, build a fence over, or manipulate a jurisdictional wetland or ephemeral drain that runs across his or her land without a federal permit, then that is regulating land use. (p. 2)

Agency Response: Please see the summary responses, above.

Landmark Legal Foundation (Doc. #15364)

1.466 The proposed rule will establish an unauthorized and nearly limitless power within the Agencies' to regulate private property. (p. 1)

Agency Response: Please see the summary responses, above.

Louisiana Landowners Association (Doc. #16490)

1.467 If adopted, the proposed Definition would give the EPA and Corps control over more privately owned land than ever before. The proposed Definition would gut individual property owner rights and effectively prevent landowners from making productive use of their own property. The scope of the proposed Definition does nothing to advance the intended congressional purpose of the Clean Water Act (the "Act") and directly undermines the individual property rights of American citizens with potentially disastrous economic consequences. (p. 1)

Agency Response: As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to the CWA's regulatory jurisdiction. Please also see the summary responses, above.

Western States Land Commissioners Association (Doc. #19453)

1.468 As set forth in our resolution, WSLCA urges the EPA to suspend and reconsider action on this rulemaking given that it contravenes Supreme Court precedent and federal statutory authority, lacks adequate scientific support and economic analysis, and prejudices the substantive and vested rights of landowners. (p. 1)

Agency Response: Please see the summary responses, above.

Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1)

1.469 For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives. (p. 1)

Agency Response: **As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to the CWA's regulatory jurisdiction. Please also see the summary responses, above.**

Home Builders Association of Michigan (Doc. #7994)

1.470 The proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives. (p. 2)

Agency Response: **As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to the CWA's regulatory jurisdiction. Please also see the summary responses, above.**

DreamTech Homes, Ltd. (Doc. #11012)

1.471 For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives. (p. 1)

Agency Response: **As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to the CWA's regulatory jurisdiction. Please also see the summary responses, above.**

Building Industry Association of Washington (Doc. #13622)

1.472 Homeowners and homebuilders will see the loss of use of their property as the EPA's proposal shifts the burden of proving or disproving whether their property is subject to federal jurisdiction onto property owners. Those unable to afford to contest the EPA's presumption simply lose their property rights. (p. 3)

Agency Response: **Please see the summary responses, above.**

Washington Cattlemen's Association (Doc. #3723)

1.473 The EPA's Proposed Rule that re-defines Waters of t he United States (WOTUS) as referenced throughout the Clean Water Act (CWA) is an egregious effort to illegally empower the EPA to seize control over private property without just compensation. This Proposed Rule represents a per se takings when it is coupled with the Interpretive Rule

(IR) that narrows the agricultural exemption from the original CWA that states in Sec 404 (f)(l): "Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material-(A)from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" and WCA insists that the EPA must rescind both the Proposed Rule and the IR completely. (p. 2)

Agency Response: **Please see the summary responses, above.**

Alameda County Cattlewomen (Doc. #8674)

1.474 Not only would the proposed rule obliterate the rights of the states under the CWA and the Constitution, it similarly tramples on the private property rights of livestock producers. The vast expansion of the CWA to cover every wet and dry depression in the United States will create a great expansion of federal regulatory oversight into land-use activity. ACCW believe this proposed rule goes so far as to cover virtually every piece of dry land across the country through one way or another, depriving landowners of the use and enjoyment of their land and severely impacting their ability to make a living off of it.

The Fifth Amendment of the U.S. Constitution provides two important rights to landowners in this context: the right of due process before life, liberty or property are taken from him and the right of just compensation for any taking of private property for public use.[135] The takings clause is of utmost importance because this proposed rule has the potential to condemn vast swaths of land across the country, preventing beneficial activity from taking place. One regulatory action such as pronouncing all prairie potholes to be "similarly situated" and found to have the requisite “significant nexus" could condemn activity in a region of more than 300,000 square miles. With farms and ranches dominating much of the landscape, our members will feel a significant direct negative impact by preventing the use of their land for farming and ranching. As demonstrated throughout these comments, the agricultural exemptions and exclusions do not protect our industry from the reach of this regulation and as such the agencies should include a discussion of how they will compensate for a taking and impairment of private property. (p. 29-30)

Agency Response: **Please see the summary responses, above.**

Michigan Farm Bureau, Lansing, Michigan (Doc. #10196)

1.475 The rule limits private property rights, which clearly goes beyond Congressional intent for the Clean Water Act, and beyond the limits set on agency jurisdiction through multiple Supreme Court decisions. (p. 12)

Agency Response: **Please see the summary responses, above.**

[135] U.S. Const. amend V, art. IV § 3 (" ... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

Missouri Soybean Association (Doc. #14986)

1.476 The expanded federal jurisdiction negatively impacts and encroaches on landowner property rights and their ability to make rightful and productive use of their land. Under the federal law, once a feature is deemed a WOTUS, it will forever legally be deemed as a WOTUS. Farm ponds, lakes, stormwater structures, BMPs, green infrastructure, constructed wetlands, and other structures that are or could be jurisdictional under WOTUS were all man-made and never designed or assumed by their owners to be legally and forever permanent. (p. 9)

Agency Response: Please see the summary responses, above, and the responses to comments related to each of these types of structures.

Oklahoma Cattlemen's Association (Doc. #15176)

1.477 The most upsetting premise of the proposed rule is the disregard for the private property rights of Oklahoma beef cattle ranchers. In early April of 2014, EPA Administrator McCarthy remarked to the attendees at the National Cattlemen's Beef Association Spring Legislative Conference attendees in a public speech, to not worry because the rule will allow us to continue to farm and ranch. Further, in a September meeting with EPA water division staff in Washington DC, OCA President Richard Gebhart asked the staff members the purpose of the rule which they replied that the rule is needed in order to better define what land the EPA has jurisdiction. Further, incredible expansion of federal oversight to include every wet and dry depression as outlined in the rule will infringe if not take the freedoms of use and enjoyment of OCA member's land.

A remark indicating that OCA members will be 'allowed to continue farming and ranching' is insulting of the very core values of cattle farmers and ranchers. Trying to further define what land the federal government needs jurisdiction goes well beyond the scope of the Clean Water Act into violating the very constitutional rights of private property. (p. 2)

Agency Response: Please see the summary responses, above.

Jensen Livestock and Land LLC (Doc. #15540)

1.478 Any imposition by the federal government that infringes on property rights based on settled state water law would constitute takings under the Fifth Amendment to the United States Constitution and would require just compensation. (p. 25)

Agency Response: Please see the summary responses, above.

Top O' The Mount Farm (Doc. #15833)

1.479 Hands off our waters and our lands! Stop taking the rights of property owners by increasing the power of the EPA and the U.S. Army Corps of Engineers. The power belongs to the people. (p. 1)

Agency Response: Please see the summary responses, above.

Mohave Livestock Association & Mohave County Farm Bureau (Doc. #15859)

1.480 The logical explanation for such action is an unconstitutional land grab, blatantly pandering to special interest. We question the need to encumber, cause emotional distress and economic losses to the users of the land in massive red tape and punitive regulation, when the EPA has the tools to regulate clean water if the water is polluted?

Rep. Vicky Hartzler (R-Mo) Stated "It is a potentially dangerous rule that could lead to infringements on farming and increase the cost of food. This policy is wrong for Missouri and wrong for America". Is anyone at the EPA listening to our Congressmen?

What is the scientific and economic justification for the proposal? If finalized, this blatant disregard for private property rights would have devastating effects on landowners and producers in this country. (p. 1)

Agency Response: Please see the preamble to the rule and the summary responses, above.

Florida Crystals Corporation (Doc. #16652)

1.481 The Proposed Rule will significantly increase the scope of CWA regulatory jurisdiction in Florida in ways which exceed the authority of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Army Corps"). This would amount to an improper assertion of federal control over land use decisions on private lands. (p. 1)

Agency Response: Please see the summary responses, above.

The 9-12 Association, Inc. (Doc. #5556)

1.482 It is my belief that the EPA is overreaching its authority by trying to redefine regulated water and water ways. I believe that the EPA needs to withdraw this proposed rule. The continued attempts to control the rights of the people through unconstitutional regulations by an agency with no constitutional Authority will only force the people to demand that congress defund the EPA. (p. 1)

Agency Response: Please see the summary responses, above.

Nebraska Water Resources Association (Doc. #13565)

1.483 Imposing “categorical” decision making under the pretense of providing clarity to a private landowner and simplifying the workload for the EPA and the Corps resonates that the Agencies are more concerned for themselves and not the responsible use of our waters or the private landowner. While the rule may very well simplify the workload of the Agencies, the proposed rule fails to provide clarity and unnecessarily restricts how a private landowner can use his or her property and, more disconcerting, results in uncertainty as to how the private landowner will be able to use his or her property. (p. 3)

Agency Response: Increased clarity and consistency does benefit the agencies administering the CWA. More importantly, increased clarity and consistency benefit the regulated community and the public. See summary responses above.

Citizen's Advisory Commission on Federal Areas, State of Alaska (Doc. #16414)

1.484 Major due process concerns arise when private property owners and sovereign states need to ask the federal government if permission is needed, regardless of whether it actually is needed, just to safely avoid significant fines and penalties without efficient or cost-effective recourse. This request can include significant expenses, including contractors, fees, studies and surveys. The proposed rule creates a scenario where private property owners must obsequiously approach the federal government, engage in a lengthy and uncertain process, shell out potentially huge sums of money, where one of the possible results of the process is that the federal government had no authority to impose these requirements. At worst, this is tantamount to an unconstitutional extraction; at best, it is bad public policy.

Asserting the need for a better way to engage with federal agency authorities under the CWA should not be taken as a failure to appreciate or care about the national interest in clean water. This is about how much states, businesses and citizens would have to pay and endure to acquire and confirm rights they already possess. This burden includes not only money but also lost opportunity for everything from conservation projects to responsible business creation and expansion to critical infrastructure development and maintenance. Regardless of the proposed rule's insistence on clarity, if adopted, every project related to lands or waters in the U.S. will become hostage to a jurisdictional question .

The cost of disproving the presumed connection would fall to the applicant. Instead of case-by case determinations establishing jurisdictional areas, which would be consistent with prevailing case law, determinations establishing non-jurisdiction will likely be the ones made case-by-case. As it stands, many project proponents in Alaska have limited construction seasons due to climate and logistics. In order to proceed with a project, many have simply conceded jurisdiction to avoid the delays and expense associated with wetlands studies and other requirements for a jurisdictional determination. Instead, applicants pay for compensatory mitigation at the outset.

The proposed rule will force more §404 applicants to pursue this option. Yet, the proposed rule fails to acknowledge or explain how indeterminate expansion of jurisdictional waters and wetlands under the proposed rule will correspondingly result in increased mitigation fees, thus undermining this readily understood cost-benefit analysis and offering no sustainable alternative. (p. 7)

Agency Response: As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to CWA regulatory jurisdiction. The rule does not effect a taking. See summary responses above.

U. S. House of Representatives (Doc. #3097)

1.485 Implementing this rule will lead to unnecessary and burdensome restrictions on landowners through the use of a clause which broadens the category of "other" waters under CWA rules. For example, if one hundred acres are owned by an individual and this property has numerous "dry-ditches" for the purpose of runoff during heavy rains, then this landowner's land could potentially fall subject to EPA and Corps regulations. The proposed rule would deem it unnecessary to always submit a report on a case-by-case

basis revealing why a particular body is in need of EPA or Corps oversight. This rule will impede on the rights of property owners. Landowners will be forced to relocate poultry houses, restricted to smaller areas to raise cattle, or be further limited in the acreage desirable for harvesting crops. These are just a few of the many issues which would come with this rule. This rule will lead to the EPA and Corps enforcing needless restrictions on landowners without the proper due process being given to the landowner. (p. 2)

Agency Response: As indicated in the preamble to the final rule, the rule narrows the scope of waters subject to CWA regulatory jurisdiction. See also the summary responses, above.

United States Senate (Doc. #3536)

1.486 Indeed, the proposed rule represents the agency's latest land grab and the most serious threat to Americans' property rights. The proposal's sweeping coverage to virtually any wet area would subject countless private and public lands to EPA's permitting requirements (p. 2)

Agency Response: See the summary responses, above.

Congress of the United States, Senate Committee on Environment and Public Works et al. (Doc. #16564)

1.487 Despite the constitutional and statutory limits which bind EPA and the Corps, the proposed "waters of the United States" rule provides essentially no limit to federal regulatory authority under the Clean Water Act. As such, the proposed rule presents a grave threat to Americans' property rights, and its finalization will force landowners throughout the country to live with the unending prospect that their homes, farms, or communities could be subject to ruinous Clean Water Act jurisdictional determinations and litigation. (p. 1)

Agency Response: See the summary responses, above.

United States Senator (Doc. #18022)

1.488 The proposed rule is a violation of my property rights and is blatantly illegal based on interpretations by the Supreme Court. Congress gave state governments a seat at the table when it crafted the Clean Water Act. That federalist system has been completely obliterated by the agencies proposed definition. (p. 2)

Agency Response: See the summary responses, above.

The Property Which Water Occupies (Doc. #8610)

1.489 The proposed Rules continue to claim broad discretion over all space that water may occupy on its path toward a navigable waterway. The Rules assert real property upon which precipitation may fall is suddenly 'jurisdictional' under the CWA. This, rather than accepting the clearly expressed will of congress to limit the scope of the CWA to protecting "navigable waters". The Rules imply the CWA holds absolute domain over those lands which water may sometimes flow, trickle, or make-damp, and that the presence of water (rain, snow, dew, humidity) somehow redefines the boundary between public property and private property. Congress did not delegate the authority to proclaim

private property now public based upon the presence of water molecules. In violation of the Administrative Procedures Act the Rules assert a federal agencies take action "in excess of statutory jurisdiction, authority, or limitations."[136] Promulgation of these Rules would also violate the due process rights owed those citizens whose property is adversely effected by such a sweeping assertions of jurisdiction which directly challenges property title[137].

Egregiously, the Rules include a claim to property title through a misinterpretation of the laws defining Navigable Waters. Id at 22200. The Rules fail to clarify the limits of CWA jurisdiction over private lands, which form the path for trickling waters or draining precipitation. The only basis to invoke CWA jurisdiction upstream of navigable waters is when necessary to protect the quality of the downstream navigable/public water. The rational outlined by the Rules disregards any connection to the protection of navigable waters by suggesting absolute regulatory control of all land (private or public) over which rain falls and drains. Under common law, the space occupied by water provides no basis to claim domain over real property[138], yet the Rules base jurisdiction on the intermittent presence of water molecules. The Rules circumvent the congressionally imposed limits on CWA jurisdiction, which is based upon protecting the quality of downstream navigable waters.

Courts have found CWA jurisdiction could extend beyond the boundary of navigable waters, but only when necessary to protect the quality of downstream-navigable waters; a right of any downstream riparian owner including the government. Jurisdictional authority cannot been premised on some ill-conceived property interest in the space through which flowing water temporarily occupies, which is the premise of the Rules. These new Rules are solely focused on establishing where water exists which may end up in navigable waters , then claiming complete domain over this space occupied by the water regardless of any real property ownership or the associated property rights. The Rules fail to recognize that beyond navigable waters the scope of CWA jurisdiction is limited to protecting the quality of downstream navigable waters. This more limited scope of CWA jurisdiction over private land is ignored within the proposed Rules and without legal basis presumes domain over private property. The Rules presume any space which drains water is property of the United States, a notion repugnant to 200 years of case law defaming real property and those associated property rights. All property over which rain falls or drains cannot be presumed under the domain of a Federal authority based upon the Clean Waters Act.

The Rules are in excess of authority on two specific issues. First, the Rules include a title claim against real property; this must be removed from the proposed Rules. Federal

[136] U.S.C. §706(2)c.

[137] The Fifth Amendment protects private property by guaranteeing a fair and timely judicial review of those property rights. Snyder v. Massachusetts, Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); 291 U.S. 97, 105 (1934) (due process represents "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

[138] It is the ownership of land which dictates control over the space occupied by water. This subject only to the riparian right of downstream owners to receive these waters without significant diminution. *Blackstone Commentaries* ,Vol II pg.18. The Rules disregard this rights of landowners, and transfers them to a Federal Agency that will 'decide ' if a property right can continue to exercise that right.

agencies do not have the authority to transfer real property title through Rulemaking without just compensation or here in excess of statutory authority. Second, the Rules fail to recognize the limited scope of CWA jurisdiction when applied to waters which flow or trickle over private lands. Interference with property rights (the human environment) cannot be knowingly disregarded under NEPA, and expanding interpretation of CWA jurisdiction beyond navigable/public waters as outline in the rules exceeds statutory authority. (p. 1-3)

Agency Response: The rule does not purport to classify all land over which rain falls or drains as "waters of the US." The rule specifies various defined categories of waters and wetlands as "waters of the US," based on the text of the CWA, Supreme Court rulings, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the CWA over the past four decades. Please also see the summary responses, above.

1.490 At common law, the ownership of land includes the space occupied by the air and water above it.[139] The proposed new Rules turn this common law maximum on its' head, ignoring vested rights in real property, by exerting ubiquitous jurisdiction based upon the presence water. Such a claim against property title has no basis in the laws of this country, and amounts to a regulatory taking. Rain falls indiscriminately across this entire country and drains toward lower elevations. It all eventually flows into Oceans which are in public ownership. Once sufficient flows gathers to form a navigable river, the land below the water became public property at the time of statehood -state-owned subject only to the Federal authority to regulate commerce.[140] and to protect downstream water quality. The distinction between state ownership of navigable waterways and private title to all non-navigable waterways, is recognized by the judiciary.[141] Title to those lands below *navigable waters* were conveyed to the State upon entering the Union. 43 USC § 1311(a)(I); while, all other waters occupying the space over land has no effect over the property ownership . 43 USC § 1315. Therefore, by redefining *navigable waters* beyond what has been traditionally recognized as *navigable* under the laws of this country, the Rules include a property claim established in excess of statutory authority.

In 1889, The Army Corps of Engineers were assigned jurisdiction over 'navigable waters ' defined now by 200 years of case law. 33 CFR § 329. But even the ACOE recognize that "navigability" is ultimately "dependent on judicial interpretation and cannot be made

[139] *Blackstone 's Commentaries*. Vol II p.18. see also Hale, *De Jure. Maris*. Chap. I, "*Aqua cedit solo*".

[140] "It was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed oafs they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations" St. Clair County v. Lovingston, 23 Wall. 46, 68, 23 L. ed. 59, 63;Bamey v. Keokuk, 94 U.S. 324,338,24 S. L. ed. 224, 228;IIlinois C. R. Co. Illinois, 146 U.S. 387, 434-437,36 L. ed. 1018, 1035-1037, 13 Sup:CI. Rep. II 0;Shively v. Bowlby, 152 U.S. 1,48-50, 58, 38 L. ed. 331,349,350, 352, 14 Sup. CI. Rep. 548; McGilvra v. Ross, 215 U.S. 70. See also PPL Montana v. Montana, 132 S. CI. 1215,1 227 (2013)

[141] Scott v. Lattig, 227 U.S. 229, 243, citing Hardin v.Shedd.190 U.S. 508. 519

conclusively by administrative agencies." id § 329.3.[142] The Rules include no such caveat protecting the due process rights of property owners when defining navigable waters.

An additional definition of 'navigability' would be redundant and completely unnecessary if the proposed definition matched existing law. Here the proposed Rules contradict navigability case law, and attempt to expand which waters classify as "navigable", which is synonymous with 'state owned'. Therefore, the proposed Rules claim, or at least cloud, vested property title by redefining the boundary of state-owned property. (p. 3-4)

Agency Response: **Please see the summary responses, above.**

1.2. SUPPLEMENTAL GENERAL COMMENTS

Agency Summary Response

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction.

The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos). The Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact.

Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.

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

[142] See also 33 CFR§ 329.14, ("conclusive determinations of navigability can be made only by federal Courts").

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, 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.

This rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty regarding the definition of Waters of the United States. The summary responses above provide additional information.

Specific Comments

Eric W. Nagle (Doc. #0009.1)

1.491 One additional source of federal authority under the Constitution is the Property Clause, which states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Constitution, Art. IV, § 3, Cl. 2. This power is "without limitation." *United States v. California*, 332 U.S. 19, 27 (1947). The Supreme Court has repeatedly relied on the Property Clause as authority for federal jurisdiction over activities that could affect federal lands, even where such activities occur on non-federal lands. For example, in *Kleppe v. New Mexico,* 426 U.S. 529, 538 (1976), the Supreme Court upheld the constitutionality of the Wild Free-Roaming Horses and Burros Act, which protects wild horses and burros even when they are on non-federal land, because the "power granted by the Property Clause is broad enough to reach beyond territorial limits." In *Camfield v. United States*, 167 U.S. 260 (1897), the Supreme Court held that the United States had authority under the Property Clause to prohibit construction of fences on private lands, where the fences would have the effect of enclosing public lands.

Similarly, in *United States v. Alford*, 274 U.S. 264, 267 (1927), the Supreme Court held that "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned lands." The case involved a federal law that prohibited the building of fires "in or near" any forest on the public domain. The Court reasoned that the purpose of the law was to prevent forest fires, and that "[t]he danger depends upon the nearness of the fire and not upon the ownership of the land where it is built."

Nothing in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") limits applicability of the Property Clause, because that question was not before the Court. The waters at issue in SWANCC had no nexus with federal property, and the "migratory bird rule" at issue rested exclusively on the Commerce Clause, not the Property Clause. The Court held that the "migratory bird rule" went beyond what Congress had authorized because the Court assumed that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." Id. at 173-74. While the "bird rule" may have stretched the "interstate commerce" nexus beyond reasonable limits of the Commerce Clause, there can be no doubt that giving federal protection to waters on or adjacent to federal lands is comfortably within established Property Clause authority. Moreover, recognizing Property Clause authority over waters on federal lands does not implicate the sort of

"state powers" concerns that troubled the SWANCC Court, since federal primacy over such lands has always been recognized. Cf. Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(8) (congressional declaration of policy that the public lands be managed to protect water resources).

This is not merely an abstract issue. Approximately one-third of the nation's land is owned by the federal government. All waters on those lands fall within Property Clause jurisdiction, regardless of whether they are "isolated" or whether they are used by migratory birds or interstate travelers. Moreover, all waters the degradation of which could affect federal lands also fall within Property Clause jurisdiction. For example, where filling a wetland on private property would increase the likelihood of flooding on nearby federal property, that wetland is "waters of the United States," regardless of whether it meets any Commerce Clause-based criteria. Like the current definition, EPA's and the Corps' proposed definition of "waters of the United States" entirely ignores this authority, and hence excludes from CWA's protection a significant portion of the waters that Congress intended the Act to protect.

Consequently, EPA and the Corps should amend their definition of waters of the United States" to include:

(1) All waters that flow across or touch upon land or other property owned by the United States; and

(2) All waters in which the United States holds a water right, including rights held in trust for Indian tribes. (p. 2 – 3)

Agency Response: **The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos).**

The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate.

This rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty. See the summary responses, above.

John Ford Ranch (Doc. #9512)

1.492 On April 21, 2014 your agencies (EPA and ACE) issued a draft rule concerning Waters of the United States (WOTUS) dealing with the Clean Water Act (CWA), which would empower the field staff of your agencies with the authority to make jurisdictional

determinations on wetlands with no oversight in the absence of a judicial challenge. The proposed definition of "jurisdictional wetlands" provides your staff with the discretion to make such determinations without empirical evidence in support. This is an attempt to make an end run around the two Supreme Court decisions which limited the EPA and ACE's authority under the CWA. You are attempting to circumvent the legislative process of rulemaking which is in place in America. Congress never intended to regulate all waters: The proposed rule would allow the EPA and the ACE to regulate waters now considered entirely under state jurisdiction. This unprecedented power grab would allow the EPA and ACE to trump states' rights and wipe out the authority of state and local governments to make local land and water use decisions. The Constitution prohibits such broad federal regulations, and Congress stated in the original Act that it would defer to the States the control of local land and water use. Your agencies are running yourselves and are accountable to no one. This is entirely too much power to give to the field staff of either of your agencies. (p. 1)

Agency Response: **The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos). Judicial review of jurisdictional determinations is outside the scope of this rule.**

The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate.

This rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty. See the summary responses, above.

Spring-Green Lawn Care Corp. (Doc. #10544)

1.493 I oppose the EPA and Army Corps of Engineers taking way our property rights through the proposed rule regarding Definition of Waters of U. S. Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880. The definition of "navigable water" is beyond the limits set by law and must be stopped. (p. 1)

Agency Response: **The rule does not constitute a taking of private property rights. The rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the U.S." consistent with the CWA, U.S. Supreme Court precedent, and science. See summary responses, above.**

J. Courtwright (Doc. #11652)

1.494 I support the clarification of the term "significant nexus", which has little scientific meaning alone, and the addition of a definition of "tributary". Bed, bank, and an ordinary high water mark are features that take years to develop and should be chemically, physically, and biologically meaningful geomorphic attributes that can be determined in the field to define tributaries; however, it would be useful to additionally provide definitions of bed and bank, which can be particularly difficult to determine in the field in intermittent and ephemeral channels (for an example of bed and bank definitions see page 3 of PACFISH/INFISH Biological Opinion Effectiveness Monitoring Program (PIBO) protocol http://www.fs.fed.us/biology/resources/pubs/feu/pibo/pibo_stream_sampling_protocol_2012.pdf). (p. 1)

Agency Response: **See summary responses, above.**

Weld County (Doc. #12343)

1.495 In both the Rapanos and *Solid Waste* decisions, the Supreme Court cautioned against the federal imposition of rules on an inherently local issue. The current balance that is achieved by allowing local governments, industry, agriculture, and citizens to work with local conditions is threatened to be washed away by a flood of new and vague definitions. Weld County seeks clarification as to the application of this "one-size-fits-all" rule to the infrastructure examples provided. (p. 20)

Agency Response: **The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos).**

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. See summary responses, above.

M. Seelinger (Doc. #12879)

1.496 The White House Office of Management and Budget (OMB) report referenced in the proposed rule states that there is a minimal expansion of Federal jurisdiction over what is currently called "Waters of the US". The report estimates that the expansion is only about 3%. While this may seem small on a relative scale it represents a land area roughly the size of the State of Arizona. This is in fact a rather large expansion of the Federal Governments reach into private land ownership. I am very concerned with the concept that the Executive Branch can expand the Federal Governments land holdings without the consent of the other two branches of government and the people. (p. 2)

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. See summary responses, above.

Todd Wilkinson (Doc. #13443)

1.497 Despite assurances from EPA agency personal at various meetings it is clear that the proposed rule would subject farmers and ranchers activity to new federal requirement under the Clean Water Act. As proposed wet areas or low lying areas would for the first time be defined as jurisdictional. The rule sues vague and undefined terms in the proposal which make it impossible for livestock producers to understand or comprehend what the rules would be or how they would be applied. If this was intended to clarify the opposite result is occurring. Terms such as neighboring, floodplain, significant nexus are defined by the definitions are so vague as to allow virtually any interpretation of their limits. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. See summary responses above.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. 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. The final rule 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.

Tamara Choat (Doc. #13701)

1.498 If the proposed rule cannot be dropped, the following concerns and recommendations should be addressed.

(…) 6. The proposed rule usurps states' rights to manage waters and land use activity. This proposed rule is an overreach that makes all waters federal, violating the Commerce Clause of the Constitution and the plain language of the Clean Water Act. (p. 1)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, 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. See summary responses, above.

M. Smith (Doc. #14022)

1.499 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: The agencies respectfully disagree that the rule will significantly increase litigation. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The rule will clarifies and simplifies implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. See summary responses above.

Plumas County Board of Supervisors (Doc. #14071)

1.500 The rule was developed without proper engagement of local and state governmental partners.

The CWA identifies state and local governments as partners in enforcing and implementing the Act, yet your agencies have proposed a rule that imposes all costs and responsibilities on these other partners. In Congressional testimony, the U.S. EPA representatives - incredibly - have been unable to name any public interests that your agencies engaged during development of the rule, which not only violates the spirit of the CWA, but also underscores the inadequate analysis of local impacts that has accompanied the proposal of this rule. Plumas County does not understand your agencies' unwillingness to fully engage local and state governments in a meaningful process to draft a new rule. (p. 1 – 2)

Agency Response: In keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials and solicited their comments on the proposed action and on the development of the rule. Specifically, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations 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. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. See also summary essays, above.

Patti Buck (Doc. #14825)

1.501 First, the definition as proposed is illegal based on the Commerce Clause of the U.S. Constitution, the framework and goals of the CWA, Congressional intent and Supreme Court rulings. Each places a limit on federal jurisdiction over the nation's waters. Currently, your proposed rule has practically no limit whatsoever. (p. 1)

Agency Response: This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. See summary essays, above.

Erika Brotzman (Doc. #15010)

1.502 *A. The "significant nexus" test strengthens the constitutionality of the proposed rule.*

Downstream effects affect interstate commerce. Non-navigable water that discharges pollutants, in aggregate or singularly, can cause adverse effects on traditional "navigable" waters. The impact is measured by the concentration of pollutants. This measure of pollution establishes "significant nexus." Water pollution affects commerce. A community is unlikely to develop around polluted waters or worse an already existing community is affected by highly polluted waters. In 1969, the Cuyahoga River caught on fire as a result of water pollution and affected not just local and downstream communities, but added fuel to fire of the environmental movement; all of which affects interstate commerce. Water does not stop flowing at a state boundary, nor does water pollution. Tributaries, intermittent or ephemeral, can have an effect on interstate commerce. Accordingly, the constitutional power provided under the Commerce Clause allows the federal government to regulate that which affects interstate commerce. The proposed rule's definition of "tributaries" applied with the "significant nexus" test is constitutional under the Commerce Clause.

In *Rapanos*, the plurality holds that "the waters of the United States" only apply to "relatively permanent, standing or continuously flowing bodies of water" and not to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[143] Justice Kennedy argued that the Court's reading of the CWA "is inconsistent with its text, structure, and purpose."[144] Kennedy maintains that the plurality's requirement to establish jurisdiction, based on permanency of water, "makes little practical sense in a statute concerned with downstream water quality."[145] First, the definitions in the CWA do not state or indicate that the "ditches, channels, etc" are determined by consistent or lack therefore of regularly flowing water. To assert that jurisdiction should be based on relative permanency is inadequate. Kennedy argues that Congress did not intend for "waters" to apply only to relatively

[143] *Rapanos v. United States*, 547 U.S. 715, 739, 126 S. Ct. 2208, 2225, 165 L. Ed. 2d 159 (2006).
[144] Id., at 753.
[145] Id., at 769.

permanent water.[146] Kennedy references large bodies of water, such as the LA Aqueduct, that is dry most of the year, yet when flowing has a significant nexus and impact on navigable waters. Second, the Connectivity Report shows that intermittent or ephemeral waters present a hydrologic connection and thus affect the purpose of the CWA. As shown in the Connectivity Report, the hydrologic connection does not turn on the relative permanency of water, but rather the chemical, physical and, biological, effect resulting from a "significant nexus."

The plurality suggests that because the CWA distinguishes between "point sources" and "navigable waters"[147] this implies that these terms are "separate and distinct" categories and thereby mutually exclusive.[148] Kennedy argues that this construction of the term "point-source" is erred on two accounts: (1) a point-source is not necessarily only "watercourses through which intermittent waters typically flow," and (2) more pertinently to this point, point sources and navigable waters are not necessarily "separate and distinct categories."[149] The plurality's opinion does not account for the fact that "point sources" can and often affect "navigable waters." Furthermore, the Connectivity Report does not support the contention that "point sources" must be excluded from the definition of the "waters of the United States." "Point sources" identify certain landscape features; but the statute does not indicate that "point sources" do not impact "navigable waters." This hydrologic connection is what the "significant nexus" test establishes. Holding that these terms, without clear language in the statute indicating otherwise, are impliedly separate is an artificial distinction that the hydrologic connection does not follow. The "significant nexus" test establishes the hydrologic connection to "navigable" waters and the Corps' jurisdiction over such waters and is constitutional under the powers granted to Congress. (p. 5 – 6)

<u>Agency Response:</u> We agree this rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty about what constitutes "Waters of the U.S." See summary essays, above.

1.503 *D. The Proposed Rule maintains a balance between state and federal regulation.*

The regulatory scheme of the CWA establishes a system of cooperative federalism. Thirty-three states and the District of Columbia support a comprehensive federal regulatory program.[150] The 1977 Amendment for §404 includes section 101(g) termed the "Wallop Amendment." Section 101(g) confirms that the CWA is to address water quality, and not to supersede state's authority to allocate water or manage water rights. Senator Wallop stated "[t]his 'state's jurisdiction' amendment reaffirms that it is the policy of congress that this act is to be used for water quality purposes."[151] The provisions reaffirm

[146] Id., at 770 (Congress' use of "waters" instead of "water," … does not necessarily carry the connotation of "relatively permanent, standing or flowing bodies of water,") (Kennedy, J., concurring).
[147] 33 U.S.C. § 1362(14).
[148] *Rapanos*, at 735-36.
[149] Id., at 771.
[150] Squillace, at 39. (referencing the Brief for New York et al. as Amici Curiae Supporting Respondents at 15, *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (No. 04-1034)).
[151] BARTON H. THOMPSON, JR., JOHN D. LESHY, AND ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES, (Thompson Reuters, 5th ed. 2013) (citing Michael Blumm, *The Clean Water Act's Section*

states' authority to maintain control over issues such as water rights and allocation, but not over water pollution.

Under CWA states are authorized by the EPA to administer permitting programs of sections 402 and 404. Section 402 applies to the NPDES permitting programs. Section 404, at issue in the proposed rule, addresses the fact that waters not found under Corps' jurisdiction, may remain unregulated. Forty-six states and the Virgin Islands are authorized to administer the NPDES program under section § 402, while two states administer the § 404 dredge and fill permitting program. Some states struggle with implementing the permitting programs. Of the two states that manage the § 404 program, Michigan continues to experience litigation regarding their program. Other states have experienced de-delegation petitions by concerned citizens.[152] Regardless, waters identified in § 404, if not regulated by a state-authorized permitting program or under the Corps' jurisdiction may be absent any regulation entirely. (p. 8)

Agency Response: **See summary essays, above.The Agencies agree the rule is consistent with Congressional policy not to supersede, abrogate, or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction, and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.**

The Heritage Foundation (Doc. #15055)

1.504 The Proposed Rule is Overbroad and Vague

The agencies claim they are seeking to provide clarity to the CWA. Unfortunately, the proposed rule creates more confusion. Justice Kennedy's significant nexus test, which plays a central role in the rule, is already confusing and lacks clarity in terms of practical application. The agencies though just expand upon his significant nexus test and then create additional overbroad and vague guidance.

Regulated entities have little objective guidance. Almost every aspect of the proposed rule applies some type of subjective element, which makes compliance almost impossible. This is exacerbated when regional offices almost assuredly will have different interpretations of subjective standards.

When dealing with regulatory compliance, there will not always be clear answers to specific factual situations-agencies are unable to predict every scenario. However, agencies can develop reasonably clear guidance that at least allows regulated entities to have some predictability and clarity regarding compliance. The proposed rule will be almost impossible to comply with because the guidance is muddled, and in many ways

404 Permit Program Enters its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L.Q. 409, 410, 466-68 (1980)).

[152] See Laura Murphy, *Story of A De-Delegation Petition: Nuts, Bolts, & Happy Endings in Vermont*, 15 Vt. J. Envtl. L. 565, 566 (2014) (referencing approximately forty-one NPDES de-delegation petitions have been filed with the EPA for Vermont's de-delegation since 1989) (citing U.S. EPA, STATE NPDES PROGRAM WITHDRAWAL PETITIONS, http:// water.epa.gov/polwaste/npdes/basics/withdrawal.cfm (last updated Apr. 5, 2013)).

appears to be subject to the whim of the agencies.

For example, the rule explains, "Application of the terms 'riparian area,' 'floodplain,' and 'hydrologic connection' would be based in part on best professional judgment and experience applied to the definitions contained in this rule."[153] This discretion may help the agency by not having to commit to any clear guidance, but it makes compliance very difficult.

The proposed rule provides little in the way of express exceptions to the coverage of the CWA; the agencies were even unwilling to expressly exclude "puddles" from CWA jurisdiction. According to the agencies "This is not because puddles are considered jurisdictional, it is because "puddles" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood."[154] Yet the rule addresses and even sometimes defines other imprecise terns such as "floodplains" and "non- wetland swale."

The agencies though did appear to have a change of heart when it came to excluding puddles, but not in the rule itself. In a question and answer guidance document, the agencies explain "Wet areas in your back yard, like puddles on your lawn that hold water temporarily following rainfall or snowmelt, are not subject to the CWA."[155] This guidance could be gone tomorrow, offering little comfort to landowners who need such a clarification in the rule itself.

The underlying problem is the rule tries to grab as much power as possible for the agencies. Instead of actually providing clarity through bright line types of rules and a long list of clear exclusions, the agencies have developed a proposed rule that ensures that almost every type of water could be covered under the CWA.

To comply, regulated entities have to be sure to analyze a potentially covered water against several definitions. For example, the water could be a "tributary." If it does not fall under "tributary," it might be an "adjacent water." Then, there is the agencies' safety net: the waters could he covered under "other waters." One way or another, the agencies will likely have a way to regulate the water.

The regulations are so broad and so unclear that any party that could reasonably be regulated by the agencies will be hesitant to take ally action if they do not want to trigger CWA requirements. This gives the regulations even greater scope; they would not only cover more waters through the language of the rule, but also through the chilling effect they will have on potential regulated entities.

[153] Federal Register Vol. 79, No. 76 (April 21, 2014), p. 22208.
[154] Federal Register; Vol. 79, No. 76 (April 21, 2014), p. 22218.
[155] "Questions and Answers – Waters of the U.S. proposal," Environmental protection Agency and U.S. Army Corps of Engineers, September 8, 2014, http://www2.epa.gov/sites/production/files/2-14-09/documents/q_a_wotus.pdf (accessed November 14,2014).

Inevitably, property owners will violate the regulations even though no reasonable person could have understood there to be a problem under the law. This is what happens when regulations are subjective, unclear, overbroad, vague, and have few bright line rules. (p. 6 – 7)

Agency Response: **See summary essays above.**

Also, see the Legal Compendium Response to comments.

1.505 **The Impact of the Proposed Rule**

The proposed rule is going to impose a wide range of costs to the public, such as undermining property rights, imposing greater permitting costs, and discouraging start-up of new ventures.

Property Rights. The proposed rule would make it more difficult for some individuals to use their property as they deem fit. The overreach is so expansive that many property owners may find that their property is far less valuable if these regulations are implemented. The scope of the rule may surprise property owners who could never imagine the rule would be applicable to their property.

The Role of States. The proposed rule would drastically minimize the role that states play in the CWA. At the start of the CWA it states, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…"[156] Any CWA regulations should be consistent with this important goal of having states play a key role under the CWA, not a marginal one, when it comes to clean water. As the agencies try to expand their power beyond even Justice Kennedy's concurrence, they should recognize that this federalism principle limits how much power they can properly secure. It is very possible that the proposed rule will not merely affect water regulation but also traditional state land use regulations, which would create significant federalism problems. (p. 7 – 8)

Agency Response: **See summary essays above.**

SD1 (Doc. #15139)

1.506 The statement that "[t]he agencies propose ... no change to the regulatory status of water transfers" appears multiple times in the Preamble.[157] EPA's Water Transfers Rule excludes any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA.[158] The Water Transfers Rule does not define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change in the

[156] Federal Water Pollution Control Act, 33 U.S.C §1251 (b).
[157] 79 Fed. Reg. at 22189; see also id. at 22193, 22199 and 22217.
[158] 40 C.F.R. § 122.3(i) ("Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use .... ").

proposed Rule.[159] In addition to the statements in the preamble, the final rule should state expressly in the text of the Code of Federal Regulations that it does not change the regulatory status of water transfers. (p. 4)

Agency Response: This final rule does not change EPA's regulation of water transfers and that regulation is outside the scope of this rule. See essay 12.3.

William Schock (Doc. #15394)

1.507 The EPA has asked for suggestions that would help them improve their clarification of this current WOTUS rule. This could easily be done by stating the obvious and the following is an example of how this could be done.

The term "Waters of the US" means all commercially navigable rivers, streams and lakes that can support commercial cargo carrying ships (at least 20 feet long and at least 8 feet wide with a minimum draft of 2 feet for at least a distance of 20 miles for at least 300 days per year and carry their cargo across a state line, along the border of an adjacent state, into a territorial sea or into a foreign country) or significant tributaries that supply continuous water to the navigable stream of at least one acre foot per day at least 300 days per year and wetlands that are significantly connected to the navigable stream or jurisdictional tributary or lake that maintain a continuously wet surface area of 100 square yards for at least 300 days per year. All other surface waters remain the jurisdiction of the states. On those state waters, the EPA and USCOE shall encourage clean water management practices by coordinating with local governments.

By their own choosing, any state could pass resolutions by its state government that would expand the EPA's jurisdiction over additional state waters but could also rescind this jurisdiction at any time by the same process. The EPA may also encourage the states to improve water quality of state controlled water by the use of monitory grants and through technical assistance.

This approach is quantifiable and verifiable while clearly ceding authority over much state property to the EPA and USCOE. The current draft rule accomplishes none of this but instead confuses and blurs the lines between the federal and state authority over what has been heretofore the exclusive domain of the states according to the constitution. The imprecise language in the draft rule will further lead to ruinous litigation for both the federal government and the state governments notwithstanding the individuals who will bear the brunt of the oppressive penalties exacted upon them by the federal court system. (p. 1 – 2)

Agency Response: See summary responses, above.

The agencies disagree that this rule will significantly increase litigation. This rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty.

[159] See 40 C.F.R. § 122.2; 73 Fed. Reg. 33,697, at 33,699, note 2 (June 13, 2008).

Vulcan Materials Company (Doc. #16566)

1.508 The definition of tributary as proposed, specifically the application of "bed and bank and ordinary high water mark" criteria, combined with the inclusion of ephemeral waters, extends CWA jurisdiction by requiring waters to be traced upstream beyond the range of traditional navigable waters (TNW) and historic jurisdiction determinations. These areas are normally reserved for state and local governments to determine the extent of regulatory coverage. (p. 1)

Agency Response: See summary responses, above, as well as discussions of "tributary" in the preamble, Technical Support Document, and compendium 8.

San Luis & Delta-Mendota Water Authority (Doc. #15645)

1.509 The statement that "The agencies propose . . . no change to the regulatory status of water transfers" appears multiple times in the Preamble. EPA's Water Transfers Rule excludes any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA. The Water Transfers Rule does not define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change in the proposed rule. In addition to the statements in the preamble, the final rule should expressly state in the text of the Code of Federal Regulations that it does not change the regulatory status of water transfers. (p. 4)

Agency Response: This final rule does not change EPA's regulation of water transfers and that rule is outside the scope of this rulemaking. See essay 12.3.

B. Price (Doc. #16381)

1.510 This is to request that a comprehensive study of (a) Pollution of, and (h) Nutrient Loading of Waters of the US using the best available Science including DNA tracing with quantification and identification of resulting harm to humans or the environment, be completed and presented to Congress before any Wetlands Rules, Storm Water Rules or Water Quality Rules are implemented or further proposed. (p. 2)

Agency Response: See summary responses, above.

L. L. Hughes (Doc. #16687)

1.511 Furthermore, the Yadkin County Board of Commissioners supports House Rule 5078, the Waters of the United States Regulatory Overreach Protection Act of 2014, which has successfully passed in the United States House of Representatives. (p. 2)

Agency Response: See summary responses, above.

Cook County, Minnesota, Board of Commissioners (Doc. #17004)

1.512 (…) WHEREAS, many of the waters and lands covered by the proposed rule are entirely outside of Congress' authority under the Commerce Clause, such as non-navigable intrastate waters that lack any significant nexus to a core water; and

WHEREAS, when constraining edicts that come, not through law, but through an executive agency that issues a rule constraining American citizens—restricting how citizens can use their land—it is an attempt to exercise binding legislative power not through an act of Congress, but through an administrative edict; and

WHEREAS, the United States Constitution expressly bars the delegation of legislative power, the proposed rule is in direct violation of the Constitution. The Constitution's very first substantive words are, "All legislative Powers herein granted shall be vested in a Congress of the United States." Administrative adjudication evades almost all of the procedural rights guaranteed under the Constitution. Administrative adjudication, hereby, becomes an open avenue for evading the Bill of Rights; and

WHEREAS, the EPA and Army Corp's Clean Water Act regulations would allow these agencies to regulate waters now considered entirely under state jurisdiction; and

WHEREAS, the Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; and

WHEREAS, the states, appropriately, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), should handle the majority of issues most relevant to individuals within their respective jurisdictions; and

WHEREAS, federal agencies are established by governments to provide specific services. The personnel of federal agencies are not elected officials, but rather civil servants. Agencies implement the actions required by laws (statutes) enacted by Congress, and may not take action that goes beyond their statutory authority or that violates the Constitution; and

WHEREAS, the proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified—as these are nonnavigable waters—clearly this expanded role is not the role the EPA and Corps were created to accomplish; and

WHEREAS, expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property; and

WHEREAS, changes to the "Waters of the U.S." definition may have far-reaching effects and unintended consequences on a number of state and local programs with the potential to create significant unfunded mandates and the power to preempt state and local authority; and

WHEREAS, it is believed no matter what definition could come about from the proposed rule, "waters of the United States" means all waters, including waters over which the EPA and Corps have previously not had jurisdictional authority, e.g. waters of the States and private lands. This is not the intent of the CWA, although it apparently is the intent of the EPA and Corps; and

WHEREAS, there is not doubt that with the plurality decision in the SWANCC and Rapanos cases, the Supreme Court has already provided a clear definition of "waters of the United States", the EPA and Corps unwillingness to accept the (Rapanos) Supreme

Court decision, are attempting to implement their own definition of the "waters of the United States" through self-determined expansion beyond their statutory authority, which has led to much confusion and uncertainty for the American public; and

WHEREAS, the extraordinary expansion of the EPA and Corps' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to seizure of that property without compensation, i.e. a regulatory taking; and

WHEREAS, the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interest, this is not true when the regulations prevent a property owner from making "economically viable use of their land." *Agins v City of Tiburon*, 447 U.S. 255 (1980).

In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property. This type of violation of the Fifth Amendment would not come about except that the EPA and Corps propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use; and (…) (p. 1 – 7)

Agency Response: **See summary responses, above.**

K. G. Oertel (Doc. #17317)

1.513 The proposed rule claims that it will "enhance protection for the nations' public health and aquatic resources, increase CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States' protected under the Act." However, it is apparent that this proposed rule will only work to expand the jurisdiction of the EPA and Army Corps of Engineers beyond what Congress intended under the CWA and will create overlap and confusion among state agencies. The proposed rule was assigned Docket No. EPA-HQ-OW-2011-0880.

The proposed regulations will expand the definition of "waters of the United States" in a manner which goes too far by expanding the EPA and Army Corps of Engineers' jurisdiction. By allowing the agencies to decide on a "case-specific basis" which waters will have a significant nexus to "an (a)(1) through (a)(3) water," will give the agencies unbridled and unchecked power. There is no language under the proposed rule which provides any guidance to state agencies or regulated industries as to how this "case-specific basis" will be determined. This language is extremely ambiguous and leaves the definition of "waters of the United States" open to ad hoc interpretations by the EPA and Army Corps. [...]

This proposed rule will give to the agencies which enforce it untethered and unbridled power to assert their jurisdiction over intrastate isolated waters, causing confusion and overlap with the state agencies which regulate and enforce state water regulations. This is in direct contradiction of the language of 33 U.S.C.A. § 1251(b) of the Clean Water

Act, in which Congress explicitly affirmed that the states were the best and most appropriate entities to regulate the waters of the United States. This proposed rule will indeed usurp the states' power to control and regulate their own isolated waters. The apparent intention of this rule is to create authority over all jurisdictional questions of what constitutes waters of the United States and place it in the hands of the Corps of Engineers and EPA. Agency rules should achieve clarity, not confusion. This rule will create a chaotic regulatory regime. It will promote litigation and result in excessive agency involvement in many aspects of normal human activity. (p. 1)

Agency Response: **See summary responses, above.**

W. Stevens (Doc. #17663)

1.514 Though statements on the website and news releases from EPA reiterate that the new proposed amendments do not expand geographic jurisdiction of EPA/Corps, it clearly does. Location by location, the definition and the rule require a reach beyond the current rule. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. See summary responses, above.**

1.515 The proposed revision of the CWA regarding the definition of Waters of the US expands federal jurisdiction and is unnecessary and duplicative in Texas. It complicates present and future projects and creates potential conflicts between State and Federal regulation. (p. 2)

Agency Response: **See summary responses, above.**

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, 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.

John Whittingham (Doc. #18426)

1.516 1) The proposed rule ignores the specific intent of congress by drastically changing the requirement that "navigable waters" are under the authority of the USACOE.

2) Our personal property, which contains a man-made irrigation ditch and an ephemeral channel, should not be regulated by a federal authority.

3) The proposed rule fails to demonstrate a scientific basis for why physically disconnected landscape features would affect wetlands or the waters of the US.

4) Most western valleys are formed on historic or modern floodplains, but entire valleys are not all physically, chemically, or biologically connected to modern waters of the US, and should not fall under the authority of either the USEPA or the USACOE.

5) Excessive regulations by the USEPA and USACOE would encumber us from managing our own property in a safe, healthy and economical manner.

6) Landowners of all types will be severely and adversely impacted by the rule by limiting their ability to properly manage their property.

7) The rule discriminates against landowners, and unfairly imposes excessive burden on people who have earned ownership of their property.

8) The rule lacks scientific basis and social equity.

9) I write in opposition to the proposed rule. (p. 1)

Agency Response: **See summary responses, above.**

R.D. Primrose (Doc. #18799)

1.517 (…)

- EPA and USACE have embarked on an arbitrary and heavy handed effort to grossly expand the scope of their own regulatory authority their direction. Truly, the Proposed Rule's alleged purpose, to "enhance protection for the nation's public health and aquatic resources, and increase [Clean Water Act] program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act" is a noble concept but should be established and managed at the state and local government level where those affected and potentially harmed will have valid, fair and reasonable input and opportunity to shape the program and measure success. (p. 1)

Agency Response: **See summary responses, above.**

1.518 (…)

- I believe this rule intends to remove the distinction between what is state and local in role and authority and what is national and leads to what is a completely centralized federal control. I believe that clearly violates and infringes upon the role of county and state governments and threatens to destroy all separation of powers, private property rights and custom and culture of local communities and counties. (p. 2)

Agency Response: **See summary responses, above. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters. Under section 510 of the CWA, 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.**

1.519 (…)

- The Proposed Rule improperly usurps "primary responsibilities and rights of States" (p. 2)

Agency Response: **See summary responses, above. The rule is consistent with Congress' intent not to supersede, abrogate, or otherwise impair the authority of each state or tribe to manage the waters within its jurisdiction or to more broadly protect their waters. Under section 510 of the CWA, 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.**

1.520 (…)

- Under the 1977 Amendments, Congress deemed it appropriate and necessary to emphasize the traditional role of the states in the management of land and water resources, and specifically noted its intent to: recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. By proposing and then potentially unilaterally enforcing a regulatory definition so encompassing as to embrace those isolated, unconnected and wholly intrastate wetlands, ponds, oxbow lakes, etc. simply because they fall within a "floodplain" -a term not found in the statutory text-the agencies' Proposed Rule will trample upon the states' and counties traditional land use and water management authority and roles. (p. 2)

Agency Response: **See summary responses, above. This rule is consistent with Congressional policy not to supersede, abrogate, or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction, and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.**

1.521 (…)

- The impingement by the federal government on the regulatory and oversight affairs traditionally reserved to the States creates a constitutional concern that must require a clear authorization from Congress. The CWA is devoid of any such authorization and, therefore, the Proposed Rule's implication of federalism concerns and traditional state authority should prompt the withdrawal of the proposed rule/definitions. (p. 2)

Agency Response: **See summary responses, above.**

J. Dillard (Doc. #18907)

1.522 You state:

This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b)

Comments:

Clean Water Act must include aspects of existing conditions, under any definition. Pollution cannot be corrected with geology that creates a contrary condition. Land resources may have grandfathered conditions due to land use decisions prior to laws and regulations. (p. 1 – 3)

Agency Response: **See summary responses, above.**

1.523 You state:

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its

jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Comments:

Water quantity, supply and rights should be an issue under CWA, but the pollution controls in permitting is creating a situation contrary to the Congressional policy (in Los Angeles Basin, California). With MS4 permitting requiring watershed management and consequently, stormwater capture at all costs, the intent of the CWA is blurred. Waters of the United States cannot be used for water supply. (p. 3)

Agency Response: See summary responses above, as well as discussions of the exclusion for stormwater control features constructed in dry land.

Anonymous (Doc. #18947)

1.524 The proposed definitions in this proposed rule defining the "waters of the United States", undermines the principle of cooperative federalism within the Clean Water Act (CWA). Section 101(b) of the CWA states, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." Individual States play a role in the implementation of the CWA within their jurisdiction as it pertains to the waters of the State as defined by their sovereign State Constitutions; not the Environmental Protection Agency (EPA) and United States Army Corp of Engineers (USACOE).

Throughout this proposed rule, the EPA and USACOE are usurping the policy of Congress; State sovereignty, and rights of local home rule. Individual states, local governments, and private property owners are in a better position to address their unique clean water needs than bureaucrats of the EPA and USACOE.

Under the U.S. Constitution, Congress has the lawmaking power; Article 1, Section 8, states; "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution..." For all practical purposes, the EPA and USACOE by this proposed rule are seeking to make law by changing the meanings of words; but they cannot change Congress's policy in Section 101(b) of the CWA; nor can they usurp State sovereignty retained at the time of the formation, admission, or re-admission (former Confederate States of America) into the United States of America. (p. 1)

Agency Response: The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule recognizes the unique role of states and tribes. As stated in the preamble, the agencies will work with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of

states to more broadly protect state waters. States and tribes may assume permitting responsibility for section 402 and 404 of the CWA. As co-implementers of these permitting programs, the agencies' commit to continue to work collaboratively with states and tribes with approved 402 and 404 programs. The rule is consistent with sections 101(b), 402(b), 404(g), and 510 of the CWA.

The final rule does not establish any new regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. As such, there are no changes in the relationship between federal, state, tribal and local implementors of CWA programs or to other state or tribal programs managing these resources. States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters under their jurisdiction.

The rule is consistent with Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA (see section 101(b) of the CWA).

See also the summary responses above and the response to legal comments in legal compendium and the TSD.

Kevin and Nicole Keegan (Doc. #19128)

1.525 I support any effort Congress has to rein in the expansion of control over private land.

- "Waters of the United States" should not be redefined until the United States Congress has clarified the jurisdiction of the Clean Water Act.
- The broad opposition the proposal is receiving is a clear indication that it should not be adopted in its present form.
- The proposed definition would be an egregious violation of personal property rights. (p. 3)

Agency Response: **See Summary responses above.**

K. Miles (Doc. #19129)

1.526 I am recommending that the Clean Water Act be renamed the Cleaner Water Act. The change in the name of the act corrects the inaccurate perception held by many na'ive individuals that adherence to an act named the Clean Water Act would bring "CLEAN" water when it does not, will not, and cannot bring the level of purity to any water that would result in a "clean" designation. This distinction needs to be made because there is no water that is without some sort of amendments (i.e. there is no "perfectly clean" water). The physical and/or chemical amendments of the nation's waters constitute impairment (e.g. specific limitations).

Water found to be "impaired" could be considered to be water with a specific limitation(s) that could be feasibly cleaned (i.e. economically, environmentally, socially) to reestablish the utility of the water to meet the water use requirements of the identified water user(s)". Water found to be "irreparably damaged" would be considered to be water

with specific limitation(s) that could not feasibly be cleaned (i.e. economically, environmentally, socially) to reestablish the utility of the water to meet the water use requirements of the identified water user(s)". (p. 8 - 9)

Agency Response: **See Summary responses above. The commenter's comments about how to treat "impaired" waters is outside the scope of this rulemaking.**

1.527 I am recommending that where section 303(d) of the Clean Water Act, states, territories, and authorized tribes are required to develop lists of impaired waters be changed to the following:

The states, territories, and authorized tribes will work with sponsors and stakeholders to identify project measures to address impairments to the water. The EPA will assist those sponsors/stakeholders in completing a preliminary plan that identifies those impairments to be addressed in project actions. Economic, environmental, regional and social accounts will be formulated and displayed in the preliminary plan. Preliminary plan information will be referenced in determining planning priorities. The Economic account w11l reasonably maximize the net economic development benefits. The Economic accounts of the preliminary plans being submitted for planning and implementation assistance will be used to prioritize EPA assistance (technical and financial) under the Act. (p. 9)

Agency Response: **The final rule is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Considerations of how lists of impaired waters under The suggested edits to Section 303(d) are outside the scope of this rule. See also summary responses above.**

Alcona Conservation District (Doc. #19345)

1.528 Additionally, rather than providing clarity and less complication over covered waters, the rule relies on undefined or vague concepts such as "riparian areas," "landscape unit," "floodplain," "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 summary responses above.**

1.529 The new proposal redefines its control over "Waters of the U.S." without considering any factors beyond a very narrow environmental view. It doesn't consider land use, private property rights or economics. It doesn't care about people's livelihoods. This proposed rule change poses a serious threat to farmers, the forest products industry and landowners in the State of Michigan. (p. 1 – 2)

Agency Response: **See summary responses above.**

City of Morgan City, Louisiana (Doc. #19346)

1.530 It appears that the Agencies did not even consider existing State authorities when developing its proposed rule. (p. 2)

Agency Response: **See summary responses above. The rule does not impact or diminish State authorities to allocate water rights or to manage their water**

resources. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." The rule is entirely consistent with these policies. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate.

The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule recognizes the unique role of states and tribes. As stated in the preamble, the agencies will work with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. States and tribes may assume permitting responsibility for section 402 and 404 of the CWA. As co-implementers of these permitting programs, the agencies' commit to continue to work collaboratively with states and tribes with approved 402 and 404 programs. The rule is consistent with sections 101(b), 402(b), 404(g), and 510 of the CWA.

United States House of Representatives (Doc. #19348)

1.531 On September 9 2014, the House of Representatives passed H.R. 5078, the *Waters of the United States Regulatory Overreach Protection Act* with strong bipartisan support. This vote was a powerful reflection of the concerns of the American people about this proposal. We believe it is appropriate and critical for the EPA to extend the comment period to allow more Americans to fully express their views. (p. 1)

Agency Response: The agencies have provided sufficient time for review of the rule. On April 21, 2014, EPA published for public comment the proposed rule defining the scope of waters protected under the Clean Water Act (CWA) in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* and *Rapanos v. United States (Rapanos)* (the Proposed Rule). The Proposed Rule was developed to enhance protection for the nation's public health and aquatic resources and increase CWA program predictability and consistency by providing clarity as to the scope of "waters of the United States" protected under the CWA. The 90-day comment period was expected to close on July 21, 2014; however on June 24, 2014, EPA issued an extension through October 20, 2014. On October 14, 2014, EPA issued an additional extension, and the comment period closed on November 14, 2014. The comment period, including the two extensions afforded substantial time for review and submission of public comments.

Western States Water Council (Doc. #19349)

1.532 B. Deference to State Water Law

The text of the rule itself should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality. (p. 2)

Agency Response: See summary responses above. This Rule does not impact or diminish State authorities to allocate water rights or to manage their water resources. Section 101(g) of the CWA states, "It is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." The rule is entirely consistent with these policies. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate.

The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level. This rule recognizes the unique role of states and tribes. As stated in the preamble, the agencies will work with states to more closely evaluate state-specific circumstances that may be present across the country and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters. States and tribes may assume permitting responsibility for section 402 and 404 of the CWA. As co-implementers of these permitting programs, the agencies' commit to continue to work collaboratively with states and tribes with approved 402 and 404 programs. The rule is consistent with sections 101(b), 402(b), 404(g), and 510 of the CWA.

Jil Tracy, State Representative 94th District (Doc. #19518)

1.533 The proposed rule promulgated by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACE) would expand federal CWA jurisdiction over nearly all areas with any hydrologic connection to navigable waters.

Your rule aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses.

The rule is flawed in a number of ways. The greatest problem is expansion of areas defined as 'waters of the U.S.' by effectively removing the word "navigable" from the definition of Waters of the United States (WOTUS).

The rule would place features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal jurisdiction. These areas are the reserved domain of the state government not the federal government. (p. 1)

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

This rule is consistent with the Clean Water Act, the Supreme Court decisions and the Constitution and provides increased clarity and certainty regarding the definition of Waters of the United States.

1.534 Rather than providing clarity and certainty in identifying covered waters, the rule instead creates more confusion and will inevitably cause unnecessary litigation. The rule relies heavily on undefined and vague concepts such as 'riparian areas,' 'landscape unit,' 'floodplain,' 'ordinary-high-water-mark' as determined by the agencies' 'best professional judgment' and 'aggregation.' (p. 2)

Agency Response: See summary responses above.

M. Sedlock (Doc. #19524)

1.535 Issue 1: Conflicting intent and incorrect purpose given for the proposed rule

Reference: FR title: *Definition of "Waters of the United States" Under the Clean Water Act*

FR page 22188 column 1: [The Agencies] *are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA),*

FR page 22190, column 3: *The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying ''waters of the United States'' less complicated and more efficient.*

Discussion: The title of the proposed rule clearly states that the subject matter is the definition of a term, "Waters of the United States". The purpose of such a definition is declared to be to define the scope of waters that are protected under the CWA. However, the most significant and the most looming gorilla in the room associated with the Agencies' proposed regulatory definition is that there is no valid or justifiable need or purpose in redefining "waters of the United States", and that the actual purpose of the proposed rule is not to create a definition but to mask a tremendous expansion of the scope of CWA protected waters.

The task of establishing the parameters of the scope of responsibility for the Agencies that will enable them to carry out their missions[160] cannot be accomplished by proposing

[160] The EPA mission is to protect human health and the environment. http://www2.epa.gov/aboutepa

to redefine a term that already has a well-understood meaning in the English language. The Agencies, in couching the proposed rule as a request for unnecessary and inappropriate redefinitions of that and multiple additional terms, beg the question of actual intent for doing so.

The Agencies have stated in the Federal Registry that there is a need for adopting a formal statement of the meaning or significance of the phrase "waters of the United States". The Agencies stated that the need for this proposed rule was because the scope of CWA protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006.

A regulatory definition, ideally, would be consistently and systematically used by the Agencies when interpreting and implementing the Clean Water Act (CWA). The Agencies' proposal that the definition of "waters of the United States" be defined masks the fact that no such new definition is needed or even wanted by the Agencies. In fact, the Agencies would be delighted for the public to accept "waters of the United States" at face value.

This approach is a "bait and switch" process based on confusion caused by self-referential internal definitions within the proposed rule, making any real definition of any term nearly impossible. The proposed rule is presented with an ultimate objective of substantially increasing the scope of waters protected by the CWA (the switch) as a consequence of getting the public to agree to using the term "waters of the United States" at face value meaning.

The bait is the pretense that a real rule change is being proposed to meet legal requirements for public notice and mandated public hearings (the bait), while bypassing not only the objective of public notice and public discussion on the actual rules, but avoiding the scrutiny of the legislative and judicial eyes (enabling the switch).

Any ordinary speaker of the English language understands "waters of the United States" to mean, in plain writing and common use, "all waters located within the territorial boundaries of the United States". None of the words are hard to comprehend, and the use of this type of phraseology is common to native speakers of the English language (e.g., "riders of the purple sage", "ranchers of the western states", "farmers of the Midwest", "speakers of the English language"). It is a non-specific term that does not exclude any specific kinds of water to be found within the United States (or, e.g., riders to be found riding the purple sage, etc).

No matter what definition could come about from the proposed rule, "waters of the United States" means all waters, including waters over which the Agencies have not previously had jurisdictional authority, e.g. waters of the States and private lands. This is not the intent of the CWA, although it apparently is the intent of the Agencies.

The mission of ACE is to "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters." http://www.usace.army.mil/About/MissionandVision.aspx

Summary of the Clean Water Act 33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. http://www2.epa.gov/laws-regulations/summary-clean-water-act

In the English language when a word or term must be qualified with a modifier it is an indicator that the word or term is too general for the intended meaning. Thus the reason for the many modifiers for "waters of the United States" in the CWA, is because the CWA was not intended to apply to every drop of water located within the territorial boundaries of the United States. Modifying words have been used to provide parameters for implementation of protection of water quality since the Water Pollution Control Act of 1948.

Thus when the CWA uses the term "navigable waters" to modify "waters of the United States", there should be no question that the Agencies should address waters that can be sailed on, i.e. that are passable by a vessel that floats on water. Using this clear and commonly understood meaning further leads to understanding that connected waterways and significant nexus waters will be waters that can be used for sailing on or that directly feed such waters. Limiting the Agencies' jurisdiction to the actual meaning of "navigable waters" yields to a simple test: Can you float your boat on the water?

It is not the business of the Agencies to reinvent language, nor is it right or proper for the Agencies to use confusing language and incorrectly stated purpose to attempt to expand a federal Agency's jurisdictional authority.

Recommendation: Withdraw the proposed rule. If the Agencies are confused about their scope of jurisdiction, they should seek Congressional and judicial guidance. (p. 3 – 5)

Agency Response: See summary responses above. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.

1.536 Issue 4: Misrepresentation of Agencies' authority in the proposed rule

Reference: Page 22189, column 3: *This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b).*

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Discussion: The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA.

The lead-in paragraph for Section 101 of the CWA states: The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's

waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act --- (b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to … and (g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act…

When the above statements are presented in the context that they are found in the CWA it becomes much more evident that Congress did intend for Federal actions conducted under authority of the CWA to not interfere with state rights and authorities, and state responsibilities to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

We also have a concern with the statements: "*This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states …"and "This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State..."* When considering all of the concerns and problems that have occurred with the current implementation of the CWA it is difficult to believe that the actions called for under the proposed rule would not add an additional burden on the states as they work to carry out their rights and responsibilities to manage the water and land resources within their jurisdiction.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all States and across the entire nation.

For over one hundred years the nation's state and local governments have dealt with the planning, development and use of land and water resources, including water pollution within their jurisdictions. These tasks have been carried out faithfully at the local level without having to take extremely punitive measures, which seems to be the norm when federal agencies have intervened in the recent past. This heavy-handed approach to gain compliance is now a common practice in the way the Agencies conducts their permitting activities. This constant fear of harsh fines and threats of being imprisoned by federal agencies has greatly affected the states' responsibilities and rights when dealing with local efforts to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. We can only foresee this situation becoming much worse if the proposed rule is implemented.

Congress has over the years been very careful to encourage state and local government responsibility for and involvement in the planning, permitting and proper implementation of land and water use activities. Only in the last twenty or thirty years has the role of the states and local governments been usurped by the mission creep of federal agencies. This proposed rule is another example of a mission creep that is being fueled and driven by a

few select elite environmental organizations that will stop at nothing to impose their will on the American public.

Recommendation: Withdraw the current proposed rule.

Additionally, the Agencies must:

- End actions that allow mission creep within the federal governmental agencies. Discontinue unconstitutional self-serving efforts to increase the Agencies' boundaries of jurisdiction over land use activities across the nation.
- Work diligently to divest themselves of all permitting authority and rather put their efforts towards helping the states and local governments coordinate and jointly plan for permitting and implementing sound land and water use practices across the entire United States, which is the clear intent of the CWA.
- Connect with the American public and not give in to the desires of a select elite group of environmental organizations that hope to gain control of the nation's land and water resources through the manipulation of the Federal land and resource management agencies. (p. 9 – 11)

Agency Response: See summary responses above.

1.537 Issue 7: Violation of Fifth Amendment "regulatory taking"

Discussion: The extraordinary expansion of the Agencies' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making "economically viable use of his land." Agins v. City of Tiburon, 447 U.S. 255 (1980).

In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property.

This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use.

Recommendations: Withdraw the proposed rule. (p. 13 – 14)

Agency Response: The rule does not constitute a taking of private property rights. As a matter of law, an agency's determination of jurisdiction, by itself, cannot constitute a regulatory taking. *See, e.g.,* U. S. v. Riverside Bayview Homes, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Even if there is a finding of jurisdiction there can still be no taking unless and until the owner is prevented from using the property. The rule does not establish any regulatory requirements. Instead, it is a

definitional rule that clarifies the scope of "waters of the U.S." consistent with the CWA, U.S. Supreme Court precedent, and science. It does not alter the underlying regulatory structure of the CWA. Under the CWA, any person discharging a pollutant from a point source into navigable waters must obtain a permit. The rule clarifies which navigable waters trigger the permit requirement. As stated by a unanimous United States Supreme Court in Riverside Bayview Homes, *supra*, "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." 474 U.S. at 127, 106 S.Ct. at 459, 88 L.Ed.2d 419 (1985).

Courts have consistently upheld the constitutional authority of federal agencies to regulate activities causing air or water pollution. Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 282-283, 101 S.Ct. 2352, 2363, 69 L.Ed. 2d 1 (1981); U.S. v. Deaton, 332 F.3d 698, 704, 707 (4th Cir. 2003), cert. den. 541 U.S. 972, 124 S.Ct. 1874, 158 L.Ed.2d 466 (2004); U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1329 (6th Cir. 1974); See also U.S. v. Cundiff, 555 F.3d 200, 213, n. 6 (6th Cir. 2009), cert. den. 558 U.S. 818, 130 S.Ct. 74, 174 L.Ed.2d 27 (2009).).

Chairman, Broadwater County Commissioner, Broadwater County Commissioners, Broadwater County, Montana (Doc. #20489)

1.538 Finally, the Constitution of the State of Montana says, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." (p. 1)

Agency Response: See summary responses above. This Rule does not impact or diminish State authorities to allocate water rights or to manage their water resources.

Flood Control Water Agency, Santa Barbara County Public Works Department, Santa Barbara County, California (Doc. #20491)

1.539 A final point to be made is the lack of justification for such a move and the unintended impacts this increased regulation would have. In our County, these retention/recharge basins are physically disconnected from waters of the United States and were constructed in upland areas. Construction in upland areas did not result in a loss of wetland areas and therefore, there is no reason to regulate them as such. The result of the current proposed changes to the CWA would be a disincentive to further construct these facilities that must be recognized as being beneficial. The federal government should be encouraging more of these facilities not regulate their maintenance, increase regulatory costs, or create time delays for doing this vital work. There are no impact from keeping these facilities outside the 404 process nor advantages for including them. (p. 2)

Agency Response: **See the summary responses above as well as compendium 7 regarding exclusions. The final rule identifies a number of waters that are not jurisdictional. For example, in the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."**

Empire District Electric Company (Doc. #20501)

1.540 The Empire District Electric Company (EDE) is submitting these comments in response to the above-referenced proposed rule that redefines "waters of the United States" under the Clean Water Act (CWA) and appears to broaden the scope of CWA jurisdiction to the detriment of the traditional state and local authority to regulate land and water.

(…) The definitions of "floodplain," "wetlands, "tributaries, "significant nexus", and "riparian area" as expanded under the concept of "adjacency" is problematic and does NOT provide the hoped for clarity and consistency. While we are supportive of efforts to codify definitions of key terms in the CWA it is our belief that the proposed rule with the new definitions, when applied to establish jurisdictional waters, does not accomplish its stated objective. (p. 1)

Agency Response: **See summary responses above.**

Michigan House of Representatives (Doc. #20504)

1.541 WHEREAS, In response to the Supreme Court decisions, the EPA and Army Corps have recently proposed an amended definition to clarify federal jurisdiction. Unfortunately, the EPA and Army Corps have once again missed the mark and continue to ignore the limits on their authority, usurping powers reserved to the states under the Tenth Amendment to the U.S. Constitution; and

WHEREAS, The proposed rule would create greater uncertainty for businesses and homeowners rather than providing clarity. The proposed rule will add new definitions for key technical terms that introduce ambiguities and vagaries into federal regulation. Confusion will inevitably lead to further litigation, tying up our com1s, delaying economic development, and wasting taxpayer money; and (…) (p. 2)

Agency Response: **See summary responses above.**

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:

American Farm Bureau Federation Responses to Sections of Stoner Blog (Doc. #16357.44)

AFBF Comments on 2008 Rapanos Guidance (includes its own exhibits 1-8), dated 1/22/2008 (Doc. #17921.4)

America's Vulnerable Waters: Assessing the Nation's Portfolio of Vulnerable Aquatic Resources since Rapanos v. United States (Doc. #15742.19)

American Waterways Operators Annual Report 2013 (Doc. #14858, p. 2)

Anderson, Robert. "Memorandum outlining concerns with Arizona portion of ELI state constraint study." September 29, 2014. (Doc. #14285, p. 62)

Anthropogenic Climate Change in the Playa Lakes Joint Venture Region: Understanding Impacts, Discerning Trends, and Developing Responses. A report prepared for the Playa Lakes Joint Venture by J.H. Matthews, PhD, February 2008 (Doc. #17477.6)

Arizona Department of Environmental Quality Comments on USEPA's Docket ID-No-OW-2002-0050 (April 15, 2003) (Doc. #17477.3)

Arizona Game and Fish Department Comments on USEPA's Docket ID-No-OW-2002-0050 (April 15, 2003) (Doc. #17477.5)

Arkansas Game Fish Commission Comments on USEPA's Docket ID-No-OW-2002-0050 (April 15, 2003) (Doc. #17477.4)

Arizona and New Mexico, National Hydrography Dataset: Medium Resolution, Little Colorado River Watershed (Doc. #17921.14, p. 323)

Arthur Brown Curriculum Vitae (Doc. #0050)

Association of State Floodplain Managers (ASFM) Comments on USEPA's Docket ID-No-OW-2002-0050 (April 16, 2003) (Doc. #17477.7)

Association of State Wetland Managers, Inc. (ASWM) Comments on USEPA's Docket ID-No-OW-2002-0050 (April 16, 2003) (Doc. #17477.9)

Aquatic Scientists Comments on USEPA's Docket ID -No -OW-2002-0050 (10 April 2003) (Doc. #17477.46)

Background Information on the Galveston Bay Council (Doc. #0866, p. 3)

Benjamin H Grumbles Response to comments, USEPA to Jeanne Christie, Association of State Wetlands Managers (January 2006) (Doc. #17477.11)

Biodiversity Conservation Alliance, Californians for Western Wilderness, Center for Native Ecosystems, Land and Water Fund of the Rockies, Oil and Gas Accountability Project, Powder River Basin Resource Council, Juan Citizens Alliance, Southern Utah Wilderness Alliance, Western Organization of Resource Councils, Western Slope Environmental Resource Council, Wyoming Outdoor Council Comments on USEPA's Docket ID-No-OW-2002-0050 (April 16, 2003) (Doc. #17477.10)

Biodiversity Values of Geographically Isolated Wetlands in the United States (Doc. #15742.9)

Black, Gary. Georgia Commissioner of Agriculture Comments. (Doc. #14430, p. 36)

Board of Directors of the North Houston Association (Doc. #8537, p. 11)

Board of Directors of the West Houston Association (Doc. #8537, p. 12)

Buechler, D., Five Case Studies on the Effects of the SWANCC and Rapanos Supreme Court Rulings on Colorado Wetlands and Streams, February 2010, prepared in association with Ducks Unlimited, National Wildlife Federation, and Trout Unlimited. (Doc. #17477.19)

Busch Wildlife (Doc. #16372.4)

Calcasieu Parish Map of Waterways and Flood zone (Doc. #15412, p. 4)

California Resources Agency and California EPA Late Comments on USEPA's Docket ID-No-OW-2002-0050 (July 3, 2003) (Doc. #17477.12)

California Water Resource Control Board Comments on USEPA's Docket ID- No-OW-2002-0050 (March 13, 2003) (Doc. #17477.13)

Clean Water Act Jurisdiction Handbook: Second Edition, May 2012 (Doc. #15742.3)

Clean Water Act Jurisdiction Handbook: 2007 Edition (Doc. #15742.4)

Coastal States Organization (CSO) Comments on USEPA's Docket ID-No-OW-2002-0050 (April 16, 2003) (Doc. #17477.14)

Committee Hearings (Doc. #16386, p. 140)

Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act", as of 8/14/2014. (Doc. #14564.2)

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Waterfowl Management Handbook Ecology of Playa Lakes, United States Department of the Interior, Fish and Wildlife Service, 1992 (Fish and Wildlife Leaflet 13) (Doc. #17477.138)

Waterways Restored - The Clean Water Act's Impact of 15 American Rivers, Lakes and Bays by Environment North Carolina Research and Policy Center (Doc. #14280.2)

Water Reuse Systems (photos only) (Doc. #17921.15, p. 39)

Western Water Alliance (WWA) Comments on USEPA's Docket ID- No-OW-2002-0050 (April 16, 2003) (Doc. #17477.139)

Wetlands at Risk 2002 Imperiled Treasures: A report by the National Wildlife Federation and Natural Resources Defense Council (Doc. #17477.143)

Wildlife Management Institute (WMI) Comments on USEPA's Docket ID-No-OW-2002-0050 (April 11, 2003) (Doc. #17477.142)

Wisconsin Department of Natural Resources Comments on USEPA's Docket ID-No-OW-2002-0050 (April 8, 2003) (Doc. #17477.145)

Wisconsin WPDES Permit Case (Doc. #16645.1)

Wyoming Office of Federal Land Policy Comments on USEPA's Docket ID-No-OW-2002-0050 (March 3, 2003) (Doc. #17477.147)

404 Permits (Doc. #16372.1)

404 Permits on Jurisdictional Waters That Lack Protection Under Missouri's 100k Rule (Doc. #16372)

In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. The agencies have not verified the references, or the validity of hyperlinks.

Brief of Environmental Law Institute as Amicus Curiae (co author), Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers, Nos. 04-1043, -1384 (U.S. filed Jan. 2006). (Doc. #14068, p. 8)

Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. EPA, Docket No. 14-1823 (2d Cir), Brief for Defendant EPA, et al. (Sept. 11, 2014), at 29-30. (Doc. #15032, p. 12)

Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 2 (May 20 13), available at http://www.eli.org/rescarch-report/state-constraints-state-imposed-lirnitations-authority-ageneies-regulate-waters (hereinafter, ELI Study). (Doc. #13615, p. 8)

EPA, Waters of the United States Proposed Rule Website. httn://www2.cpa.gov/usw8tcrs (last visited: August 12, 2014). (Doc. #13615, p. 8)

EPA Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters. (Doc. #13615, p. 8)

Laurence Tribe, Constitutional Law vol. I, § 5-9 at 853. (Doc. #5058.2, p. 15)

Letter from David T. Allen, Chair of the EPA Science Advisory Board, to EPA Administrator Gina McCarthy. Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific

and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act," September 30, 2014. (Doc. #14645, p. 2)

Missouri Revised Statutes Chapter 242 (Doc. #6254, p. 1)

"MS4: What is an Urbanized Area," at http://cfpub.epa.gov/npdes/faqs.cfm?program_id=6#174. (Doc. #5058.2, p. 14)

Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles, 636 F.3d 1235, 1247(9th Cir. 2011). (Doc. #5058.2, p. 14)

Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Testimony Before the Subcommittee on Water Resources and Environment (June 11, 2014), available at http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf (statement of J.D. Strong, Western Governors' Association, Western States Water Council). (Doc. #15536, p. 10)

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 151, 166-67 (2001) ("SWANCC") (citing 33 U.S.C. § 1251(b)). (Doc. #5058.2, p. 13)

Supreme Court rulings in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001) and in Rapanos v. United States, 547 U.S. 715 (2006). (Doc. #14645, p. 2)

SWANCC, 531 U.S. at 172-73; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985)). (Doc. #5058.2, p. 15)

Texas Commission of Environmental Quality; Enforcement Initiation Criteria (EIC); https://www.tceq.texas.gov/assets/public/agency/eic-a4-tpdes-rev-14.pdf Environmental Protection Division; A Division of the Georgia Department of Natural Resources http://epd.georgia.gov/watershed-protection-branch http://epd.georgia.gov/enforcement Arizona Department of Environmental Quality; http://www.azdeq.gov/function/forms/docs.html#hand (Doc. #14068, p. 9)

United States House of Representatives Committee on Natural Resources Subcommittee on Water and Power Hearing: "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs." Testimony of Patrick Tyrrell, P.E. Wyoming State Engineer; June 24, 2014 (Doc. #14068, p. 2)

"Urbanized Area Maps," at http://cfpub.epa.gov/npdes/stormwater/urbanmaps.cfm. (Doc. #5058.2, p. 14)

http://www.epa.gov/uswaters (Doc. #14068, p. 8)

http://deq.state.wy.us/wqd/WQDrules/Chapter_01.pdf (Doc. #14068, p. 9)

http://legisweb.state.wy.us/LSOWEB/StatutesDownload.aspx (Doc. #14068, p. 9)

http://www.epa.gov/uswaters/documents-re1ated-proposed-definition-waters-united-states-under-clean-water-act (Doc. #14465, p. 2)

http://yosemite.epa.gov/opal admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30 (Doc. #14465, p. 2)

http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf. (Doc. #15356, p. 10)

Supplemental references:

Camfield v. United States, 167 U.S. 260 (1897) (Doc. #0009.1, p. 2)

Kleppe v. New Mexico, 426 U.S. 529, 538 (1976) (Doc. #0009.1, p. 2)

Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC") (Doc. #0009.1, p. 2)

United States v. Alford, 274 U.S. 264, 267 (1927) (Doc. #0009.1, p. 2)

United States v. California, 332 U.S. 19, 27 (1947). (Doc. #0009.1, p. 2)