Clean Water Rule Comment Compendium
Topic 2: Traditional Navigable Waters (TNWs), Interstate Waters, Territorial Seas, and Impoundments

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 TNWs, interstate waters, territorial seas, and impoundments submitted by commenters. Comments have been copied into this document "as is" with no editing or summarizing. Footnotes in regular font are taken directly from the comments.

Topic 2. TNWs, Interstate Waters, Territorial Seas, and Impoundments

Agency Summary Response

Consistent with the statute, the case law, and the Constitution, the rule defines "waters of the United States" to include traditional navigable waters, interstate waters, and the territorial seas. Preamble and Technical Support Document.

Specific Comments

South Kansas Groundwater Management District No. 3 (Doc. #16465)

2.1 To address the issues identified in this letter the Federal Agencies should:

Eliminate the categorical regulation of all "traditional navigable waters" and their tributaries and clarify that isolated, non-navigable interstate waters are not jurisdictional; (p. 2)

Agency Response: See TSD and Preamble

Water Advocacy Coalition (Doc. #17921.1)

2.2 Without Explanation, the Proposed Rule Broadens the Scope of (a)(1) through (a)(4) Waters and the Waters that Are Jurisdictional Based on Relationships to Those Waters.

As discussed in the Appendix to these comments, under the proposed rule, a determination that waters are (a)(1) TNWs, (a)(2) interstate waters, or (a)(3) territorial seas is fundamental because the rule deems many other waters jurisdictional based on their relationships to these (a)(1) through (a)(3) waters. The proposed rule improperly broadens the scope of (a)(1) NTWs and equates all (a)(2) interstate waters and (a)(3) territorial seas with TNWs. In addition, (a)(4) impoundments are given elevated status because tributaries and adjacent waters can be jurisdictional by virtue of their connections with impoundments. As a result, the proposed rule extends jurisdiction to more waters than are now jurisdictional by virtue of their relationship to (a)(1) through (a)(4) waters. (p. 39)

Agency Response: See TSD and Preamble

American Society of Civil Engineers (Doc. #19572)

2.3 ASCE National Wetlands Regulatory Policy 378

Policy

The American Society of Civil Engineers (ASCE) believes Congress must amend the Clean Water Act to clarify jurisdiction over wetlands, establish clearly where states must assume responsibility, and provide appropriate federal oversight. ASCE recommends legislation that would:

- Maintain federal jurisdiction over all interstate and navigable waters, their tributaries, and all adjacent wetlands under the pre-2001 U. S. Army Corps of Engineers' (USACE) regulatory program under the Commerce Clause in the U.S. Constitution using an unambiguous test for significant nexus to navigable-in-fact waters; (p. 6)

Agency Response: Comments on legislation are outside the scope of this rulemaking.

Portland Cement Association (Doc. #13271)

2.4 That portion of the rule identifies as "always jurisdictional" navigable and interstate waters and the territorial seas; impoundments of these waters, tributaries of all of these waters, and waters adjacent to all of the above. This definition includes waters beyond the scope of the CWA and includes unclear and impractical terminology on which the Agencies should not rely. (p. 12)

Agency Response: See TSD and Preamble

Pennsy Supply, Inc. (Doc. #15255)

2.5 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. 2)

Agency Response: See TSD and Preamble

PennAg Industries Association (Doc. #13594)

2.6 We would be supportive of a proposed rulemaking that limited its jurisdiction to continuous flowing waterways and navigable bodies of water. (p. 2)

Agency Response: See TSD and Preamble

United Egg Producers (Doc. #15201)

2.7 Jurisdictional Waters Must Be Significant to Navigability

The proposed rule makes all ephemeral and intermittent tributaries categorically jurisdictional. It also makes categorically jurisdictional any impoundments of these tributaries, as well as any wetlands or waters adjacent to these tributaries. We believe this is unlawful. Non-navigable waters can be jurisdictional under the CWA, but as Supreme Court Justice Kennedy's opinion in the Rapanos case points out, it is through their substantial hydrological contribution to navigable waters that they can be considered as part of a navigable system and therefore WOTDS. While he discusses chemical, physical

and biological effects in this context, he makes it absolutely clear that he agrees with the majority that the word "navigable" must be given some meaning if a non-navigable water is to be found jurisdictional. Our view is that to be jurisdictional, non-navigable waters must be tied in a clear, direct, substantive and non-speculative fashion to navigation and navigability. While some ephemeral or intermittent tributaries could be jurisdictional, that can only be determined properly case-by-case, using a correctly defined significant nexus standard that reflects "navigable" as an effect of the nexus. The same then follows for impoundments of these tributaries and wetlands adjacent to them. (p. 2)

Agency Response: **See TSD and Preamble**

Northern Arizona Municipal Waters Users Association (Doc. #9730)

2.8 Inclusion of waters that "may be susceptible to use in interstate or foreign commerce" in the definition is much too vague and leaves too much to the interpretation of the Corps of Engineers and/or U.S.E.P.A. (p. 1)

Agency Response: **That provision of the rule is unchanged from the existing regulation.**

Edison Electric Institute (Doc. #15032)

2.9 To avoid exercising jurisdiction over remote and isolated waters and erosional features on the land, the agencies should specify that interstate waters, impoundments, and tributaries are jurisdictional only if they themselves are traditional navigable waters or they act as channels that contribute flow to such waters in sufficient amounts and with sufficient frequency to carry pollutants that would substantially affect the quality of the navigable waters.[1] Thus these water features should not be categorically jurisdictional. (p. 28)

Agency Response: **See TSD and Preamble**

Ducks Unlimited (Doc. #11014)

2.10 Emerging Technologies and Jurisdictional Waters:

We note the agencies' expressed interest "in identifying emerging technologies or other 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." Because traditional navigable waters, interstate waters, and the territorial seas ultimately provide the basis for designating by rule or assessing potential CWA jurisdiction for all other categories of waters, we strongly recommend that existing and readily available technology be used to map all (a)(1) through (a)(3) waters across the U.S. At the moment, it is extremely difficult if not impossible to find maps, even at the level of individual Corps districts, which clearly depict these waters. While there are limited maps available in some instances, and lists for some of these waters in some areas, there is by no means a cohesive, nationwide system of compiling and making this information available at this time. Some criteria for determining navigability, such as when "a Federal court has

[1] An effect must be substantial to invoke jurisdiction under the Commerce Clause. *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). The Corps can rely on measurements of flow developed from actual data or pollutant transport models.

determined that the water body is navigable-in-fact under Federal law," often involve protracted and complex court proceedings. These kinds of cases, in particular, often seem not to be transferred to readily available maps or other publicly available sources of information about waters that have been determined to be jurisdictional. Therefore, a nationally coherent, readily available, searchable database and mapping system that depicts all the (a)(1) through (a)(3) waters could be one of the most important steps that could be taken to use technology to "save time and money and improve efficiency for regulators and the regulated community." (p. 12)

Agency Response: **Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. 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.**

American Rivers (Doc. #15372)

2.11 American Rivers is supportive of the proposed rule. We believe that it is in line with the legislative and legal history of the Clean Water Act, and is supported by the most current scientific evidence. The proposed rule reaffirms categorical protection to traditionally navigable water, interstate waters, territorial seas, and impoundments of traditionally navigable waters, interstate waters, and territorial seas. (p. 2)

Agency Response: **The agencies agree. See TSD and Preamble**

2.12 A. Traditionally Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments of These Waters

The proposed rule takes a comprehensive and protective approach to clarifying the scope of the CWA. We are strongly supportive of the decision to maintain categorical protections under the proposed rule for traditionally navigable waters, interstate waters, territorial seas, and impoundments of traditionally navigable waters, interstate waters, and the territorial seas. These categories of waters have enjoyed longstanding protections under the law and we are supportive of the Agencies' decision to maintain those protections. (p. 16)

Agency Response: **See TSD and Preamble**

Earthjustice (Doc. #14564)

2.13 I. EARTHJUSTICE GENERALLY SUPPORTS THE PROPOSED DEFINITIONS IN 40 C.F.R. § 230.3(s).

A. Subsection (s) Generally.

Earthjustice believes that subsection (s) is a generally sound, science-based effort to define waters of the U.S. that are subject to Clean Water Act jurisdiction. While Earthjustice does not necessarily agree that the EPA must conform its definition to the "significant nexus" discussion in SWANCC and Rapanos (a non-scientific concept as pointed out repeatedly by members of the SAB), to the extent that EPA believes it must do so, subsection (s) meets those requirements. Plainly, the waters described in

subsections (s)(1)-(3) are navigable waters or they affect interstate commerce in that the waters themselves are interstate, are actually used in interstate commerce, or are the territorial seas. Including these waters within the scope of the Act is consistent with clearly expressed congressional intent as required under Step One of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984), and—assuming the issue were governed by Chevron Step Two—is also a reasonable interpretation of the Act. Conversely, excluding these waters would not be a reasonable interpretation—nor would it be reasoned decision making supported by the record. See *Transactive Corp. v. U.S.*, 91 F.3d 232, 236 (D.C. Cir. 1996); *Association of Data Processing Service Organizations v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984). Earthjustice will concentrate its comments on subsection (s), parts (4)-(7). (p. 4-5)

Agency Response: **The agencies agree. See TSD and Preamble**

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

2.14 *Summary of Our Proposed Definition* Any definition of Waters of the United States, particularly after Rapanos, must acknowledge that the term, at a minimum, includes

1. Waters that are capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes.

2. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, or with the Indian Tribes

3. Interstate waters, including interstate wetlands

4. Waters and wetlands with a continuous surface connection to bodies that are Waters of the United States in their own right

5. Waters and wetlands possessing a significant nexus to navigable waters, meaning that the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters.

6. Tributaries that contribute flow to above listed waters

7. Such other waters the disruption of which may impact above listed waters, or interstate commerce (p. 11-12)

Agency Response: **See TSD and Preamble**

2.15 *The Agencies Should Specifically Acknowledge That Type (i) Commercial Waters Include Non---Navigable Waters That Are Important to Commerce*

This rule marks the Agencies' unavoidably recognition that Clean Water Act jurisdiction does not extend as broadly as we had hoped before the Supreme Court decided SWANCC. The Court's decisions in SWANCC and Rapanos are broad, but are limited to their facts. We recognize that Paragraph (l)(1)(i) in part seeks to remedy the current limitation by applying to waters susceptible to use in interstate commerce. We would clarify this intention so that it is clear that non---navigable intrastate waters are also

commonly used in commerce. It should thus be clear that Waters of the United States include, among other things, large intrastate basins that attract tourism, or prairie potholes that are so important to both duck watchers and duck hunters or quarries used for boating, swimming and recreation of a significant interstate nature. Waters like these are easily differentiated from the non---commercially important man--- made quarries and gravel pits because they in themselves are actually used or susceptible to use in interstate commerce. (p. 14)

Agency Response: See TSD and Preamble

Anacostia Riverkeeper et al. (Doc. #15375)

2.16 I. WATERKEEPERS CHESAPEAKE GENERALLY SUPPORTS THE PROPOSED DEFINITIONS IN 40 C.F.R. § 230.3(s).

A. Subsection (s) Generally.

Waterkeepers Chesapeake believes that subsection (s) is a generally sound, science-based effort to define waters of the U.S. that are subject to Clean Water Act jurisdiction. While Waterkeepers Chesapeake does not necessarily agree that the EPA must conform its definition to the non-scientific approach taken by a portion of the Supreme Court requiring a "significant nexus" to navigable water s (a non-scientific concept as pointed out repeatedly by members of the SAB), to the extent that EPA believes it must do so, subsection (s) meets those requirements. Plainly, (s)(1)-(3) are navigable waters and/or they affect interstate commerce in that the waters themselves are interstate, are actually used in interstate commerce or are the territorial seas. (p. 4)

Agency Response: See TSD and Preamble

Mobile Baykeeper (Doc. #16472)

2.17 We recommend that the new rule should uphold the protections for waters currently protected under the existing definition. The new rule should not narrow jurisdictional coverage of Clean Water Act beyond that is required by SWANCC and Rapanos. The new rule should fully protect jurisdictional coverage of all tributaries, not just TNWs, Interstate Waters, Territorial Seas and Impoundments. The new rule should fully protect jurisdictional coverage of all impoundments of any Waters of the United States. The new rule should fully protect waters in a manner that is consistent with the science, and should not limit coverage solely based on vague notions of close proximity. The new rule should not reduce protections for wetlands, tributaries and other waters, which are wholly intrastate by removing the interstate commerce grounds for asserting jurisdiction. The new rule should also not include a categorical exclusion for groundwater and waste treatment systems. Categorical exclusion of groundwater will lead to regulatory confusion and is not supported by sound science as described by numerous members of the SAB. Further, EPA lacks the authority to exempt waste treatment system impoundments that are otherwise waters of the U.S. from coverage under the CWA and EPA is doing so in violation of the Administrative Procedures Act. (p. 2)

Agency Response: See TSD and Preamble and Waters Not Jurisdictional Response to Comments Compendium.

2.18 While we agree that waters with a "significant nexus" to TNWs, Interstate Waters and Territorial Seas should be jurisdictional, we do not agree that these are the only "other" waters that should be protected under the CWA. (p. 2-3)

Agency Response: **See TSD and Preamble**

Altamaha Riverkeeper and Altamaha Coastkeeper (Doc. #18941)

2.19 Altamaha Riverkeeper supports the Proposed Rule to the extent that it maintains protections for Traditionally Navigable Waters ("TNWs"), Interstate Waters, and Territorial Seas. (p. 2)

Agency Response: **See TSD and Preamble**

2.1. TRADITIONAL NAVIGABLE WATERS

Agency Summary Response

The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The preamble to the proposed rule and the Preamble and the Technical Support Document reflect the considerations the agencies will use when making traditional navigable waters determinations. When such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act.

Specific Comments

Los Angeles Department of Water and Power (Doc. #15238)

2.20 LADWP recommends that the Proposed Rule be modified to: (…) Address navigability with respect to waters prohibited for public access and susceptibility for navigation. (p. 8-9)

Agency Response: **See TSD and Preamble**

Carlton County, Minnesota (Doc. #19243)

2.21 BE IT FURTHER RESOLVED that the Carlton County Board of Commissioners support the EPA and ACOE regulation of traditional navigable waters only. (p. 2)

Agency Response: **See TSD and Preamble**

Delta Council (Doc. #5611.1)

2.22 Although the agency suggests that the interpretive rule does not broaden the coverage of jurisdictional waters under provisions of the Clean Water Act, Delta Council views that by changing the definition of the term, "Waters of the U.S.", that the rule does extend the jurisdiction beyond "navigable or significantly connected to navigable waters", which is part of the current rule. The proposed rule would include smaller water bodies and in the case of the Delta, we believe the jurisdiction would extend to smaller water bodies and consequently, require permits for modification to ditches, small ponds, field depressions

and field drains that are only wet when there is heavy rain. Our history of Section 404 of the Clean Water Act suggests that the term 'navigable was specifically used by the Congress in order to limit the scope of the law's jurisdiction and preserve the individual States' authority to regulate intrastate waters'. (p. 2)

Agency Response: **See TSD and Preamble**

Federal Water Quality Coalition (Doc. #15822.1)

2.23 As discussed above, the CWA addresses only the quality of navigable waters. Consistent with Supreme Court case law interpreting the Act, to protect the quality of navigable waters the agencies may exert jurisdiction over a limited set of waters that are not navigable. The identification of those waters must be based on a showing that federal jurisdiction over those non-navigable waters is necessary for the protection of the quality of navigable waters. (p. 63-64)

Agency Response: **See TSD and Preamble**

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

2.24 The agencies' notion of "traditional navigable waters" is overbroad, inconsistent with case law, and inconsistent with their own past interpretations of what constitutes a traditional navigable water. (p. 7)

Agency Response: **See TSD and Preamble**

2.25 Recommendation: The agencies should clarify Appendix B to state that traditional navigable waters refer to RHA jurisdiction and that RHA standards and principles should be used for determining whether a particular body of water qualifies as a TNW. (p. 26)

Agency Response: **See TSD and Preamble**

Arizona Mining Association (Doc. #13951)

2.26 Overly Expansive Interpretation of Traditional Navigable Waters.

The preamble to the proposed rule discusses the agencies' approach to identifying "traditional navigable waters" ("TNWs") and in the process makes a fundamental error by ignoring what was and is "traditional." The phrase of course evolved out of a need to distinguish between waters regulated by the federal government prior to the adoption of the CWA ("navigable waters of the United States") and "navigable waters" under the CWA, defined as "waters of the U.S." Under "traditional" federal regulatory authority, waters needed to both be navigable-in-fact[2] and, alone or in combination with other navigable-in-fact waters, form a "continuous highway" for waterborne commerce across state lines. See The Daniel Ball, 77 U.S. 557, 563 (1870). The preamble to the proposed

[2] Under Section 13 of the Rivers and Harbors Act, the Corps regulates discharge of refuse to navigable waters and their tributaries. 33 U.S.C. § 407; see also New Jersey v. New York, 283 U.S. 336, 346 (1931); U.S. v. American Cyanamid Co., 480 F.2d 1132, 1135 (2d Cir. 1967). The Rivers and Harbors Act also extended to activities not just within navigable waters but also activities affecting navigable capacity of waters, based on a similar premise to the need to regulate tributaries. See 33 C.F.R. § 322.3(a); Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

rule ignores a traditional limit placed on federal regulatory authority (the continuous highway requirement) and expands the concept of navigable-in-fact beyond traditional regulatory standards. Although EPA and the Corps have some leeway to define what types of non-navigable waters are regulated under the CWA, they cannot change history by redefining what was previously regulated.

1. The preamble ignores traditional limits of Federal regulatory authority: As a starting point, the preamble erroneously assumes that the word "traditional" refers to all navigable-in-fact waters, not just those traditionally regulated by the federal government. As noted above, federal regulatory authority prior to adoption of the CWA generally encompassed "navigable waters of the United States," the test for which is embodied in The Daniel Ball, 77 U.S. 557, 563 (1870).[3] That test has two parts. The first is denoted by the use of the word "navigable" and involves a determination of whether a water body is "navigable-in-fact." The second is denoted by the phrase "of the United States" and involves a determination of whether the waterbody forms by itself or conjunction with other waters, a continuous interstate highway for waterborne commerce. The phrase "navigable waters of the United States" was later used by Congress in defining the scope of regulation under the Rivers and Harbors Act ("RHA"), 33 U.S.C. §§ 403 and 407, as well as the Federal Power Act. 16 U.S.C. § 796(8) (definition of "navigable waters"); id. § 817(1) (permits required for dams in navigable waters of the United States).[4] In other words, "navigable waters of the United States" represents the traditional limit of federal regulatory jurisdiction.

The phrase "traditional navigable waters" is found in SWANCC and was also discussed by Justices Scalia and Kennedy in their opinions in Rapanos. In all three contexts, it is clear that the Justices are referring to the "traditional" extent of federal regulatory jurisdiction, i.e., navigable waters of the U.S. For example, in SWANCC, the Court says: "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." 531 U.S. at 172. The Court cites to United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408 (1940), which involves navigable waters of the United States. Similarly, in Rapanos, the essential question was how far the CWA extended the Corps' "traditional" regulatory reach. In discussing the Corps' approach to the regulatory definition of navigable waters under the CWA, Justice Scalia refers to "traditional interstate navigable waters." 547 U.S. at 724 (emphasis added). Similarly, Justice Kennedy, in drawing the same contrast, refers to "waters susceptible to use in interstate commerce – the traditional understanding of the terms 'navigable waters of the United States' . . . ." Id. at 760-61.

[3] Later cases have refined the concept of navigable-in-fact but have largely left the continuous highway test alone. See, e.g., Economy Light & Power Co. v. U.S., 256 U.S. 113, 123 (1921) (once navigable, always navigable, also referred to as "indelible navigability"); U.S. v. Appalachian Electric Power Co., 311 U.S. 377, 407-09 (susceptible for navigation with reasonable improvement).

[4] The Federal Power Act regulates non-navigable water bodies also but does not use the term "navigable waters" when doing so. 16 U.S.C. § 797(e). See also Muckleshoot Tribe v. FERC, 993 F.2d 1428 (1993) (requiring a navigable water connection between upstream and downstream segments of a river in order to meet the navigability test of the Federal Power Act).

Thus, the starting point for defining CWA jurisdiction is the traditional scope of federal regulatory authority before the CWA was adopted, i.e., RHA jurisdiction. This was in fact the Corps' initial reaction to the Rapanos opinion, when in a memorandum from Corps Headquarters, the Corps referred to traditional navigable waters as [RHA] Section 10 waters. See Memorandum from Mark Sudol, Interim Guidance on the Rapanos and Carabell Supreme Court Decisions (July 5, 2006). Once the agencies set about creating formal guidance, they apparently concluded that the concept of TNWs could be stretched beyond meaning by equating "traditional navigable waters" with all navigable-in-fact waters. But this is simply inconsistent with the assumptions governing the controlling decisions in SWANCC and Rapanos. Justice Kennedy in particular is referring to traditional federal jurisdiction. Under the public trust and equal footing doctrine, navigable-in-fact waters are owned by the State and title is vested at statehood. Utah Division of State Lands v. U.S., 482 U.S. 193 (1987); Defenders of Wildlife v. Hull, 199 Ariz. 411 (App. 2001). The test for "title" navigability is a federal one and, like the RHA jurisdiction, is based on The Daniel Ball, supra. Defenders, 199 Ariz. at 419. Although utilizing a federal test, the fact that waters are navigable-in-fact did not extend federal jurisdiction and control over them, at least before the Clean Water Act. So presuming that all navigable-in-fact waters are TNWs as that term was used by Justice Kennedy (and Justice Rehnquist in SWANCC) simply has no legal basis. (p. 15-17)

Agency Response: **See TSD and Preamble**

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

2.27 Providing evidentiary criteria for determining jurisdiction based on the "sliding scale" principle that the greater the distance and the more tenuous the connection that a wetland or water may have to a navigable water, the greater the site-specific evidence is needed to assert jurisdiction. For example, asserting jurisdiction over an intermittent and ephemeral tributary and its adjacent wetlands that indirectly flows to traditionally navigable water would require strong site-specific evidence. That evidence must show that the tributary and its adjacent wetlands along with evidence of similarly situated tributaries and their adjacent wetlands within the same watershed provide functions and values important to the chemical, physical and biological integrity of the closest traditionally navigable water (TNW). The Fourth Circuit's Precon decision provides a road map as to the kind of evidence that should be required. (p. 55-56)

Agency Response: **The agencies have not adopted the sliding scale principle, rather they interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience.**

Wyoming Mining Association (Doc. #14460)

2.28 Nonnavigable waters are protected under existing regulations

WMA members support the premise of the rule in that it is important to have regulations in place that protect our nations "navigable waters" however the rule appears to expand jurisdiction over features with no significant relationship to navigable waters and

ultimately goes beyond the limits intended by Congress. The expanded waters would include channels that flow infrequently such as ephemeral and intermittent drainages regardless of significance, nonnavigable ditches and isolated waters. Currently there are rules in place to protect these nonnavigable waters such as the Section 402 National Pollutant Discharge Elimination System (NPDES), Section 401 state water quality certification process, Section 311 oil spill program, and Section 303 water quality standards and total maximum daily load programs. The proposed rule does not provide any documentation to show that the existing rules do not adequately protect these nonnavigable waters. The rule's expansion of jurisdictional waters is unwarranted as there are regulations in place that protect these waters. (p. 2)

Agency Response: **See TSD and Preamble**

Georgetown Sand & Gravel (Doc. #19566)

2.29 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. 2)

Agency Response: **See TSD and Preamble**

Oregon Cattlemen's Association (Doc. #5273.1)

2.30 Nowhere in its definition of "navigable waters" did Congress mention that the CWA would extend beyond "the waters of the United States, including the territorial seas" to include areas that "significantly affect (or have a "significant nexus" with) the waters of the United States, including the territorial seas." Implicit in the language used by Congress in defining "navigable waters" is the idea that waters must actually be waters to satisfy the definition. Under no reasonable construction of the CWA's definition of "navigable waters" can one fairly say it includes areas that are not themselves "waters" but merely "affect" those areas that are "waters" in their own right. (p. 2)

Agency Response: **See TSD and Preamble**

Montana Wool Growers Association (Doc. #5843.1)

2.31 The Proposed Rule would entirely obviate the obvious meaning of "navigable waters." Such construction is inconsistent with SWANCC and the plurality's holding in Rapanos (the "plain language of the [CWA] simply does not authorize this 'Land Is Waters' approach"). 547 U.S. at 734 (plurality). Of equal importance, the Proposed Rule would make the CWA's use of "navigable waters" counterintuitive and incomprehensible to the public. (p. 5)

Agency Response: **See TSD and Preamble**

Nebraska Cattlemen (Doc. #13018.1)

2.32 The Supreme Court has clearly articulated there is a limit to CWA jurisdictional authority. This limit is the commerce clause, the term navigable and a finding of

"significance" in impact to traditionally navigable waters. See *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001). In *SWANCC* the Court pointed out the authority of the "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." *Id.* at 172. (p. 10)

Agency Response: See TSD and Preamble

Westlands Water District (Doc. #14414)

2.33 Under the Proposed Rule, the Clean Water Act's limitation to "navigable waters" would have little or no meaning, because the Act would apply to virtually all waters in the nation even though some such waters may have little or no discernible connection to or impacts on a traditional navigable water body. (p. 23)

Agency Response: See TSD and Preamble

California Association of Winegrape Growers (Doc. #14593)

2.34 Notwithstanding formal regulations and the multitude of federal case law defining and interpreting "navigable waters," dating back decades and even hundreds of years, the Proposed Rule attempts to ignore current regulatory definitions and, instead, redefine the term in order to encompass all waters, including those that may or may not have the likelihood of being classified as "navigable" at some future date. Specifically, the Proposed Rule states "waters will be considered traditional navigable waters if: …they are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation." (Guidance, p. 6.) As seen by the plain language of the current regulations, the Proposed Rule misstates the law. Current regulations require "navigable waters" to be "susceptible to use in interstate or foreign commerce." (33 C.F.R. § 328.3(a)(1).) As drafted, the Proposed Rule fails to correctly define the requirements necessary for a water to be classified as "navigable water." Such regulations remain valid, as neither SWANCC nor Rapanos invalidated any of the regulatory provisions defining "waters of the United States." Thus, the Proposed Rule's attempt to expand the definition of "navigable waters" to cover any waterbody that can support "one-time recreational use" is improper and inappropriate. (p. 13)

Agency Response: See TSD and Preamble

The Mosiac Company (Doc. #14640)

2.35 Although the proposed rule would not change the regulatory text for TNWs from the existing regulations, the interpretation under the proposed rule broadly expands the concept of TNWs and is inconsistent with the definition relied on by the *Rapanos* plurality and Justice Kennedy's concurrence. (p. 11)

Agency Response: See TSD and Preamble

Florida Crystals Corporation (Doc. #16652)

2.36 A. The Proposed Rule Effectively Ignores the Word "Navigable" in the CWA

The plain language of the CWA states that it governs discharges into the "navigable waters." 33 U.S .C §§ 1311(a), 1362(12). "Navigable waters" are defined as "the waters of the United States, including the territorial seas. " 33 U.S.C. § 1362(7). The phrase "waters of the United States " cannot be construed out of the context of the term it defines, which is "navigable waters." The Supreme Court ruled in Solid Waste Agency of Northern Cook County, 531 U.S. at 682-83 , that

> "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. We said in Riverside Bayview Homes that the word 'navigable' in the statute was of 'limited import.. . ', and went on to hold that § 404(a) extended to non-navigable wetlands adjacent to open whatever. 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 made so."

Yet, the Proposed Rule ignores the phrase "navigable waters" when it seeks to regulate farm ditches, isolated lakes and ponds, and other minor bodies of water located miles away from waters that are navigable in fact. The Proposed Rule would recapture most of the bodies of water which the Supreme Court in Solid Waste Agency of Northern Cook County ruled were improperly regulated, ignoring the finding of the court.

B. The Proposed Rule Ignores the Supreme Court's Directive to Regulate Only Waters That Matter to Navigable Waters

The Proposed Rule also twists the decision in Rapanos v. United States, 547 U.S. 715 (2006), to the point that it is unrecognizable. In Rapanos, the majority of the Supreme Court expressed great skepticism that ditches miles away from navigable waters can be regulated under the CWA. The five justices in the majority identified ways to distinguish between the waters that matter from a federal perspective (which can be regulated) and those which do not matter (and therefore lie outside the jurisdiction of the CWA). Justice Kennedy in particular wrote that a water is only regulated under the CWA if it has a "significant nexus" to a truly navigable water. He wrote that while the CWA may allow for regulation of some waters which are not themselves navigable, the CWA does not "permit federal regulation whenever wetlands lie along a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." ld. at 778. That is why he wrote that the nexus with traditionally navigable waters must be "significant." In other words, the CWA calls for the regulation of some waters which are closely connected to truly navigable waters and are important - but not the regulation of other waters. The Proposed Rule, by contrast, regulates almost all small waters in places like Florida no matter how far away from truly navigable waters or their importance to those downstream waters. The agencies therefore are treating almost any connection as "significant" and ignoring his opinion that there are many waters which should not be regulated under the CWA. (p. 7-8)

Agency Response: **See TSD and Preamble**

National Wildlife Federation (Doc. #15020)

2.37 The Proposed Rule Definition of Traditional Navigable Waters is Well- Supported by Statute and Case Law.

The proposed rule properly retains the existing regulatory language defining and interpreting traditional navigable waters (TNWs) as: [a]ll waters which are currently used, or were used in the past, or may be susceptible of use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." See e.g., 33 C.F.R. 328.3 (a)(1). The Agencies' proposed rule and interpretation regarding TNWs is well-supported by pre-Clean Water Act navigability case law and statutes, is consistent with existing regulations and with the current 2008 Guidance on TNWs, and helps restore protections for wetlands, lakes, and streams nationwide.

A. TNWs include waters currently used, used in the past, or susceptible of use in interstate commerce.

Case law makes clear that TNWs include waters that can be navigated by water craft, waters that are currently used as highways in interstate commerce, waters susceptible to such use, and waters that were historically so used, even if they are not currently so used.[5] These include waters that may have areas difficult to navigate.[6] These also include certain intrastate waters.[7] Moreover, navigation need not be commercial in nature, but can be recreational or small craft navigation.[8]

There are three lines of cases that comprise the foundation for TNWs—1) Commerce Clause cases, including commerce,[9] Rivers and Harbors Act,[10] Federal Power Act,[11] and navigational servitude cases;[12] 2) Admiralty cases,[13] and 3) Equal Footing Clause cases.[14]

[5] See, e.g., *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (waters "are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce"); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so.").

[6] See Appalachian Elec. Power Co., 311 U.S. at 408 (navigability can exist despite "the necessity for reasonable improvements to make an interstate waterway available for traffic").

[7] Utah v. United States, 403 U.S. 9 (1971).

[8] See Appalachian Elec. Power Co., 311 U.S. at 416 ("Nor is the lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the streams for similar types of commercial navigation."); FPL Energy Marine Hydro LLC v. FERC, 287 F.3d 1151, 1157-59 (D.C. Cir. 2002) (upholding navigation based on three canoe trips taken to demonstrate navigability); Alaska v. Ahtna, 891 F.2d 1404, 1405 (9th Cir. 1989) (use of river for commercial recreational boating sufficient to show navigability).

[9] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824); The Daniel Ball, 77 U.S. 557 (1870); United States v. Steamer Montello (The Montello), 87 U.S. (20 Wall.) 430 (1874).

[10] Economy Light & Power Co. v. United States, 256 U.S. 113 (1921). The Corps' RHA regulatory definition is based on such cases as The Daniel Ball, The Montello, and Economy Light & Power, as well as such cases as United States v. Utah, 283 U.S. 64 (1931) and and United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[11] United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940). In Appalachian Electric Power, the Court ruled, inter alia, that: "[W]hen once found to be navigable, a waterway remains so." Id. at 408.

[12] The navigational servitude extends from the "ordinary high water mark" on one bank of a navigable water of the United States to the ordinary high watermark on the other bank. A water body's ordinary high watermark is the "line

All of these lines of cases involve TNWs and all of these cases can and should be used to support a determination that a water is a TNW.

The statutes, federal case law, and regulatory policy noted above support the Agencies' rule interpretation that waters will be considered TNWs if:

- They are subject to section 9 or 10 of the Rivers and Harbors Act of 1899; or
- A federal court has found the water body to be navigable-in-fact; or
- They are waters currently in use for commercial navigation, including commercial waterborne recreation; or
- They have historically been used for such commercial navigation; or
- They are susceptible to being used in the future for such commercial navigation. (p. 24-26)

Agency Response: **See TSD and Preamble**

Pacific Legal Foundation (Doc. #14081)

2.38 The proposed rule purports to retain its existing definition of "traditional navigable waters" as those waters that "are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce or could be used for commercial navigation." See 79 Fed. Reg. 22200. This emphasis on the use of such channels for commerce is consistent with the long-standing definition of "traditional" or "navigable-in-fact" waters as described by the Supreme Court in The Daniel Ball, 77 U.S. 557 (1870), and reiterated by the court in SWANCC ,531 U.S. 159, wherein the High Court held that the Corps could not regulate isolated water bodies and that, through the Clean Water Act, Congress intended to exert nothing "more than its commerce power over navigation." See id. fn 3.

However, the proposed rule brazenly declares that "traditional navigable waters" under the Clean Water Act will include any water for which a "Federal Court has determined that the water body is navigable-in-fact under Federal Law." 79 Fed. Reg. 22200. This would include navigability determinations that have nothing to do with interstate commerce or commercial navigation, as the definition expressly requires. For example, the agencies intend to rely on navigability determinations under the equal footing doctrine designed to determine title in waterways at the time of statehood, even though those determinations do not require a connection to interstate commerce. See id. at 22253. The Corps and EPA seem unconcerned that this interpretation of federal jurisdiction under the Clean Water Act directly conflicts with their own regulatory definition of "traditional navigable waters" and Supreme Court precedent. In fact, the proposed rule fails to cite a single case in support of the agencies' novel interpretation

of the shore established by the fluctuations of water . . . ." 33 C.F.R. §329.11(a). It is determined by "physical characteristics such as a clear, natural line impressed on the bank, . . . changes in the character of the soil; destruction of terrestrial vegetation; . . . or other appropriate means that consider the characteristics of the surrounding areas." *Id. See e.g.*, Normal Parm Jr. et al. v. Mark Shumate, 513 F.3d 135, 143 (5th Cir. 2007); United States v. Rands, 389 U.S. 121, 123 (1967).

[13] Price v. Price, 929 F.2d 131, 134 (1991).

[14] Idaho et al. v. Coeur D'Alene Tribe of Idaho et al., 521 U.S. 261 (1996); United States v. Utah, 283 U.S. 64, 76 (1931) (citing United States v. Holt State Bank, 270 U.S. 49, 56 (1926)).

that "navigable waters" under the Clean Water Act are the same as "navigable waters" under any other federal law. There is no law to support this interpretation.

Moreover, the proposed rule states that the "likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes." 79 Fed. Reg. 22200. In support of this proposition, the proposed rule relies in large part on FPL Energy Marine Hydro LLC v. FERC, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (emphasis added). See 79 Fed. Reg. 22253. But that case undercuts the proposed rule.

In FPL, the D.C. Circuit upheld a FERC determination that a stream was a "traditional navigable water" based, in part, on the fact that the stream had minimal rapids and had been traversed by canoe and therefore could be used for simple forms of transportation. Id. at 1158. However the court acknowledged FERC had also determined that streams traversed only by expert kayakers, "or specialized sporting craft designed for river running," were not "traditional navigable waters." Id. Therefore, the implication in the proposed rule that navigability can be demonstrated by any type of current boating is not supported by this authority.

The agencies' reliance on FPL is misplaced for other reasons as well. The court was clear that, under U.S. Supreme Court precedent, future navigability cannot be based solely on transport by canoe, but must be supported by other factors: '"capacity [of a waterway to meet the needs of commerce] may be shown by physical characteristics and experimentation as well as by uses to which the streams have been put."' Id. at 1157 (citing United States v. Utah, 283 U.S. 64, 83 (1931) (emphasis added). Transport by canoe can satisfy the experimentation part of the Supreme Court's navigability standard, but it does not satisfy the physical characteristics part of the Supreme Court standard. As in FPL, so in other cases, the agency must show that the stream is suitable for commercial navigation by its physical characteristics, such as by flow, depth, gradient, and capacity. See id. at 1159. But the proposed rule dismisses this requirement.

Also, the proposed rule (p.22200) states that the future navigability of a stream should "be supported by evidence," and implies such evidence may be limited to boating, whereas the court in FPL held that both the experimentation and physical characteristics parts of the navigability determination must be supported by substantial evidence. Id. at 1159-1160.

For these reasons, the proposed rule overstates federal jurisdiction under the Clean Water Act and should be amended or withdrawn. A determination of navigability under some other law is not sufficient to satisfy the Commerce Clause requirements of the Clean Water Act and transport by boat alone is insufficient to establish a "traditional navigable water." (p. 3-4)

Agency Response: **See TSD and Preamble**

Southeastern Legal Foundation (Doc. #16592)

2.39 The Proposed Rule Effectively Nullifies the Term "Navigable," Rendering the Statutory Phrase "Navigable Waters" Meaningless.

The threshold issue in any analysis of the Proposed Rule is that the Agencies have authority only over navigable waters. While the Supreme Court has recognized that the statutory term "navigable" in the CWA is not limited to waters that are navigable-in-fact, it has also clarified that the term "navigable" creates an important limitation on agency jurisdiction. Looking to Rapanos, it is again useful to consider both the plurality and Justice Kennedy opinions. The plurality held that "the traditional term 'navigable waters' . . . carries some of its original substance. . . ."[15] The SWANCC court painted a comprehensive picture of how the Agencies should understand "navigable":

> We said in Riverside Bayview Homes that the word "navigable" in the statute was of 'limited effect' and went on to hold that Section 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatsoever. 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.[16]

Justice Kennedy likewise highlighted the importance of "navigable:" "[c]onsistent with SWANCC and Riverside Bayview and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and [Traditional Waters]."[17] He also chided the dissent for ignoring the term "navigable" when he noted that "the dissent reads a central requirement out of [the CWA] - namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[18]

Understanding "navigable" leads to the conclusion certain categories of waters are indisputably WOTUS and certain that are not. In between those two categories (WOTUS and not-WOTUS) lies the third category of waters. Under the Proposed Rule, the Agencies are taking jurisdiction over the entire third category when, in reality, only a portion of the third category is actually jurisdictional. Based on the case law, one can draw several important conclusions about the third category and greatly reduce its size. First, isolated ponds and wetlands (such as in SWANCC), waters with strained ecological connections (such as "migratory bird habitat"), and waters removed fiom navigable waters (such as the wetlands in Rapanos) fall out of the third category and into the not-WOTUS category. Second, what navigable waters include, "navigable" waters, if not strictly limited to waters navigable in fact or can be "reasonably made so," goes no further than waters that have a real, substantial, and apparent connection to such waters. Wetlands with direct physical contact to navigable waters (such as in Riverside) and tributaries that are an obvious and substantial source of water to Traditional Waters fall out of the third category and into the WOTUS category. If the waters are not navigable, then they are jurisdictional only if there is a self-evident reason there is no meaningful

[15] *Rapanos*, 547 U.S. at 734.
[16] *SWANCC*, 531 U.S. at 172 (emphasis added).
[17] *Rapanos*, 547 U.S. at 779.
[18] *Id*. at 778.

distinction between those waters and nearby navigable waters. Any other approach to the concept of navigability renders the concept nugatory and futile.

Against the backdrop of the "navigable" discussions in Riverside, SWANCC and Rapanos, Congress had multiple opportunities to weigh in to remove the term from the statute.[19] In the 108th(2003-2004), 109th(200-2006), 110th (2007-2008), and 111th (2009-2010) Congresses, bills were introduced with the purpose of deleting the term "navigable" from the CWA. In all cases, Congress had the opportunity to give the Agencies the power to regulate all waters -not just "navigable" waters u n d e r the CWA. But, in all cases, Congress chose not to do so because Congress recognizes that "navigable" is an important limitation on the Agencies' jurisdiction.[20] Unfazed by the Supreme Court's and Congress' insistence that "navigable" has meaning, the Agencies have moved forward with the Proposed Rule. In doing so, the Agencies are proposing a rule that removes any notion of a "navigable" requirement from its jurisdictional constraints. And, in doing so, the Agencies are expanding the universe of waters over which they will have authority. (p. 8-10)

Agency Response: **Commenter relies on various Congressional bills that failed to remove the term "navigable" to support its interpretation of "navigable waters". In general, reliance on failed legislation is of little import. U.S. v. Craft, 535 U.S. 274 (2002)("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") The agencies' interpretation is set forth in the TSD and Preamble.**

Eastern Municipal Water District (Doc. #15544)

2.40 **Clarification of the Extent of Regulation Required for Waters of the U.S. and Removal of Ambiguities**

The Clean Water Act prohibits the discharge of pollutants into navigable waters and mandates a long list of regulatory requirements for navigable waters. Because the Act defines navigable water as "waters of the U.S. and the territorial seas," the proposed rule must clarify whether waters of the U.S. identified by this rule must meet the requirements of navigable waters in the statute. Those requirements for navigable water, and potentially the waters of the U.S. defined in this rule, include:

- National goal to eliminate discharges into navigable waters;
- Monitor water quality standard of navigable waters;
- Set effluent limits for discharges into navigable waters;
- Designate beneficial uses for navigable waters;
- Establish water quality standards for navigable waters;
- Set Total Maximum Daily Loads (TMDL) for pollutants into navigable waters;

[19] See bills introduced in the 108th, 109th, 110th, and 111th Congresses to either delete the term "navigable" from the CWA or to expand jurisdiction under the CWA.
[20] Notably, the Clean Water Restoration Act introduced in both the 110th and 111th Congress failed to pass the start line -neither made it to a vote in a House Committee.

• List all impaired navigable water and develop strategy for each segment of navigable waters that fails to meet water quality standards;

• Consider listing (by EPA) as impaired, any navigable water for which a person submits a petition;

• Inventory all point source discharges into navigable waters; and

• Identify non-point sources contributing to failure of water quality standard in navigable waters.

The imposition of these requirements on water infrastructure facilities that could be defined as waters of the U.S. under the proposed rule will dramatically increase the scope and degree of regulation, and therefore increase costs that must be passed on to EMWD's ratepayers with no appreciable benefit. While some water infrastructure facilities are currently regulated under the Act, meeting the additional mandate of navigable waters through the expanded definition of waters of the U.S. will significantly change the regulatory requirements that must be met.

For example, EMWD's water recycling facilities operate under NPDES permits that regulate discharges into waters of the U.S. However, if water reuse facilities themselves are defined as waters of the U.S., and must meet the Clean Water Act requirements for navigable waters, EMWD will have to control not only the discharges from the system, but also all flow into the system after inventorying all point source discharges and any non-point sources that could contribute to water quality standards being exceeded. Beneficial uses would have to be identified for the ditches and reservoirs of the system, and water quality standards would have to be set and achieved consistent with those beneficial uses. Water quality in the system would have to be monitored and numeric effluent limits must be met. The rule explicitly states that the definition of waters of the U.S. applies throughout all sections of the Clean Water Act, yet much of the discussion andthe economic analysis of the rule is focused on the Section 404 dredge and fill permit program. **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. 5-6)

Agency Response: **See TSD and Preamble and Economic Analysis.**

Citizen's Advisory Commission on Federal Areas, State of Alaska (Doc. #16414)

2.41 A defensible interpretation of a statute cannot accompany effective nullification of its words and provisions; however, this is the result of the proposed definition. For example, the rule grants no deference to Congress' inclusion of the word "navigable" in 404. Jurisdictional waters extend as far away from navigable waters as the potential for hydrologic connectivity. Not only is navigability a "central requirement" in the CWA,[21] it provides a bright line toggle for federal jurisdiction over areas lacking a connection to interstate commerce in the traditional sense. (p. 2)

Agency Response: **See TSD and Preamble**

[21] Rapanos v. United States, 126 S. Ct. 2208,2247 (2006) (Kennedy, J., concurring)

Wetland Science Applications, Inc. (Doc. #4958.2)

2.42 The Study seems to suggest that all positive effects on navigable waters can be tied to the channels or to wet features not connected to channels. This is nonsense. Protection of navigable waters cannot be accomplished without sound management of nonwet landscapes. An objective assessment of the effect of remote channels and wetlands on navigable waters would have compared those features to the effects that the rest of the landscape has on navigable waters. (p. 7)

Agency Response: See TSD, Science Compendium and Preamble

The Property Which Water Occupies (Doc. #8610)

2.43 Expanding Navigable Waters Will Likely Diminish Water Quality. Navigable waters are considered public highways[22], providing a travel route for commerce. Most States acknowledge a 'right' to travel on these 'water highways' with little restrictions. Redefining headwater streams and small creeks as 'navigable waters' would increase use of, and therefore impacts to, ever smaller and more fragile channels for water. So while the Rules purport these water-soaked lands, intermittent streams and tiny creeks are critical to the filtration of downstream public waters, expanding the definition of 'navigable waters' would increase human impacts to these 'critical headwater streams' be it by foot, by boat or by Jeep. Additional public use would compact soils impeding filtration, and may disturb aquatic and riparian habitats. Turning delicate headwater streams into *public highways* will result in bank erosion, increases in sedimentation, cross-contamination from recreational gear, litter, human waste, etc. None of these likely impacts are considered as an 'effect' from the expansion of what waters are navigable, yet impacts to water-quality from recreational use of these small streams is well documented by the other Federal agencies (National Park Service, the Bureau of Land management, Fish and Wildlife, and the U.S. Forest Service). Expanding the definition of navigability does not 'protect the quality of water' over headwater streams, it diminishes water quality which is itself a violation of the Clean Waters Act. The Rules overlook that State regulations and the federal navigable servitude protects public use of 'navigable' waterways. The environmental consequence of turning critical wetland habitat into a public highway for recreational use and vehicles is not considered within the Rules. Further, turning private property into a public highway without compensation violate the 14th and 5th amendments. The consequences of redefining 'navigable waters' extends far beyond the jurisdiction of Clean Waters Act. Any jurisdictional authority claimed beyond larger navigable rivers should clarify that public access rights are not expanded with any "clarification," or 'expansive reading', of CWA jurisdiction. Unless the intent of these Rules is to expand public access rights onto those fragile streams within our National Parks or over private property, redefining which waters are 'navigable' should be avoided. The Rules must be explicate that state rights of public access do not, and can not be interpreted to, expand with jurisdiction under these proposed Rules. (p. 7-8)

[22] PPL Montana v. Montana, 132 S. Ct. 1215,1227 (2012)

Agency Response: **The agencies disagree that providing CWA protection to waters defined as "waters of the United States" will diminish water quality. See TSD and Preamble**

2.44 Redefining 'Navigable Waters' Transfers Jurisdiction to the States. An expanded definition of navigability creates new state-owned public highways.[23] Stream buffer zoning –that protecting fastlands from being trampled or overused- would interfere with the public right to utilize newly established state-owned thoroughfares. Additionally, creating highways over private property removes one of the most fundamental elements of all property rights, the right to exclude others.[24] Such title transfer not only takes property from private citizens, but also transfers to the States any Federal title or jurisdiction over smaller streams within current National Forest and National Park Lands. (p. 8)

Agency Response: **See TSD and Preamble**

2.45 Redefining Navigable Waters through Rule Making is Imprudent. It would be unnecessary to clarify the definition of *Traditional Navigable Waters* as outlined by the 200 years of jurisprudence, in order to protect water quality. Altering this definition has significant consequences not addressed by the proposed Rules. The Courts long ago recognized the CWA provides limited jurisdiction over upstream waters including non-navigable tributaries, but only when necessary to protect downstream navigable waters. Therefore adding a new definition for *Navigable Waters* is itself unnecessary to delineate or invoke jurisdiction. To those individuals, entities and federal agencies holding title to these headwater streams, washes, intermittent streams and non-navigable tributaries, the Rules' expansive definition for *navigable* waters creates a significant threat to their interests, and interferes with their property rights. Only by removing the unnecessary and contradictory definition for *navigable waters* within the proposed Rules, could the Rules avoid upsetting vested property title. Instead the Rules should simply reference 33 CFR § 329, which defines navigable waters for jurisdictional purposes and clarifies that only a Federal Court can upset vested title to real property by declaring a water body navigable. (p. 8-9)

Agency Response: **See TSD and Preamble**

2.46 The Clean Air Act limits air pollution originating from the space over private property, but limits regulatory jurisdiction to issues and conduct pertaining to air quality. Alone, the presence of Air does not justify domain over all potential uses of private, yet the proposed Rules make such a bold presumption based on the presence of water. Under the proposed Rules, regulatory control over land uses which have any remote nexus to navigable waters is only 'permitted' upon approval by the ACOE. This claimed power is based entirely on the presence of water molecules regardless of the ownership of the space occupied by the water. Such a claim of domain has nothing to do with water quality and is in excess of statutory authority, which congress limited to protecting navigable/public waters. At common law, water itself provides no basis to claim

[23] PPL Montana v. Montana, 132 S. Ct. 1215,1227 (2013)
[24] Lingle v. Chevron, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Citing 512 U. S. 374, 384,(1994); 483 U. S. 825, 831-832, (1987); & 444 U. S. 164, 176, (1979).

jurisdiction or a right over private lands. (*Blackstone Commentaries* Vol II pg.18). Similarly, the air breezing over land provides no basis to upset property rights vested in the soil. Because the Rules make no distinction between public lands submerged by navigable waterways and the space over private property, the Rules unlawfully presume domain regardless of property ownership. Any presumption of authority based only upon the existence of water is in excess of agency delegated authority, and a violation of the law. 5 USC 706. A Federal Agency must provide the legal basis for making such a broad presumptive claim, and the CWA does not provide this basis. Because the proposed Rules have failed to provide any basis for such claimed jurisdiction, it does not provided the necessary information for citizens to raise objection to, or challenge, the unnecessary permitting costs, claim of title or the taking of a property right as required under the 6th amendment. Though courts have held the Federal Government holds absolute authority over navigable waters[25], they also recognize t he scope of this Federal Navigable Servitude is confined to the navigable waterways.[26] In error, the proposed Rules fail to differentiate between the ownership of the space occupied by navigable waters, and all other real property which may be temporarily occupied by water. The Rules mistakenly presume homogeneous jurisdiction through the space over both private and public lands. The presence of water provides no basis for controlling use of private property, and therefore cannot by itself invoke CWA jurisdiction. This flawed premise for invoking CWA jurisdiction, rather than any real threat to public/navigable waters, established an arbitrary standard. (p. 9-10)

Agency Response: **See TSD and Preamble**

2.1.1. Definition

Agency Summary Response

The agencies' TSD and Preamble address the vast majority of these comments.

Specific Comments

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

2.47 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). (p. 1)

Agency Response: **See TSD and Preamble**

Stokes Soil & Water Conservation District (Doc. #2043)

2.48 Again, I say NO to the proposed clarifications and urge that the word "navigable" remain in the language of the CWA, as originally intended. (p. 1)

Agency Response: **See TSD and Preamble**

[25] US hold absolute power over navigable streams
[26] Navigable servitude limited to the navigable water body. Rand v US (cite)

Hyde County Board of Commissioners et al. (Doc. #2472)

2.49 RESOLUTION NOT IN SUPPORT OF THE ENVIRONMENTAL PROTECTION AGENCY REMOVING LANGUAGE CONTAINING "NAVIGABLE" WATERS IN THE WATERS OF THE UNITED STATES PROPOSED RULE UNDER THE CLEANWATERACT AMENDMENT

"Navigable" is a limiting factor, and without that word in the language it opens the door to stricter limitations from the Environmental Protection Agency. (p. 2)

Agency Response: See TSD and Preamble

Custer County Commission (Doc. #10186)

2.50 "NAVIGABLE" is another word that needs to be defined. It would be very difficult to put a watercraft of any size in most of the creeks in Eastern Montana even during spring thaw or after a heavy rain. Common sense would suggest the word "NAVIGABLE would mean a waterway that a person could navigate a boat up or down the stream most of the year. This would only pertain to a very few waterways in Eastern Montana. The definition of this word will have a long reaching effect on our County and on Agriculture in general. (p. 2)

Agency Response: See TSD and Preamble

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

2.51 The agencies redefine the term "traditional navigable waters" to include future use of impoundments as navigable waters. Using future use to define a "traditional" is an oxymoron. See, pages 22200 and 22201. The waters of the United States as a jurisdictional concept arose out of admiralty law. EPA and USACE attempt to define these issues in a way completely contrary to this historical background. (p. 2)

Agency Response: See TSD and Preamble

Wibaux County Commissioners (Doc. #12732)

2.52 The word “NAVIGABLE” is another word that needs to be defined. Most of our streams in eastern Montana are not navigable but under your guidelines they are considered that way. Common sense would suggest the word ‘navigable” would mean a waterway that a person could navigate a boat up or down stream most of the year. This definition would have a very long arm into counties and the agriculture sector. (p. 2)

Agency Response: See TSD and Preamble

Calcasieu Parish Police Jury, Louisiana (Doc. #15412)

2.53 WHEREAS, broadening the "Waters of the U.S." definition would adversely impact local farmers, governments, businesses, and property owners. The Calcasieu Parish Police Jury would like the U.S. Army Corps of Engineers to define navigable waterways as any waterway that can be navigated by a multi-person vessel with a berth of ten (10) feet or greater and in its original condition used for interstate and/or foreign commerce; all other waterways will be left out of this proposed rule (p. 2)

Agency Response: **See TSD and Preamble**

Association of Clean Water Administrators (Doc. #13069)

2.54 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: **See TSD and Preamble**

Coalition of Local Governments (Doc. #15516)

2.55 VI. EPA's "Ditch the Myth" Responses

The EPA drafted a document called "Ditch the Myth" in response to concerns and alleged misconceptions about the Proposed Rule, to which the Coalition responds to EPA's comments as follows: (…)

Regulating Non-navigable Waters

EPA's Response:

Court decisions and the legislative history of the Clean Water Act make clear that waters do not need actual navigation to be covered, and these waters have been protected by the Clean Water Act since it was passed in 1972.

Coalition's Comment:

As was discussed supra Section IV.A, the term navigable within the CWA must be given some meaning and the jurisdiction over waters must therefore depend on the existence of a significant nexus to waters that are navigable in fact or that are adjacent and connected to traditional navigable waterways. Riverside Bayview Homes, Inc., 747 U.S. at 135; Rapanos, 547 U.S. at 779. (p. 15-19)

Agency Response: **See TSD and Preamble**

Washington State Water Resources Association (Doc. #16543)

2.56 The Agencies do not adequately recognize that both the Supreme Court and Congress have consistently established limits to the jurisdiction to the CWA. In part these limits have come from the meaning and weight given to the term "navigable waters" when interpreting what constitutes "waters of the United States."

As noted in the WWG comments, though the Supreme Court has stated that the word "navigable" in the statute is of "limited import," it has emphasized that "it is one thing to give a word limited effect and quite another to give it no effect whatever":

> 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 . . . 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.[27]

The Agencies' proposed rule exceeds this authority. (p. 3)

Agency Response: **See TSD and Preamble**

National Association of Manufacturers (Doc. #15410)

2.57 The flaws of the proposed rule are highlighted when the implications and internal inconsistencies of the many new, proposed definitions included in the proposed rule are analyzed. In the proposed rule, the agencies purport to interpret the term "navigable waters" by defining several terms that make up the ultimate definition of this term. The impacts of this change has far-reaching implications, as this term is an important limitation on the agencies' authority in connection with a number of regulatory programs under the Clean Water Act, including "the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 [dredge and fill] permit program, the section 311 oil spill prevention and response program, the water quality standard and total maximum daily load programs under section 303, and the section 401 state water quality certification process." 79 Fed. Reg. at 22191. Because of the far-reaching impacts, the definitions introduced in the proposed rule should be measured, clear, and appropriate, but the proposed rule and its definitions are anything but measured, clear, and appropriate. Indeed, the agencies' expansive reading of their jurisdiction is ultimately premised on the notion that land features can be regulated because they influence the flow of water, but the "plain language of the statute simply does not authorize this 'Land is Water' approach to federal jurisdiction." Rapanos, 547 U.S. at 734 (plurality). (p. 3)

Agency Response: **See TSD and Preamble**

Home Builders Association of Tennessee (Doc. #16849)

2.58 **The Agencies Have Attempted To Impose A Federal Common Law Definition Of Traditional Navigable Waters When That Determination Is Largely Made By States.**

The term traditional navigable waters ("TNW") is not well defined in the Proposed Rule. Apparently the Agencies believe the term is commonly understood or accepted. Such is not the case. The Agencies rely on one United States Circuit Court of Appeals cases and a handful of United States District Court cases as they have for many years. In reality, states have always made determinations of navigability. The Proposed Rule should require the Agencies to apply the state common law on navigability in determining whether a water is a TNW, rather than that currently used by the Agencies. The state common law definition of navigability defines land use components and legal boundary descriptions. Such deference is entirely compatible with the CWA. Therefore, where the Agencies use the term "traditional navigable waters" they should defer to long established state common law on navigability. (p. 10)

[27] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 162 , (2001) (emphasis added).

Agency Response: **The CWA is a federal statute. See TSD and Preamble**

Home Builders Association of Tennessee (Doc. #19581)

2.59 VII. The Agencies Have Attempted To Impose A Federal Common Law Definition Of Traditional Navigable Waters When That Determination Is Largely Made By States.

The term traditional navigable waters ("TNW") is not well defined in the Proposed Rule. Apparently the Agencies believe the term is commonly understood or accepted. Such is not the case. The Agencies rely on one United States Circuit Court of Appeals cases and a handful of United States District Court cases as they have for many years. In reality, states have always made determinations of navigability. The Proposed Rule should require the Agencies to apply the state common law on navigability in determining whether a water is a TNW, rather than that currently used by the Agencies. The state common law definition of navigability defines land use components and legal boundary descriptions. Such deference is entirely compatible with the CWA. Therefore, where the Agencies use the term "traditional navigable waters" they should defer to long established state common law on navigability. (p. 10)

Agency Response: **See TSD and Preamble**

Tennessee Mining Association (Doc. #14582)

2.60 VII. The Agencies Have Attempted To Impose A Federal Common Law Definition Of Traditional Navigable Waters When That Determination Is Largely Made By States.

The term traditional navigable waters ("TNW") is not well defined in the Proposed Rule. Apparently the Agencies believe the term is commonly understood or accepted. Such is not the case. The Agencies rely on one United States Circuit Court of Appeals cases and a handful of United States District Court cases as they have for many years. In reality, states have always made determinations of navigability. The Proposed Rule should require the Agencies to apply the state common law on navigability in determining whether a water is a TNW, rather than that currently used by the Agencies. The state common law definition of navigability defines land use components and legal boundary descriptions. Such deference is entirely compatible with the CWA. Therefore, where the Agencies use the term "traditional navigable waters" they should defer to long established state common law on navigability. (p. 11)

Agency Response: **See TSD and Preamble**

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

2.61 As a threshold matter of statutory construction, the fact that Congress explicitly sought to limit federal jurisdiction under the CWA to only certain "navigable" "waters of the United States" underscores the fact that certain other waters necessarily fall beyond its reach. See 33 U.S.C. §§ 1311(a), 1342(a) and 1362(7). Claiming per se jurisdiction over ephemeral streams would essentially render the word "navigable" meaningless. Surely Congress did not intend for this critical term to be read out of the Act by agency regulation. (p. 4)

Agency Response: **See TSD and Preamble**

Montana Wool Growers Association (Doc. #5843.1)

2.62 The Agencies should define WOTUS as "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," as set forth in Section (a)(l) of the Proposed Rule. All other sections of the Proposed Rule should be discarded. As explained in Section II of this comment letter, so defining WOTUS would be consistent with constitutional authority, statutory authority, and case law, and would solve problems confronted by the Agencies in attempting to enforce the CWA where jurisdiction is questionable. (p. 2)

Agency Response: See TSD and Preamble

2.63 The Agencies justifiably distinguish the CWA from other statutes in Title 33 by concentrating on the CWA's unique and ambitious objectives. The Agencies err by using the definition of WOTUS as a vehicle for the distinctions. The definition of a single term, particularly a term with intuitive meaning and longstanding definitions that appear throughout similar statutes in the United States Code, is an inappropriate place to assert changes in jurisdiction. Providing a single definition of "navigable waters" for all statutes in Title 33 offers many benefits. First, the public can readily understand what "navigable waters" are and can fall back on a century of case law to understand it. Second, many states already use navigability tests for other purposes. For instance, Montana determines public domain using the "navigable-in-fact" test. Third, the Corps has a century of navigability determinations to rely on and maintains an up-to-date list of "final determinations of navigability" in each district office, pursuant to 33 C.F.R. § 329.16. Finally, the number of jurisdictional waters is limited; unlike the Proposed Rule's definition, waters that can be found "navigable-in-fact" are quantifiable. (p. 3)

Agency Response: See TSD and Preamble

2.64 Expanding Federal Authority: The Proposed Rule does not protect any waters that have not historically been covered under the CWA. Court decisions and the legislative history of the CWA make clear that waters do not need actual navigation to be covered, and these waters have been protected by the CWA since it was passed in 1972. (…) This assertion relies on the inaccurate conclusion that current regulations defining WOTUS have always existed and always been upheld. As explained in Section II(B) of this comment letter, the definition of WOTUS under the CWA was originally the same as the regulatory definition for "navigable waters" under the Rivers and Harbors Act, but the Corps later expanded the definition without reason. In SWANCC, the Court cited the discrepancy when questioning the validity of the current regulations. 531 U.S. at 168. The United States Supreme Court has never validated the current regulations and has repeatedly hinted that some sections of the current regulations are unconstitutional, but avoided ruling definitively. See SWANCC, 531 U.S. at 173-74; Rapanos, 547 U.S. at 731-32. (p. 9)

Agency Response: See TSD and Preamble

Hartland Ditch Company (Doc. #11342)

2.65 Navigable waters are defined in law but not as to their navigability. When talking about navigable, that is a matter of law. If a body of water was being used as highways of commerce over which trade and commerce trade and travel were conducted at the time of Statehood. Waters crossing State boundaries does not make them Navigable. (p. 1)

Agency Response: See TSD and Preamble

2.66 The ownership of private lands, when adjacent to Navigable waters, normally falls within the Doctrine of Accretion. The Doctrine of Accretion states that when the banks of a Navigable body of water changes by avulsion or accretion then the private lands abutting said body the new shore line. The submerged State lands underlying the changed boundaries does not change. (…) The private lands abutting Non-Navigable waters does not change when the shore line changes through avulsion or accretion. (p. 1)

Agency Response: See TSD and Preamble

Iowa Corn Growers Association (Doc. #13269)

2.67 [T]he proposed rule robs the term navigable from any meaning, in direct contradiction to Scalia's plurality opinion in *Rapanos*. As explained above, terms like adjacent, aggregated, and tributary expand the EPA's reach to ditches, ephemeral features, ponds and other waters that are small, speculative, and insubstantial. Ignoring the meaningful connection to navigability, the Agencies expand their jurisdiction beyond these terms. (p. 5)

Agency Response: See TSD and Preamble

Boone County Farm Bureau, Inc. (Doc. #14073)

2.68 Replacing the term "navigable" in the definition of the Clean Water Act, and replacing it with a "significant nexus" concept will open the proposed rule to increased confusion. (p. 1)

Agency Response: See TSD and Preamble

Monarch-Chesterfield Levee District, St. Louis, Missouri (Doc. #14904)

2.69 Additionally, it is contrary to the Supreme Court ruling in Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers (SWANCC). The SWANCC Court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable. But the Court went on to make clear that "limited effect" is not the same as "no effect whatever.

The proposed rule seeks to strip the term navigable of having any meaningful effect. In Rapanos v. United States the Supreme Court identified limits to Federal authority under the CWA. (p. 4)

Agency Response: See TSD and Preamble

National Alliance of Forest Owners (Doc. #15247)

2.70 NAFO urges the Agencies to define "navigable waters" in a manner consistent with Supreme Court precedents and to provide greater clarity and predictability in the Agencies' exercise of their CWA jurisdiction. (p. 4)

Agency Response: See TSD and Preamble

Montana Stockgrowers Association (Doc. #16937)

2.71 This proposed rule seems to define what was originally "navigable waters" in statute as "all waters, regardless of navigability." "Navigable waters" is defined in statute as "waters of the U.S." (33 U.S.C. sec. 1362(7)). In 1974, the Corps originally interpreted "navigable waters" in sec. 404(a) as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." SWANCC, 531 U.S. 159, 168 (2001) (quoting 33 C.F.R. sec. 209.120(d)(l)). The definition has changed or the agencies have attempted to change the definitions many times since.

The issue of the definition of "navigable waters" receives much attention in Riverside Bayview, SWANCC and Rapanos, and the agencies would be well served to pay closer attention to the concerns expressed in those cases. Justice Scalia, in the plurality opinion of Rapanos stated that in that case "the Corps' expansive interpretation of [the phrase "waters of the U.S."] is. . . not based on a permissible construction of the statute. Rapanos v. U.S., 547 U.S. 715,716 (2006) (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843(1984). Chevron deference issues aside, removing any clear meaning from the phrase "navigable waters" is extremely confusing to those who must operate under these regulations. Perhaps most important in Scalia's opinion, from the perspective of the regulated public, is his insistence on making sure that words in the regulations mean what they say. We would urge the agencies to stay within the bounds of the original language of the Clean Water Act. (p. 4-5)

Agency Response: See TSD and Preamble

Associated Equipment Distributors (Doc. #13665)

2.72 This NPRM seeks to clarify the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). However, rather than merely clarifying, the rulemaking instead seeks to dramatically increase the scope of what are considered WOTUS. Under the existing framework, the EPA currently regulates "traditional navigable waters" (e.g. waters used in interstate or foreign commerce and their tributaries). The proposed rule drastically expands this definition and results in the new definition of "waters of the U.S." including adjacent non-wetlands, riparian areas, flood plains and other waters. (p. 1)

Agency Response: See TSD and Preamble

Nebraska Public Power District (Doc. #15126)

2.73 NPPD believes very strongly that the term "navigable waters" expressed clear Congressional intent when the Section 404 wetlands program was included as part of the

Clean Water Act and set the definition that some waters were viewed as falling under federal jurisdiction, while others were not. By proposing the revised definition of waters of the United States, the COE and EPA provide a rationale for agency or citizen enforcers to claim that almost any ditch or low spot is "waters of the U.S." This creates confusion and risk, not clarity, and therefore, does not meet the objective of the proposed rulemaking.

Navigable Waters are defined at 33 CFR 329.4 as "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." The vast body of federal regulation concerning navigable waters frequently gives rise to litigation, and in many cases the courts have the difficult job of determining whether particular bodies of water are navigable (and thus subject to the law or regulation in question). Lakes and rivers are generally considered navigable waters, but smaller bodies of water may also be navigable. Attempting to address years of problematic litigation, the U.S. Supreme Court in 1979 created four tests for determining what constitutes navigable waters. Established in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332, the tests ask whether the body of water (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.

If the EPA and the Corps truly desire to add clarity to the definition of "waters of the United States", restrict the term to those waters that are navigable as defined above and meets the tests established in *Kaiser Aetna v. United States*. (p. 3)

Agency Response: **See TSD and Preamble**

Yazoo Valley EPA (Doc. #15838)

2.74 EPA and the Corps should withdraw its proposed rule and keep "navigable" as the defining term for "waters of the U.S." under CWA jurisdiction. (p. 1)

Agency Response: **See TSD and Preamble**

Ducks Unlimited (Doc. #11014)

2.75 A. Traditional Navigable Waters, Interstate Waters, and Territorial Seas[:] We agree that, in light of the language of the Act and related judicial findings, these categories of waters should continue to be the foundation for assessing CWA jurisdiction. It is appropriate that the fundamental question of “significant nexus” for other categories of waters be viewed through the lens of assessing their impact on these (a)(1) through (a)(3) waters. (p. 12)

Agency Response: **See TSD and Preamble**

Southern Environmental Law Center et al. (Doc. #13610)

2.76 Because the significant nexus test is directly linked to traditional navigable waters, the basis of the term “traditional navigable waters” must be further explained. To be jurisdictional, “other waters” must have a significant nexus to traditional navigable waters. The concept of traditional navigable waters and how these waters are determined is not explained sufficiently in the proposed rule. Case law is the only source for a

meaning of this term, yet the cases vary greatly in what constitutes a traditional navigable water. Since the term traditional navigable waters is so critical to applying the significant nexus test, the agencies should provide a complete foundation for that concept both in the preamble to the final rule and in guidance after the rule is finalized. (p. 3)

Agency Response: **See TSD and Preamble**

2.77 Although the agencies did not seek comments on this provision that defines traditional navigable waters, it is important that the agencies give this concept more attention. In addition to this comment, we have provided a more in-depth analysis of this issue in Exhibit C.

How traditional navigable waters are determined is important because this concept is inexorably tied to the concept of significant nexus. In making a significant nexus determination the first question is always where is the nearest traditionally navigable water? Whether that water is two miles or two-hundred miles from the water in question can make a significant difference. Yet it is far from clear in many cases where the nearest traditionally navigable water is located.

There are three separate lines of cases that define traditionally navigable waters: (1) Commerce Clause cases, (2) Admiralty cases, and (3) Equal Footing Doctrine cases. And within the Commerce Clause line of cases there are four sub-lines of cases: (1) regulation of commerce cases, (2) Federal Power Act (FPA) cases, Rivers & Harbors Act (R&H Act) cases; and navigational servitude cases. Across this country under these varying authorities waters have been determined to be navigable or non-navigable based on the circumstances at hand. (p. 11)

Agency Response: **See TSD and Preamble**

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

2.78 Treatment of Interstate Waters

Your proposed rule would continue to include, within the definition of WOTUS, all interstate waters, regardless of their navigability. Proposed 40 CFR 122.2(a)(2), 79 Fed. Reg. 22267.1 The conservation groups agree that retention of interstate waters, including non-navigable interstate waters, in the regulatory definition of waters of the U.S. is consistent with the language of the Clean Water Act and its legislative and statutory history. It is also consistent with relevant Supreme Court precedent, which remains undisturbed by the Court's recent decisions in *Rapanos* and *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)("SWANCC"). 79 Fed. Reg. 22254-59. (p. 2)

Agency Response: **See TSD and Preamble**

Georgia Water Coalition (Doc. #13844)

2.79 While we do support the proposed rule, we see several opportunities for improvement. The exact nature of "traditional navigable waters" can be more fully spelled out so as to

eliminate any uncertainty as to which waters are intended to be covered by that term. (p. 2)

Agency Response: **See TSD and Preamble**

University of Missouri (Doc. #7942.1)

2.80 In addition, we are very concerned about the implications of the new ruling in terms of apparent broadening of some CWA definitions including (…) the definition of "navigable waters", which under the new ruling would now include drainage ditches and ephemeral streams and drains. (p. 2)

Agency Response: **See TSD and Preamble**

2.1.2. Scope of Jurisdiction

Agency Summary Response

The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The preamble to the proposed rule and the Preamble and the Technical Support Document reflect the considerations the agencies will use when making traditional navigable waters determinations. When such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act.

Specific Comments

Beaver County Commission (Doc. #9667)

2.81 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?* (p. 5)

Agency Response: **See TSD and Preamble**

Outdoor Alliance and Outdoor Industry Association (Doc. #14415)

2.82 Our members recreate on "traditional navigable waters," and we fully support protecting the quality of the waters that have a significant nexus to these waters. We also highlight our support for maintaining the definition of traditional navigable waters as those that include waters that currently, are susceptible to, or have historically been used for commercial recreational purposes. The capacity of a stream to support recreational paddling directly dictates the capacity of that stream to support commerce in the form of recreational guiding services, fee-based stream access, transportation of people or goods, and other commercial ventures. (p. 3)

Agency Response: **See TSD and Preamble**

Federal Water Quality Coalition (Doc. #15822.1)

2.83 The proposed rule asserts jurisdiction over navigable waters, interstate waters, and territorial seas. These waters are jurisdictional under the current regulatory definition of waters of the U.S. 33 C.F.R. § 328.3(a)(1), (2) & (6). There is no question whether the Constitution or the CWA authorizes federal jurisdiction over navigable waters and territorial seas.[28] However, the proposed rule has created uncertainty regarding what is considered "navigable." The preamble suggests that commercial navigation can be demonstrated by an experimental canoe trip taken solely to demonstrate navigability. 79 Fed. Reg. at 22253. While the Agencies cite FPL Energy Marine Hydro L.L.C. v. FERC, 287 F.3d 1151 (D.C. Cir. 1992), to support this position, such insignificant and speculative evidence does not meet the test set forth by the Supreme Court, which requires a traditional navigable water to be a "highway of commerce." The Daniel Ball, 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the "gist of the federal test." Utah v. United States, 403 U.S. 9 (1971). An experimental canoe trip fails that test. Further, under the Commerce Clause, Congress can regulate only those activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995). Again, a canoe trip fails that test. (p. 8-9)

Agency Response: **See TSD and Preamble**

Water Advocacy Coalition (Doc. #17921.1)

2.84 The proposed rule attempts to codify an interpretation of TNWs that is inconsistent with Rapanos.

As we have noted in the past,[29] the agencies' post-Rapanos TNWs determinations have not been faithful to Rapanos and have broadened the concept of TNWs beyond the waters that can be used as highways for interstate commerce. Many of the agencies' case-by-case TNW determinations over the past decade have been based on potential use by out-of-state visitors or a waterbody's potential to float a canoe or kayak. For example, in December 2008, EPA declared two reaches of the Santa Cruz River in southern Arizona, which has no significant water flow during the dry seasons of the year, to be traditional navigable waters.[30] The Santa Cruz River flows primarily in direct response to precipitation, and virtually all of the flows recorded in both reaches consist of sewage effluent discharged into the river from upstream sewer plants. The agencies had no evidence that the effluent-filled reaches were susceptible to use as highways for interstate or foreign commerce – only that there were two documented instances of recreational use of the river, and both of these small boat trips were largely unsuccessful.[31] Similarly, in

[28] Territorial seas are navigable. 33 C.F.R. § 328.4(a) ("The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.").
[29] WAC Comments on 2011 Draft Guidance, Exhibit 1 at 25-29.
[30] Letter from Benjamin H. Grumbles, EPA Region 9 Assistant Administrator, to John Paul Woodley, Assistant Secretary of the Army on Santa Cruz Traditional Navigable Waters Determination (Dec. 3, 2008), available at http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_EPALetter.pdf.
[31] Industry groups challenged the Santa Cruz determination, but the district court found that the challengers

July 2010, EPA declared the entire 51-mile mainstem Los Angeles River, a cement-lined channel that is less than 1 foot deep and has a daily average flow of 10 cubic feet per second during summer months, a TNW.[32] Notwithstanding the river's shallowness and low flows, EPA deemed it a TNW based largely on an experimental expedition made by a group of kayakers and canoeists. The Los Angeles River is definitely not susceptible to use as a highway for interstate or foreign commerce; it can barely be maneuvered in a canoe. Although a waterbody's susceptibility to use for recreational purposes is not the proper standard for determining whether a water is a TNW under the CWA, the agencies continue to accord waters that cannot serve as highways for commerce TNW status.[33]

The proposed rule attempts to codify this novel take on TNWs, with the preamble stating that the agencies will find a water to be a jurisdictional TNW under (a)(1) of the proposed rule if, among other things, a "Federal court has determined that the water body is 'navigable-in-fact' under Federal law for any purpose" or if the water is "currently being used for commercial navigation, including commercial waterborne recreation." 79 Fed. Reg. at 22,254-55, 22,200 (emphasis added). With this definition, the agencies will continue to apply their expansive interpretation of (a)(1) jurisdictional "waters of the United States." As explained more fully in the Appendix, the broader the definition of "traditional navigable waters," the more likely the agencies are to find the requisite connection to non-navigable waters and assert jurisdiction over them.

We recommend that the agencies revise the standard for TNWs to align with the waters the Rapanos Court had in mind – those that are susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce. Moreover, because determination of whether a water is a TNW is so critical to determining whether impoundments, tributaries, adjacent waters, and other waters are jurisdictional, the Corps should establish a public process for the designation of TNWs and publish a comprehensive list of them. (p. 39-40)

<u>Agency Response:</u> The EPA decisions regarding the Santa Cruz River in Arizona and the Los Angeles River in California speak for themselves. See TSD and Preamble.

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did not have standing and that the CWA precludes judicial review of a traditional navigable water determination. See *Nat'l Ass'n of Home Builders v. EPA*, 956 F. Supp. 2d 198 (D.D.C. 2013).

[32] EPA, Region 9, Special Case Evaluation Regarding Status of the Los Angeles River, California as a Traditional Navigable Water (July 1, 2010), available at http://www.epa.gov/region09/mediacenter/LAriver/LASpecialCaseLetterandEvaluation.pdf.

[33] See, e.g., EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWO-2007-1550.pdf (designating 150-mile segment of Little Snake River, which is navigable only by kayak and canoe, and even then only rarely, as a TNW); EPA and Corps Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_MVP-2007-1497.pdf (designating Boyer Lake, an isolated, wholly intrastate lake in Minnesota a TNW, based on one point of public access and speculation that some recreational fishermen who use the lake come from out of state); EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/BahLakeEPA_memo2007-04488.pdf (declaring Bah Lakes, a landlocked 70-acre water body a TNW based on the possibility that some out-of-state travelers could use small recreational watercraft on the lake).

Kingsport Horizontal Property Regime and Kingsport Homeowners Association, et al. (Doc. #4847)

2.85 I have several properties in Florida on the manmade sections of the Intracoastal Waterway. All of the properties have the ownership extending under the Intracoastal Waterway with the governments having an easement to construct and operate the waterway over the property. The problem is that the waterway has exceeded its legal boundary of the easement and is trespassing onto my property, thereby "exporting" waters of the United States onto my properties. There was a courtcase that addressed this issue in South Carolina (See Attached Kingsport case) a few years ago, which redefined the term Navigable waters. The court found that the navigable waters do not extend beyond the easement line. It is my opinion that this should also apply to waters of the United States definition. Primarily because the erosion of the waterway and the failure of the Corps to properly maintain the waterway within its legal easement, should not create waters of the United States onto other properties without payment. The courts have found that the Corp is responsible to provide shoreline protection, but they have not abided by the courts previous decisions. This would also reduce future similar lawsuits and reduce regulatory costs of Corps. (p. 1)

Agency Response: See TSD and Preamble

Arizona Mining Association (Doc #13951)

2.86 2. The preamble expands the concept of navigable-in-fact beyond traditional regulatory standards:

It is particularly odd that the agency policy would purport to define what is "traditional" by ignoring traditional limits on navigability findings by the Corps. The preamble does this by improperly allowing minimal recreational use to serve as conclusive evidence of navigability. Noting that susceptibility to "being used in the future for commercial navigation, including commercial waterborne recreation" is sufficient to establish jurisdiction, the preamble explains:

> Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water to be used in commercial navigation, including commercial recreational navigation (for example, size, depth, and flow velocity), and the likelihood of future commercial navigation, including commercial waterborne recreation. While a traditional navigable water need not be capable of supporting navigation at all times, the frequency, volume, and duration of flow are relevant considerations for determining if a water body has the physical characteristics suitable for navigation. A likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes. A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, must be supported by evidence.

79 Fed. Reg. at 22200. Later on, the preamble references FPL Energy Marine Hydro v. FERC, 287 F.3d 1151 (D.C. Cir. 2002) where a navigability finding by the Federal Energy Regulatory Commission "based upon three experimental canoe trips taken specifically to demonstrate the river's navigability" was upheld. This "float a boat" test significantly misstates traditional federal approaches to navigability determinations.

As noted above, to be navigable, waters must be "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ." The Daniel Ball, supra. The Montello, 87 U.S. 430 (1874) (cited in the preamble) represented a refinement of The Daniel Ball test in holding that obstructions or obstacles to navigation do not defeat a finding of navigability. That case involved a river system that in its natural state could not have been used by steamboats or larger vessels due to the presence of rapids and other obstructions but nevertheless was used historically to carry a part of the "immense fur trade of the Northwest" over more than a century. Id. at 440. There was no question that a substantial canoe-based interstate commerce had been conducted on this waterway.

In response to criticism that the decision would result in virtually any stream being considered navigable, the Montello Court said: "It is not, however, . . . 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." Id.; see also Harrison v. Fite, 148 F. 781 (8th Cir. 1906) ("Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes"); North American Dredging Co. of Nev. v. Mintzer, 245 F. 297 (9th Cir. 1917) (same). Obviously, in The Montello, the extensive fur trade conducted on the watercourse in question was the basis for a finding of navigability, not the mere use by canoes. It does not stand for the proposition that navigating a water body by canoe is enough to establish that a waterbody is navigable-in-fact.

Alaska v. Ahtna, Inc., 891 F.2d 1404 (9th Cir. 1989) (also cited in the preamble) similarly does not support a simple "float a boat" test. In Ahtna, the court upheld a finding of navigability of the Gulkana River in Alaska based on evidence of substantial flows in the river (3,600 to 4,800 cubic feet per second from May to September) and extensive commercial recreational use. Id. at 1402-03. Thus, this case does not stand for the proposition that a few canoe trips are sufficient to establish navigability.

Reliance on the FPL case is similarly misplaced. The case arose under the Federal Power Act and upheld a finding by the Federal Energy Regulatory Commission ("FERC") that a waterbody was considered "navigable waters of the United States" because it was susceptible to use for commercial purposes. This conclusion was based on the physical characteristics of the waterbody and five experimental canoe trips undertaken expressly for the purposes of litigation to demonstrate whether a water body was in fact navigable, three of which were apparently successful. Citing this case is odd in that the final determination by the Court of Appeals rests substantially on the deference owed FERC

decisions by statute and not on traditional standards of navigability typically employed by the Corps. Having found navigability, the Court was obligated to uphold that finding if there was "substantial evidence" supporting it. FPL, 287 F.3d at 1159-60. The Court noted that "the evidence of navigability is not overwhelming" and went on to explain that the substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." Id.

By contrast, federal decisions arising in other contexts confirm that the proponent of navigability carries the burden of proof, Harrison, supra, 148 F. at 785, and that the general federal standard for determining navigability is "preponderance of the evidence." North Dakota v. U.S., 972 F.2d 235, 238 (8th Cir. 1992). Under the RHA rules, only a court can finally determine a waterbody to be navigable, 33 C.F.R. § 329.3, and an administrative finding by the Corps of navigability, while given "substantial weight" by the reviewing Court, is reviewed de novo. Loving v. Alexander, 548 F. Supp. 1079, 1087 (W.D. Va. 1982). Moreover, the Corps administrative practice used for designating a waterbody as navigable under federal law is quite involved and is a decision that is made at relatively high levels within the agency. It does not appear that the watercourse at issue in the FPL case would have been deemed navigable under RHA procedures and burdens of proof.

For all of the above reasons, the agencies are interpreting the notion of "traditional navigable waters" too broadly in the proposal. Given that establishing a significant nexus to such waters is the basis for a large portion of the agencies' proposed rule, this is a significant error. (p. 17-19)

Agency Response: **See TSD and Preamble**

Washington Cattlemen's Association (Doc. #3723.2)

2.87 The EPA has not been completely forthright and honest in their interpretation of commercial navigation. The WCA believes that commercial navigation is navigation by a ship or a barge not a canoe or a rubber raft for a fishing trip. The WCA opposes EPA's attempt to expand the term of "commerce" to include the "canoe trip" example as a water that potentially could be regulated by the EPA under the proposal. The EPA's proposed new definition of "commercial navigation" dramatically expands the current regulatory reach that EPA has under the current CWA and that the interpretation places private property owners at great risk due to the vagueness of the new interpretation. The WCA believes this expansion on the definition of commercial navigation represents a significant infringement of private property rights. (p. 2)

Agency Response: **See TSD and Preamble**

The Mosaic Company (Doc. #14640)

2.88 That a water is deemed a "navigable water" by a federal court for purposes of title, admiralty, or the Rivers and Harbors Act does not mean that it meets the two-part standard for TNWs. Likewise, treating a water body as an (a)(l) water simply because a canoe or kayak can float on it is an impermissible expansion of the TNW definition relied upon by the *Rapanos* Court. Thus, the interpretation of what can be considered an (a)(l)

water should be limited to the traditional scope as relied upon in *Rapanos* and cannot be based on navigability determinations for other purposes or recreational use. (p. 12)

Agency Response: **See TSD and Preamble**

National Sustainable Agriculture Coalition (Doc. #16357.2)

2.89 We believe that the proposed categorical regulation of these land features amounts to an attempted end-run around Congress and two Supreme Court rulings. The Supreme Court, in separate decisions in 2001 and 2006, ruled that Congress meant what it said in the Clean Water Act: "navigable waters" does not mean all waters. Yet the proposal will significantly expand the scope of "navigable waters" subject to Clean Water Act jurisdiction by regulating innumerable small and remote "waters"—many of which are not even "waters" under any common understanding of that word. To farmers, ranchers and other landowners, these features look like land, and this proposed rule looks like a land grab. (p. 2)

Agency Response: **See TSD and Preamble**

Peltzer & Richardson, LC (Doc. #16360)

2.90 The several Supreme Court and Circuit Court decisions have repeatedly abrogated the definitional rules promulgated by the agencies for straying too far from the basic tenet that should guide the extent of federal jurisdiction over waterways: connection to traditional navigable waters. The actual term used throughout the key provisions of the Clean Water Act is "navigable waters" defined (unhelpfully) only as "the waters of the United States and the territorial seas". In further defining the term "navigable waters", the Supreme Court has repeatedly held that agencies must include an element of "navigability". The Kaweah and Tule Commenters manage waterways that have no conceivable connection to any navigable waterways. Yet under the present rule, and the rule as proposed, they are subject to onerous and often time-consuming reviews for even the slightest maintenance activity, a result that could not have been envisioned on the original adoption of the CWA. The USACE and the EPA should be guided by the principle of ensuring that the waters regulated by the CWA have a true connection to waters that fit the traditional definition of navigability, as required by the Supreme Court, rather than attempting to stray as far from this notion as possible as they appear to be doing with the current rule-making. (p. 2)

Agency Response: **See TSD and Preamble**

Clearwater County Highway Department, Minnesota (Doc. #1762.1)

2.91 It appears to me that the proposed rules do not provide clarification over jurisdiction and still keeps everything up to individual interpretation. The proposed rules should be written clearly to clarify that the Corps of Engineers jurisdiction is traditional navigable waters as listed by the Corps of Engineers. The Minnesota list of navigable waters developed by the Corps of Engineers is attached. The proposed rules should state the Corps of Engineers jurisdiction only covers the waters listed and that other water quality and wetland impacts will fall under other agencies to address the water quality through the NPDES program and wetland impacts through the Wetland Conservation Act which

is being administered by most states with oversight by the EPA. Having multiple agencies regulate the same thing just adds unnecessary cost to the public. I urge you to consider separating and clearly defining who has juridical oversight of each area. (p. 2)

Agency Response: Definition applies to all of CWA including NPDES program. See TSD and Preamble

Airports Council International (Doc. #16370)

2.92 On Page 22200 of the Proposed Rule the concept of defining a navigable water via susceptibility to future navigation is described as follows:

"A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, must be supported by evidence."

Based on the above text, it appears that any type of commercial navigation would make a water a navigable water. What defines commercial navigation in this case? For example, would a small company that rented canoes to birdwatchers or photographers in a wetland/waters render the waters jurisdictional? (p. 4)

Agency Response: See TSD and Preamble

Duke Energy (Doc. #13029)

2.93 Traditional Navigable Waters: The standard for determining traditional navigable waters should be based on waters that are susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce. (p. 12)

Agency Response: See TSD and Preamble

2.94 Therefore, the agencies' interpretation of what can be considered an (a)(1) water should be limited to the traditional scope as relied upon in *Rapanos* and should not be based on navigability determinations for other purposes or recreational use. Duke Energy recommends that the standard for determinations of an (a)(1) water be based only waters those are susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce. (p. 19)

Agency Response: See TSD and Preamble

North Dakota EmPower Commission (Doc. #13604)

2.95 The proposed rule expands the scope of the term "traditional navigable waters" to include water for which "a Federal court has determined that the water body is 'navigable-in-fact' under Federal law for any purpose"[34], and to waters that are "currently being used for navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."[35] This expansive view of traditional navigable waters is not supported by the SWANCC or Rapanos decisions; rather it was invented by the EPA and Corps to expand their jurisdiction. EmPowerND requests that the agencies make this standard more in line with waters that the Court had in mind with

[34] 79 Fed. Reg. at 22,255
[35] 79 Fed. Reg. at 22,200

the Rapanos decision – waters used for transportation of commercial goods in interstate or foreign commerce – and make such determinations subject to an established public process. (p. 2)

Agency Response: See TSD and Preamble. The Corps' process for jurisdictional determinations is outside the scope of this rulemaking.

Southern Environmental Law Center et al. (Doc. #13610)

2.96 Undoubtedly when a significant nexus determination is made the applicants, consultants and agencies involved will be looking to see how the stream, creek, or river at issue has been classified in the past based on whatever information is most readily available. In many cases the Corps will turn to the navigability studies that it has completed under the R&H Act. However, these studies are often outdated. For example, one such study in Georgia set the head of navigation 70 miles downstream of where it should be, because the author of the report did not apply the historic commerce test. The section of river at issue had been in commercial use well into the 1900's.

To address this issue, we recommend the following:

1) The agencies should include a section in the preamble expanding on the one in the proposed rule at 79 Fed. Reg. 22200 (April 21, 2014) that explains in further detail all of the different sources of the term "traditional navigable water" and that points out that they are all equally applicable in making a significant nexus determination. The section should also explain that the nearest traditional navigable water determination should be based on the most inclusive information available.

2) The agencies should make it clear that only one prong of the traditional navigable water test is needed to qualify a water as a traditional navigable water, i.e., the historic commerce test is enough on its own.

3) The agencies should make it clear in the preamble that the Corps' navigability reports hold no more sway than any other navigability test.

4) The preamble should also explain that the Corps must consider any information in making traditional navigable determinations, such as information on historic commerce, introduced by the third parties during a permit process. And that if the Corps judges that third-party information to be legitimate, it cannot be trumped by, for example, a Corps navigability report.

5) In addition to including this information in the preamble, the Corps should state in the preamble that it will be issuing a regulatory guidance letter further explaining the traditional navigability test. (p. 11-12)

Agency Response: See TSD and Preamble

National Wildlife Federation (Doc. #15020)

2.97 B. Susceptibility for future use may properly be based on capacity for use and future use for waterborne recreation.

Susceptibility for future use may be based on such factors as physical characteristics and capacity for commercial navigation, including commercial waterborne recreation and potential future use for these purposes. The case law cited herein and in the Proposed Rule preamble supports the agencies' interpretation that potential future use for such purposes "can be demonstrated by current boating or canoe trips for recreation or other purposes." Proposed Rule Preamble at 22200 and 22253 citing FPL Energy Marine Hydro L.L.C. v. FERC, 287 F. 3d 1151, 1157 (D.C. Cir. 2002) and Alaska v. Ahtna, Inc., 891 F. 2d 1401, 1405 (9th Cir. 1989).

Waterborne recreational trips are appropriately considered in determining whether a water body is a TNW. As the proposed rule preamble notes, on many rivers the only commerce that will occur in the future is recreational use by paddlers in canoes, kayaks, and rafts. Based on the case law, the question to be asked in determining TNW status is whether this water body ever could be used for commercial recreational boating. If a boating trip can establish that the water is or could be made navigable for small water craft, then the water should be classified a TNW. 79 Fed. Reg. at 22200, 22253.

The July 2010 EPA Los Angeles River TNW determination demonstrates that the TNW definition in the Proposed Rule is no more expansive than the 2008 TNW definition.[36] Although the determination looked at the current commercial uses of the river, as well as the historic uses of the river, an expedition of kayakers and canoeists down the Los Angeles River played a prominent role in convincing EPA that the river was a TNW. If the EPA were to conduct a similar analysis under the Proposed Rule, it is quite likely that it would reach the same result, albeit with considerably less confusion, delay, and resources having clarified, consistent with the case law, that a trip taken for the purpose of demonstrating a water body can be navigated is sufficient.

C. The final rule regarding TNWs could be improved by further clarifying the TNW case law and improving available TNW mapping data.

The TNW definition and its interpretation are key to determining CWA jurisdiction since Justice Kennedy's Rapanos opinion uses TNWs as a primary reference point for determining significant nexus and therefore CWA jurisdiction. Any failure to properly identify the nearest TNW could mean a significant nexus analysis is improperly conducted by using a water body that is further away than the nearest water that could be deemed traditionally navigable – and where the significant nexus between the waters may be less apparent and more difficult to prove.

Consider an example in which EPA or Corps staff is trying to determine whether a non-adjacent wetland has a significant nexus to a TNW. Two miles down gradient from where the wetland sits, there is a creek that can be canoed today, and that records show was used 100 years ago by fur trappers. The next downstream water is a major river, but it is more than 20 miles away.[37] Clearly, it would be easier to show that the wetland (perhaps in combination with similarly situated wetlands in the region) had a physical, biological,

[36] Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditionally Navigable Water, EPA Region 9 (July 1, 2010).
[37] This hypothetical situation is largely borrowed from William W. Sapp et al, *The Historic Navigability Test: How to Use It to Advantage in This Post-Rapanos World*, 37 ELR 10797, 10798 (Nov. 2007).

or chemical linkage – a "significant nexus" – to the creek, as compared to proving the requisite nexus between the wetland and the river 20 miles away. While the wetland may very well have similar impacts on the more distant river, that nexus "might be more difficult to demonstrate and more subtle."[38]

If, for instance, a water is found to have supported "historic commerce," that is all that is necessary to find that the water is a TNW, even if that commerce only involved a trapper using the creek to get his beaver pelts to market. The "susceptible to being used for future commercial navigation" test need only be applied if there is no evidence of historic commerce. And while a "susceptibility" determination may involve an inquiry into the size, depth, and flow velocity of a creek, that same inquiry has no place in a determination of the presence or absence of evidence of historic commerce.

In many cases the Corps will turn to the navigability studies that it has completed under the Rivers and Harbors Act (RHA). However, these studies are often outdated. For example, one such study in Georgia set the head of navigation 70 miles downstream of where it should be, because the author of the report did not apply the historic commerce test. The section of river at issue had been in commercial use well into the 1900's. Thus, this already small subset of TNWs is, in some regions, smaller than it should be. Western Resource Advocates reports, for example, that historically, the Corps had determined that, of Colorado's approximately 100,000 miles of stream, only 15 miles (on the main stem Colorado River from Grand Junction to the state line) were TNW.[39] Excessive reliance on Corps district RHA Section 10 waters for TNW determinations would lead to missing many TNWs and, as a result, likely leaving many wetlands, lakes, and ponds without Clean Water Act protection, or would increase the time, cost and effort involved in establishing a basis for CWA protection.

To address these concerns, we join Southern Environmental Law Center (SELC)[40] in recommending the following:

1. The agencies should include a section in the preamble expanding on the one in the proposed rule at 79 Fed. Reg. 22200 (April 21, 2014) that explains in further detail all of the different sources of the term "traditional navigable water" and that points out that they are all equally applicable in making a significant nexus determination. The section should also explain that the nearest traditional navigable water determination should be based on the most inclusive information available.

2. The agencies should make it clear that only one prong of the traditional navigable water test is needed to qualify a water as a traditional navigable water, i.e., the historic commerce test is enough on its own.

3. The agencies should make it clear in the preamble that the Corps' navigability reports hold no more sway than any other navigability test.

4. The preamble should also explain that the Corps must consider any information in making traditional navigable determinations, such as information on historic commerce,

[38] Id. at 10805.
[39] Western Resource Advocates 2014 Rule Comments citing Hill, John, "The Right to Float in Colorado: Differing Perspectives," 26 Colorado Water 18 (Colorado Water Institute 2009).
[40] See SELC 2014 Rule Comments.

introduced by the third parties during a permit process. And that if the Corps judges that third-party information to be legitimate, it cannot be trumped by, for example, a Corps navigability report.

5. In addition to including this information in the preamble, the Corps should state in the preamble that it will be issuing a regulatory guidance letter further explaining the traditional navigability test.

Finally and importantly, the agencies should establish a publicly available spatial database documenting all TNWs as the information supporting TNW status is identified. Readily accessible maps documenting TNWs will improve the efficiency, consistency, and accuracy of TNW, significant nexus, and CWA jurisdictional determinations. (p. 27-29)

Agency Response: See TSD and Preamble

Waterkeeper Alliance et al. (Doc. #16413)

2.98 However, it is essential that the agencies clarify the meaning of the term traditional navigable waters in the Preamble consistent with our previous comments on this subject.[41] One particularly high-profile example of the potential for differing agency interpretations of navigability under the CWA involves the Los Angeles River where, in 2008, the Corps determined that only 4 miles of the 51-mile river was "navigable" and, therefore, subject to the automatic protections of the CWA.[42] While public outcry and action by EPA eventually reversed that decision finding the river to be a Traditional Navigable Water, the time and resources spent on this exercise would have been better spent actually protecting the River.[43] The meaning of "navigability" under the CWA is especially important given the agencies decision to adopt the "significant nexus" test. (p. 25-26)

Agency Response: The Los Angeles River decision speaks for itself. See TSD and Preamble

Western Resource Advocates (Doc. #16460)

2.99 With regard to Traditionally Navigable Waters (TNW), WRA commends the agencies for going beyond the relatively narrow reach of the Rivers and Harbors Act, and beyond previous articulations from the Corps as to what constitute TNWs. Historically, the Corps had determined that, of Colorado's approximately 100,000 miles of stream, only 15 miles (on the main stem Colorado River from Grand Junction to the state line) were TNW.[44] Yet, as the preamble explains with the proposed rule, (a)(1) waters will include "waters currently used for commercial navigation, including commercial waterborne recreation

[41] See 2011 Comments, *supra* note 48, at pp. 18-28.
[42] See Letter from Jared Blumenfeld, Region 9 EPA Administrator to Colonel Mark Troy, U.S. Army Corps of Engineers District Engineer, Los Angeles District, transmitting SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER (July 6, 2010). http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.
[43] Id.
[44] John Hill, The Right to Float in Colorado: Differing Perspectives, 26 COLORADO WATER 18 (2009).

(for example boat rentals, guided fishing trips or water ski tournaments)."[45] WRA recommends that EPA and the Corps work with the Departments of Interior and Labor to update lists of (a)(1) waters so that each District office maintains a more complete list (if not a GIS map) based on current commercial navigation, and to continue to update these lists on a periodic basis. The lists should be on-line in a searchable data-base accessible to permittees, agency staff and others.

A contemporary interpretation of what constitutes (a)(1) waters is necessary and appropriate given that, in some rural mountain communities, river recreation and related activities have the largest share of the local economy. Throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represents billions of dollars in commerce.

For example, in the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output.[46] While rafting on the main stem Colorado through the Grand Canyon is a nationally-renowned, there are dozens of other rivers in the Colorado River Basin and throughout the southwest where commercial boating occurs; in fact, the Grand Canyon did not make one expert's list of top five rafting experiences in the southwest.[47] Commercial guides take rafting clients on numerous sections of the Green, Yampa, and Dolores Rivers in Colorado and Utah, the San Juan River in New Mexico and Utah, and the Cache La Poudre, Arkansas, Gunnison and Upper Colorado Rivers in the state of Colorado. The Colorado River Outfitters Association 2013 annual assessment reports almost $57 million in direct expenditures for commercial rafting in the state, with the overall economic impact estimated at over $145 million.[48] Of course, private groups also float these rivers, thereby contributing millions more to local economies.

Kayaking tends to be more of a private endeavor, with boaters going out on their own to places like Cottonwood/Lower Seeley Creek or the East and Hayden Forks of the Bear River (all tributaries to the Great Salt Lake) in Utah, and the Roaring Fork and Eagle Rivers (tributary to the Colorado River in Colorado above its confluence with the Gunnison where it becomes a TNW), rather than with commercial guides. However, companies like Renaissance Adventure Guides[49] in Colorado offer classes to teach kayaking on the Colorado River, and to teach swiftwater rescue in the Waterton Canyon reach of the Upper South Platte River, upstream of Denver, CO, while Arizona Outback

[45] 79 Fed. Reg. 22200 (proposed Apr. 21, 2014).
[46] SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), available at http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.
[47] Nate Hoppes, TOP FIVE RAFTING RIVERS IN THE SOUTHWEST (2012), available at http://www.grindtv.com/outdoor/post/top-5-whitewater-rafting-rivers-in-the-southwest/.
[48] Colorado River Outfitter's Association, Commercial River Use in the State of Colorado, 1988-2013: 2013 Year End Report, available at http://www.croa.org/wp-content/uploads/2014/05/2013-Commercial-Rafting-Use-Report.pdf.
[49] http://raguides.com/ (last visited Oct. 8, 2014).

Adventures takes kayakers on trips down the Salt River.[50] Even Las Vegas visitors can buy day-long kayaking trips.[51]

In addition, cities in Colorado bordering rivers host water competitions on surprisingly small streams. In 2010, there were 30 whitewater parks across the state.[52] For example, Vail uses Gore Creek, tributary to the Eagle River which is tributary to the Colorado River above its confluence with the Gunnison; the recent Mountain Games event attracted 58,000 spectators who spent $4M.[53] Golden pioneered a summer whitewater competition on Clear Creek, tributary to the South Platte.[54] Several other parks, including the City of Boulder's on Boulder Creek, are sites for Colorado Whitewater members' summer "cruises."[55] Utah has one park, in Ogden,[56] while Nevada has at least three, in Reno,[57] Sparks,[58] and Carson City.

The most recent (2011) US Fish and Wildlife survey on freshwater fishing expenditures reports that 2.2M anglers, 16 years old and up, fished in Arizona, Colorado, New Mexico, Nevada and Utah, with between 16 and 23% of these recreationists coming from out of state to do so. For the equipment and trips, these anglers spent $2.4B and their expenditures supported almost 38,000 jobs.[59] These figures include both guided and non-guided trips, and show that angling represents a significant contribution to these states'

[50] Arizona Outback Adventures Half-Day Kayaking Tour, http://aoa-adventures.com/guided-half-day-kayaking-tour/ (last visited Oct 1, 2014). Note that the Salt River above Roosevelt Lake is seasonal, with paddling limited to March-May in most years. Salt River Report, http://southwestpaddler.com/docs/salt2.html (last visited on Oct. 1,2014). Below Phoenix' wastewater treatment plant discharge, the river is effluent dependent, both due to seasonal flows and extensive diversions for the Salt River Project. Joseph R. Gebler, Water Quality of Selected Effluent-Dependent Stream Reaches in Southern Arizona as Indicated by Concentrations of Periphytic Chlorophyll a and Aquatic-Invertebrate Communities (USGS 1998), available at http://pubs.er.usgs.gov/publication/wri984199.

[51] Kayaking Tours, https://evolutionexpeditions.com/index.php/kayaking.html (last visited on Oct. 1, 2014).

[52] Pete Gauvin & Wendy Lautner, California's Dearth of Whitewater Parks, CALIFORNIA'S ADVENTURE SPORTS JOURNAL, May 4, 2010, available at http://adventuresportsjournal.com/water_sports/kayaking/california%E2%80%99s-dearth-of-whitewater-parks.

[53] Melanie Wong, GoPro Mountain Games in Vail Draw Record Crowds, VAIL DAILY, June 13, 2014, available at http://www.vaildaily.com/news/sports/11810089-113/games-vail-gopro-crowds. These events appear to be growing. A few years earlier, the Games attracted 30,000 people who spent $3M. COLEY/FORREST INC. FOR NORTHWEST CO. COUNCIL OF GOV'TS FOUND., INC., WATER AND ITS RELATIONSHIP TO THE ECONOMIES OF THE HEADWATERS COUNTIES 24 (2011), available at http://nwccog.org/docs/qq/QQStudy_Report_Jan%202012.pdf.

[54] Colorado Whitewater Competition, http://www.coloradowhitewater.org/racing-competition (last visited on Oct. 1, 2014).

[55] Colorado Whitewater, Calendar, http://www.coloradowhitewater.org/Events?EventViewMode=1&EventListViewMode=2&SelectedDate=6/4/2014&CalendarViewType=1 (last visited Nov. 4, 2014). For a description of the Boulder kayak course, see, Boulder Outdoors Center description, available at, http://boc123.com/Kayak/PlayparkBoulder.cfm (last visited Nov. 4, 2014).

[56] Ogden's Kayak Park – Ogden City, http://www.ogdencity.com/en/community/parks/kayak_park.aspx (last visited Oct. 3, 2014).

[57] Truckee River White Water Kayak Park, Reno, NV, http://www.visitrenotahoe.com/reno-tahoe/what-to-do/water-adventures/kayak-park (last visited Oct. 3, 2014).

[58] White Water Park at Rock Park, http://www.cityofsparks.us/residents/parks-and-facilities/whitewater-park-rock-park (last visited Oct. 3, 2014).

[59] US FISH & WILDLIFE SERV., NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION (Tables 56 and 60), available at https://www.census.gov/prod/2012pubs/fhw11-nat.pdf.

economies and to interstate commerce. Even more so than boating, a significant percentage of fishing trips occur on smaller headwaters rivers and streams. For those anglers interested specifically in fly fishing for native trout in this region, for example, all of the options are on relatively small streams, such as those in Rocky Mountain National Park. (p. 7-9)

Agency Response: **See TSD and Preamble**

Guardians of the Range (Doc. #14960)

2.100 The judicial standard already recognized and in place for "traditional navigable waters" would be misrepresented by this rule. It mistakenly asserts that transport by boat alone would be enough to establish federal jurisdiction. It goes against Rapanos v. United States, 547 U.S. 715 (2006) for one of many case law examples which contravene this assertion. (p. 1)

Agency Response: **See TSD and Preamble**

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

2.101 *Waters of the United States Should Include All Navigable-In-Fact Waters*

The Agencies should note that Waters of the United States is itself a statutory definition of the Clean Water Act term of art "Navigable Waters." Clean Water Act §502(7). The term 'navigable waters'' means the waters of the United States, including the territorial seas." Waters of the United States explains what "navigable waters" are, and thus should, within its own definition, include traditionally navigable waters. i.e. "any stream is 'navigable in fact' which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 (1952). (p. 4)

Agency Response: **See TSD and Preamble**

2.102 The Supreme Court has always stated or taken for granted that the Clean Water Act applies to navigable waters. It is clear that the Clean Water Act also concerns at least some waters that are not traditionally understood to be navigable, but it cannot be argued that by using the term "Navigable Waters," congress intended that the act cover waters that are navigable in fact. Because "any stream is 'navigable in fact' which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." Muench, the Agencies' rule should define Waters of the United States as including:

> 1. Waters that are capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes. (p. 5)

Agency Response: **See TSD and Preamble**

2.103 *The Definition Should Include Waters That Are Navigable--In-Fact*

The Agencies' definition largely accords with our definition; the largest differences are that it does not specifically include waters that are navigable-in-fact, but it does include the Territorial Seas. We suggest that the Agencies add specific coverage for waters that

are navigable in fact. We believe that Agencies' intent is to clearly cover all of these waters within the rule. In your final rule you should ensure that your intention is clear and unmistakable. Specifically including the territorial Seas in the definition of Waters of the United States is unnecessary because the Territorial Seas are already in the statutory definition of Navigable Waters at 33 U.S.C. §1362(7). (p. 12)

Agency Response: See TSD and Preamble

Arkansas Wildlife Federation (Doc. #16493)

2.104 In summary, never has there been greater need for legal clarification of "Waters of the US". This Rule maximizes transparency in addressing "navigable in fact" as a simplified user measuring mechanism sportsmen, landowners, enforcement, state and federal agency staff understands. (p. 2)

Agency Response: See TSD and Preamble

United States House of Representatives (Doc. #17474)

2.105 There are certain federal water delivery canals and open drains that could be navigated but are not designed for navigability. Is the intent of this rule to assert jurisdiction over these waterways where no jurisdiction is currently authorized under the 2008 guidance? (p. 1)

Agency Response: See TSD and Preamble. The jurisdictional status of specific waters is beyond the scope of this rulemaking. The agencies have provided additional clarity and exclusions in response to comments. See Preamble and Ditches and Waters not Jurisdictional Response to Comment Compendiums.

The Property Which Water Occupies (Doc. #8610)

2.106 The proposed Rules erroneously contends boat rentals16 and guided recreation trips are evidence of navigability.i.d.22200. This in contradiction to the US Supreme Court which explicitly found modern-day recreational use is not evidence of navigability.[60] Further, federal authority to control commerce -occurring through private property temporarily occupied by water- provides no basis for altering property tile or claiming these waters are 'navigable'. Federal authority under the commerce clause provides no exception to the taking clause based simply upon the presence of water.[61] Therefore, Federal authority over regulating commerce be that "boat rentals" or "guided trips" provides no basis to claim the water 'navigable' and thereby transfer vested title. The Rules also mistakenly note that navigability could be assessed during temporary high flow conditions, like spring flooding. id 22200.[62] Such a revised definition of navigability disregards 200 years

[60] "evidence of present-day [recreational] use has little or no bearing on navigability" PPL Montana, LLC v. Montana, 132 S. Ct. 1215,1234 (2012)
[61] Kaiser Aetna v. United States, 444 US 164,180 (1979); also Monongahela Nav. Co. v. United States, 148 US 312,336 supra (1893) "Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."
[62] The Rules wrote conditions of navigability "Need not be available during all times"

of jurisprudence which requires courts to disregard temporary flow conditions (both high and low) and assesses navigability during ordinary flow levels.[63] As defined by the Supreme Court: "A greater capacity for practical and beneficial use in commerce is essential to establish navigability".[64] By misrepresenting relevant case law, the Rules attempt to expand the definition of 'navigable waters' to include property not currently held by the State. (p. 6-7)

Agency Response: **See TSD and Preamble**

2.2. INTERSTATE WATERS

Agency Summary Response

The existing regulations define "waters of the United States" to include interstate waters, including interstate wetlands. The rule does not change that provision of the regulations. Therefore, interstate waters are "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, the rule protects impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters because they have a significant nexus to interstate waters. Protection of these waters is thus critical to protecting interstate waters.

Specific Comments

New York State Attorney General Office et al. (Doc. #6020.1)

2.107 [T]he proposed rule advances the statute's protection of state waters downstream of other states by securing a strong federal "floor" for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution. Of note is the fact that all of the lower forty-eight states have waters that are downstream of the waters of other states. By protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges which might otherwise go unregulated. (p. 2)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

[63] United States v. Utah, 283 U.S. 64 (1931) (a river must have ordinarily assure regularity and predictability of usage); United States v. Harrell, 926 F.2d 1036 (11th Cir. 1991) (navigability should not be confined to "exceptional conditions or short periods of temporary high water"); Leovy v United States, 177 U.S. 621, 632 (must be "of a substantial and permanent character"). Harrison v. Fite, 148 F. 781, 784 (8th Cir.) ("navigability that is temporary, precarious and unprofitable, is not sufficient");

[64] Oklahoma v. Texas, 258 US 574, 591 S,Ct.(1922)

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

2.108 As to interstate waters, in particular, it is unclear why they categorically warrant jurisdictional status. Should not some level of significance of flow, pollutant retention, floodwater absorption, or other factor be identified? Just because a feature happens to straddle or cross state lines, does not necessarily mean it has an effect, let alone a significant effect, on the "chemical, physical and biological integrity of the Nation's waters." See, Proposed Rule at 22,262; 33 U.S.C. § 1251(a). (p. 17)

Agency Response: See Summary Response, TSD and Preamble

Federal StormWater Association (Doc. #15161)

2.109 The proposed rule also expands the agencies' asserted jurisdiction over interstate water by expanding the concept of "water." Under the proposed rule, "waters" can be dry, they can be erosion features on the land, they can be ponds or pools that are hydrologically isolated from any navigable water, and they can even be found in soil. Moreover, under the rule, if so-called "water" crosses state lines, it is automatically subject to federal jurisdiction, and other "water" connected to this "interstate water" also would be per se jurisdictional. The proposed expansion in jurisdiction over navigable and interstate water has created tremendous uncertainty regarding the status of a ditch or pond or wetland that has no connection to navigable water but lies on or crosses a state boundary. (p. 3)

Agency Response: See Summary Response, TSD and Preamble

Water Advocacy Coalition (Doc. #17921.1)

2.110 The proposed rule's treatment of interstate waters fails to provide clarity and is not supported by case law or science. Without support from case law or science,[65] the proposed rule accords interstate waters the same status as TNWs, allowing for features to be jurisdictional based on their relationship to interstate waters. See 79 Fed. Reg. at 22,262-63. The rule does not require that interstate waters have a significant nexus or any type of connection to TNWs or meet any flow or permanence requirements. Rather, without consideration of relationship to TNWs, the proposed rule asserts jurisdiction over tributaries to interstate waters, wetlands and waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters. Id. at 22,200. As discussed in the Appendix, we dispute the agencies' assertion that its regulation of "interstate waters" reaches non-navigable interstate waters. (p. 40-41)

Agency Response: See Summary Response, TSD and Preamble

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

2.111 Regulating any water crossing a state line (i.e., interstate waters) regardless of its relationship to traditional navigable waters is not consistent with the plain language of the CWA or the Rapanos decision. This approach to interstate waters is in fact based on a legal theory (that Congress intended to regulate to the limits of its authority under the

[65] Neither the Connectivity Report nor the preamble's Appendix A addresses interstate waters, let alone provides support for equating all interstate waters with TNWs.

interstate commerce clause) explicitly repudiated by the Supreme Court. Automatically regulating any tributaries to interstate waters compounds the error. (p. 7)

Agency Response: **See Summary Response, TSD and Preamble**

2.112 Recommendation: (1) The agencies should delete the reference to interstate waters in the definition of waters of the U.S. To the extent that Congress intended to regulate such waters, it does so through reaching traditional navigable waters and waters with sufficient connections to such waters to merit regulation. (2) Even if all interstate waters were to (improperly) remain jurisdictional in a final rule, tributaries to such waters should not automatically be regulated without regard to whether they are themselves navigable or have a significant nexus to a traditional navigable water. (p. 31)

Agency Response: **See Summary Response, TSD and Preamble**

Arizona Mining Association (Doc. #13951)

2.113 Automatic Regulation of All Interstate Waters and Tributaries Thereto is Not Supported by the CWA

1. There is no basis in the Clean Water Act to assert that all waters that cross state lines are subject to federal regulation, regardless of size or relationship to traditional navigable waters:

We begin with the obvious: the CWA itself establishes the scope of jurisdiction as "navigable waters" and not "interstate waters." Although mentioning interstate waters, the CWA does not set them up as a separate jurisdictional class of waters. The agencies correctly point out that prior to the 1972 amendments, the CWA predecessor statutes did in fact rest jurisdiction on both terms. See 76 Fed. Reg. at 22255. More specifically, the original version of the Federal Water Pollution Control Act ("FWPCA") passed in 1948 regulated only "interstate waters" but was amended in 1961 to refer to "interstate waters or navigable waters." Id. at 22256. The conclusion the agencies draw from this is flawed, however. The fact that Congress was aware of the distinction in prior law and chose not to separately classify interstate waters as a basis of jurisdiction in the 1972 amendments is a clear indication that Congress saw no need to separately regulate such waters.

As the legislative history cited by the agencies indicates, interstate waters were viewed as a very narrow class of waters prior to the 1972 amendments, and Congress recognized that by basing jurisdiction on navigable waters rather the interstate waters, a more comprehensive regulatory scheme could be implemented. An early Senate report (cited by the agencies), justifying proposed expansion of federal jurisdiction over navigable waters explained: "The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries." Id. at 22258 (citing S. Rep. 414, 92d Cong., 1st Sess. 77 (1971)). Although the definition of jurisdictional waters in the legislation then under consideration by the Senate was

different from that ultimately adopted ("navigable water of the United States . . and their tributaries"), the basic understanding that a comprehensive nationwide water quality law could be premised on navigable waters and not interstate waters is evident.

This is further illustrated by the inclusion of navigable waters in FWPCA in 1961. Id. at 22255. In the 1956 amendments to the FWPCA, the definition of interstate waters was amended to include "all rivers, lakes, and other waters that flow across, or form a part of, boundaries between two or more States." Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498, 506, § 11(e). This modified the prior definition which only required such waters to form the boundary of or flow across a single state or international line. See Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155, 1161, § 10(e). The legislative history leading up the 1961 amendments indicated concern over the narrowness of this definition, which regulated only those segments of waters that actually form a boundary between two states or flow from one state to another, thus excluding waters that cross or form international boundaries and segments of waters lying within a single state (e.g., "the Missouri River from the Kansas State line to just above St. Louis"). See Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103, 1110 (1970). The solution was to revise the definition back to the original 1948 version and to expand the abatement remedies provided in FWPCA to include "navigable waters," which would reach intrastate waters. Id., at 1113; Federal Water Pollution Control Act Amendments of 1961, Public Law 87-88, 75 Stat. 204, 208, §8(a). One commentator referred to this amendment as expanding FWPCA "to include almost all of the waters of the nation . . . ." 68 Mich. L. Rev. at 1112. Thus a regulatory program premised on navigable waters was generally considered far broader and more comprehensive than one based on interstate waters.

Although the agencies raise alarms about interstate waters that are not navigable in themselves and have no connection to navigable waters, they cite no authority to indicate that Congress was concerned with, or intended to reach, such a narrow class of waters. Id. at 22257 ("If these protections only applied to navigable interstate waters, a downstream state would be unable to protect many of its waters from out of state water pollution.") This class of waters is quite small, given the expansive reading of navigable waters given by both Kennedy and Scalia, which would include all TNWs plus all waters with a continuous surface connection to TNWs, as well as any with a significant nexus to such waters. As noted above, the fact that Congress chose not to premise jurisdiction on interstate waters is an indication that as a class, they did not merit federal attention independent from waters of the U.S. Moreover, the regulatory landscape that Congress was legislating in has changed markedly since 1972, with the adoption of broad environmental laws at the federal, state and local level reaching every facet of pollution discharges. The likelihood that significant interstate pollution problems would arise out of discharges to interstate waters not otherwise captured by the CWA is remote at best.

2. Supreme Court precedent does not support CWA jurisdiction over interstate waters without respect to navigability:

The agencies place substantial reliance on two Supreme Court cases that addressed an interstate water pollution dispute arising before adoption of the CWA but ultimately

resolved by the regulatory scheme established by the Act. However, neither case supports the proposition that Congress intended to reach interstate waters regardless of navigability in the 1972 amendments. The first case, Illinois v. Milwaukee, 406 U.S. 91 (1972), arises before the 1972 amendments and involved municipal sewage and stormwater discharges to Lake Michigan. The case recognized that the federal common law of nuisance was an appropriate vehicle for the State of Illinois to challenge discharges coming from Wisconsin. The decision notes the important role of the federal courts in resolving interstate disputes and supports assertion of federal jurisdiction over interstate waters. The agencies assert that "[i]n the context of interstate water pollution, nothing in the Court's language or logic limits the reach of this conclusion to only navigable interstate waters." 79 Fed. Reg. at 22256. The case of course deals with a waterbody (Lake Michigan) that is obviously both interstate and navigable in fact and so does not actually address interstate waters unconnected to traditional navigable waters. At most, it provides a rationale for Congress to expressly extend regulation to interstate waters, whether navigable or not. Because Congress chose not to do so (as discussed above), the case is a historical curiosity.

The second case, City of Milwaukee v. Illinois, 451 U.S. 304 (1981), involves the same facts except this time, the CWA had been enacted and the municipalities at issue were operating under permits issued under the CWA. The case had proceeded under the federal common law cause of action recognized in Illinois and the lower court had imposed effluent limitations and other requirements on the municipalities that exceeded the requirements under their CWA permits. The question was whether, given the comprehensive regulatory scheme adopted in the CWA (which includes provisions for states to participate in issuance of permits issued in other states), the federal common claim for nuisance could be maintained and the more strict court-ordered discharge limitations enforced. The Supreme Court concluded that Congress had "occupied the field," eliminating the availability of federal common law remedies.

In the agencies' view, the importance of the case boils down to this: "Since the federal common law of nuisance (as well as the statutory provisions regulating water pollution in the Federal Water Pollution Control Act) applied to interstate waters whether navigable or not, the CWA could only occupy the field of interstate water pollution if it too extended to non-navigable as well as navigable interstate waters." However, the status of Lake Michigan as a navigable water under the CWA (or interstate water for that matter) was not at issue. Therefore, the question of whether the Court would reach the same conclusion about "occupying the field" if it were presented with an interstate dispute affecting waters unconnected to TNWs is not addressed.

Contrary to the agencies' view, SWANCC and Rapanos do in fact constrain jurisdiction over non-navigable interstate waters. Attempts to distinguish these cases overlook a very basic point – they are construing the terms "navigable waters" and "waters of the U.S.," which are the very same terms providing the basis for the regulation of interstate waters. Thus, the conclusion that the word "navigable" has meaning applies equally to interstate waters. This conclusion is even more compelling after evaluating the origin of the practice of including all interstate waters within the regulatory definition of waters of the U.S., regardless of navigability. As documented below, the rule relied on the agency position that Congress intended to regulate to the limit of its authorities under the

interstate commerce clause, the very rationale explicitly rejected in *SWANCC* and *Rapanos*.

3. *Regulation of interstate waters as a class rests on the now-discarded notion that Congress intended to regulate all waters that it could reach under its plenary authority over interstate commerce*:

When looking at the history of the term "interstate waters" as it appears in the current regulatory definition of waters of the United States, it is clear that the basis for the regulation rests on the assumption that Congress intended to regulate to the fullest extent of its Commerce Clause power. The regulation of interstate waters has its origins in a February 6, 1973 EPA General Counsel opinion (*"Meaning of the Term "Navigable Waters"*) concluding that the new definition of navigable waters should be given "the broadest possible Constitutional interpretation." That opinion expresses the view, based in legislative history, that deletion of the word "navigable" from the phrase "navigable waters of the United States" indicated a Congressional intent to eliminate the requirement of navigability. Accordingly, the opinion recommended that the definition of "waters of the United States" be expanded to include waters that could be reached under Congress' Commerce Clause authority, including "interstate waters." EPA subsequently adopted the list of waters found in the opinion a few months later in its NPDES rulemaking, without substantive discussion. *See* 38 Fed. Reg. 13528 (May 22, 1973). For its part, the Corps' initial regulations adopted a narrower view of "waters of the United States." *See* 65 Fed. Reg. 12115, 12119 (April 3, 1974). Following judicial challenge, the Corps promulgated new rules following the broad interstate commerce test espoused by EPA (and eventually rejected in *SWANCC*). The Corps expanded its regulation (by borrowing from EPA's rule) to include interstate waters in its 1975 interim final rule, 40 Fed. Reg. 31320 (July 25, 1975), and in its 1977 final rules, 42 Fed. Reg. 37122 (July 19, 1977). This reliance on broad application of interstate commerce authority was explicitly repudiated in both *SWANCC* and *Rapanos*. As noted multiple times above, Congress could have independently recognized interstate waters as a jurisdictional class under the CWA and chose not to do so.

The fact that the extension of CWA jurisdiction to interstate waters as a class without regard to navigability has been a longstanding agency position is of no import. The same can be said of the agency position prior to *SWANCC*, and it is essentially the same position as repudiated in *SWANCC* (i.e., use of the word navigable has no meaning when applied to these waters).

4. *Regulation of interstate waters and their tributaries as a class, without reference to navigability, is inconsistent with the CWA*:

Regulation of a water feature simply because it crosses a state line does not mean that discharges to that waterbody on either side of the line implicates interstate commerce, which is the underlying authority that Congress is relying upon to regulate navigable waters. Waters which are navigable of course have the requisite interstate commerce connection, and as *Rapanos* and *SWANCC* concluded, waters with a sufficient connection to traditional navigable waters, even if non-navigable, can be reached. But non-navigable waters that simply cross state lines may not implicate interstate commerce at all. This is doubly true of tributaries to such waters.

The law prior to the 1972 amendments did not regulate interstate waters as a class in the manner that the 1972 amendments regulated navigable waters. Although the FWPCA required the establishment of water quality standards for interstate waters, it did not require permits for discharges to all such waters, as the CWA did for navigable waters. Rather, the premise for regulation was abatement of interstate pollution, which had to be demonstrated in order for federal action to commence. *See generally* FWPCA, § 8. Thus, there was no basis under that law to regulate activities in waters downstream of state lines – including their tributaries - as such activities could not give rise to interstate pollution. There was also no basis to regulate activities upstream of a state line unless the activity was causing pollution problems in a neighboring state. Thus, whatever traditional role the federal government has played in mediating interstate pollution disputes is not automatically implicated by regulation of all interstate waters and their tributaries. This in turn raises the question of whether Congress can actually reach such intrastate activities under its Commerce Clause authority. *SWANCC* and *Rapanos* of course declined to consider this question in finding that the word "navigable" had meaning and formed the basis of CWA jurisdiction. The current agency position runs headlong into this problem.

The application of Justice Kennedy's significant nexus test on a blanket basis to all tributaries to interstate waters is particularly problematic. Justice Kennedy's test (and the *SWANCC* Court's prior use of the phrase "significant nexus") was specifically applied to navigable waters, the explicit jurisdictional limit of the CWA. In the proposed rule, this concept is being applied to interstate waters, which are not a separate class of jurisdiction under the CWA. If the agencies have no authority to regulate interstate waters regardless of navigability, then they certainly lack the authority to regulate tributaries to such waters in this fashion. (p. 19-23)

Agency Response: **See Summary Response, TSD and Preamble**

Continental Resources, Inc. (Doc. #14655)

2.114 The Proposed Rule inappropriately expands the definition of "waters of the United States" to equate all interstate waters and interstate wetlands with traditional navigable waters, treating all (a)(1)-(a)(3) waters the same. 79 Fed. Reg. at 22,262 (Proposed 33 C.F.R. § 328.3(a)(2)). The Proposed Rule does not include a definition of "interstate" waters, introducing a level of uncertainty as to what would be considered an interstate water. 79 Fed. Reg. at 22,188 n.1. As proposed, it appears that each and every stream reach, pond, or other wet feature that crosses a state border-no matter how small the volume or infrequent the flow-would be subject to CWA jurisdiction. While jurisdiction may be appropriate in some circumstances, it makes no sense for a water to be jurisdictional simply because it crosses a state boundary. Some interstate waters will be remote, small, insubstantial, non-permanent or even ephemeral, and/or non-navigable-yet they now will be accorded the same jurisdictional treatment as traditional navigable waters simply because they happen to cross a state border.

The treatment of interstate waters in the Proposed Rule is even more problematic because of the layering of other definitions proposed. It is not just interstate waters that are jurisdictional, but also waters with a relationship to interstate waters. That is, the following categories of waters will now also be considered jurisdictional: impoundments

of interstate waters, tributaries of interstate waters, all waters adjacent to interstate waters, and all "other waters" with a significant nexus to interstate waters. 79 Fed. Reg. at 22,262 (Proposed 33 C.F.R. § 328.3(a)(4)-(7)). As discussed in the sections below, the Proposed Rule adopts a broader definition for each of these related waters (that is, impoundments, tributaries, adjacent waters, and "other waters") than under the current regulations. As a result, the treatment of interstate waters as traditional navigable waters will expand the agencies' CWA jurisdiction. Moreover, there is no legal or scientific authority in the Proposed Rule to support the agencies' novel interpretation that interstate waters are relevant for purpose of applying a significant nexus test. See 79 Fed. Reg. at 22,200 (offering no credible justification for the agency's expansion). As proposed, every wet feature with a significant nexus to any stream reach, pond, or other wet feature that crosses a state border would be subject to CWA jurisdiction. This is certainly well beyond what Justice Kennedy would have allowed in Rapanos. The agencies need to reconsider this aspect of the Proposed Rule and, at a minimum, include a definition for or better guidance on the term "interstate" and delete the further assertion of jurisdiction of other waters in (a)(4)-(a)(7). (p. 4-5)

Agency Response: **See Summary Response, TSD and Preamble**

California Association of Winegrape Growers (Doc. #14593)

2.115 Specific examples of improper expansion of jurisdiction include (…) Gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters, thus making it easier to find jurisdiction for adjacent wetlands and waters judged by the significant nexus test; (…) This sweeping expansion of federal jurisdiction exceeds federal authority, contradicts with explicit U.S. Supreme Court directives, and abrogates existing state authority. (p. 5)

Agency Response: **See Summary Response, TSD and Preamble**

The Walker River Irrigation District (Doc. #16567)

2.116 Under the proposed rule, waters of the United States includes all interstate waters, including interstate wetlands. Although "interstate waters" are not defined, the preamble indicates that the phrase includes waters flowing across state lines, even if they are not a traditional navigable water and even if they do not connect to a traditional navigable water.

There is no support for the inclusion of all interstate waters in the definition of "waters of the United States" in Solid Waste Agency of Northern Cook County v. u.s. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), or in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ("Riverside Bayview") , or in Rapanos. Neither the plurality opinion nor the Kennedy concurrence in Rapanos even discussed interstate waters. The plurality opinion in Rapanos distinguished between relatively permanent bodies of water and ordinarily dry channels through which water occasionally flows. The Kennedy concurrence in Rapanos considered "waters" that had a significant nexus to a traditional navigable water. The significant nexus principles referenced in SWANCC and Rapanos relate to traditional navigable waters, not to all interstate waters.

As a result of the proposed rule' s inclusion of all interstate waters, minor streams, some of which may be ephemeral, which happen to cross a state border, will be considered waters of the United States. Waters that provide flow to "interstate waters" will also be deemed jurisdictional "tributaries" under the proposed rule. In addition, because interstate waters are deemed jurisdictional, other waters or wetlands may also be jurisdictional because of their relationship to these "interstate waters." (p. 3-4)

Agency Response: See Summary Response, TSD and Preamble

Duke Energy (Doc. #13029)

2.117 The proposed rule also does not require that interstate waters have a significant nexus or even any type of connection to TNWs. Rather, without consideration of a relationship to TNWs, the proposed rule asserts jurisdiction over tributaries to interstate waters, wetlands and waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters.[66] Moreover, the preamble discusses in depth that interstate waters can be non navigable, but does not discuss how far this concept extends. For example, "other waters" can now be considered jurisdictional if they have a significant nexus to a non navigable interstate water such as a roadside ditch that crosses a State border. Finally, the proposed rule does not provide a definition of interstate waters, only a footnote that still provides no meaning or clarification: "'Interstate waters' in this preamble refers to all interstate waters including interstate wetlands."[67] This footnote fails to provide necessary clarity. Therefore, interstate waters should not be treated as TNWs and Duke Energy recommends that the agencies reassess the concept of interstate waters and define the term to be consistent with the limits of the CWA. (p. 20)

Agency Response: See Summary Response, TSD and Preamble

Washington County Water Conservancy District (Doc. #15536)

2.118 Accordingly, the Agencies should revise their jurisdictional-by-rule proposal as follows:

Eliminate the categorical regulation of all "interstate waters" under category (2) and clarify that isolated, non-navigable interstate waters are not jurisdictional; (…) (p. 13)

Agency Response: See Summary Response, TSD and Preamble

National Wildlife Federation (Doc. #15020)

2.119 The Proposed Rule's Treatment of Interstate Waters is Well-Supported by Statute, Regulations, and Case Law.

A. The Clean Water Act and the agencies' existing rules provide for categorical protection of interstate waters.

The agencies' proposal to assert jurisdiction over all interstate waters (IWs), including interstate wetlands, categorically and without a case-by-case significant nexus analysis, is consistent with the CWA and its legislative history. See Proposed Rule Preamble at

[66] 79 Fed. Reg. at 22,200
[67] 79 Fed. Reg. at 22,188 n.1

22200 and 22254-59, citing, e.g., CWA section 303(a)(1). The Senate Committee on Public Works stated, for example:

Through a narrow interpretation of the definition of interstate waters the implementation of the1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.[68]

The agencies' definition falls squarely within their longstanding rules "defining 'waters of the United States' to include "interstate waters including interstate wetlands." The categorical protection of these waters pursuant to these rule provisions was not questioned or even at issue in the Rapanos or SWANCC Supreme Court decisions.

The agencies' definition of "interstate waters" also carefully tracks the statutory definition of "interstate waters" dating back to the 1948 water pollution law that includes "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." See Proposed Rule Preamble at 22255. Assertion of categorical jurisdiction over these waters is neither new nor an expansion of CWA jurisdiction. The 2008 guidance document, still in effect, inexplicably fails to mention or clarify the treatment of "interstate waters."[69]

Consider, as Western Resource Advocates comments, the headwaters states of the Rockies, where every major river system is the subject of either an interstate compact that allocates its waters or a Supreme Court of the United States decree for an equitable apportionment thereof.[70] According to WRA, the State of Colorado alone is party to nine interstate compacts (two on the Colorado River), one interstate agreement and two equitable apportionment decrees for rivers. Yet, the Corps had formally designated only one of these waterways as a TNW prior to July 2011. Most of Colorado's nearly 100,000 miles of streams are tributary to one of the rivers that is subject to a compact, agreement or decree.

B. The agencies' treatment of tributaries, adjacent wetlands, and other waters in relation to interstate waters is well-supported.

Also well-supported by law and policy is the agencies' proposal to analyze tributaries to IWs, wetlands adjacent to IWs, and other waters relative to IWs in essentially the same manner as these waters are analyzed vis-à-vis TNWs. Proposed Rule Preamble at 22200, 22258-59. Congress clearly intended to protect interstate waters and their tributaries, and understood that protecting interstate waters required limiting pollution upstream. We agree that it is reasonable to apply Justice Kennedy's significant nexus test to the tributaries, adjacent wetlands, and other waters that have demonstrated hydrological or ecological connections to IWs. As noted in the proposed rule preamble:

> Justice Kennedy's standard seeks to ensure that waters Congress intended to subject to federal jurisdiction are indeed protected, both by recognizing that waters and wetlands with a significant nexus to covered waters have important beneficial effects on those waters, and by recognizing that

[68] S. Rep No. 92-414 at 77 (1971) 1972 Legislative History at 1495 (emphasis added).
[69] Robert Meltz and Claudia Copeland, The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States, at 14. Congressional Research Service 7-57– (June 3, 2011).
[70] Western Resource Advocates 2014 Rule Comments.

polluting or destroying waters with a significant nexus can harm downstream covered waters.

Id. at 22200. (p. 29-30)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

Pacific Legal Foundation (Doc. #14081)

2.120 The proposed rule asserts that the Corps and EPA have authority under the Clean Water Act to categorically regulate all interstate waters as if they were "traditional navigable waters," even if they are not navigable-in-fact and have no connection to interstate commerce. See 79 Fed. Reg. 22254-22259. But these agencies conveniently overlook the obvious; the Clean Water Act is not a general mandate to regulate all waters. Congress does not have that power. The Act is based on Congress' constitutional power to regulate interstate commerce. See SWANCC and Rapanos. The Supreme Court has limited that power to the regulation of channels of interstate commerce (such as navigable-in-fact waters), things in interstate commerce (such as commodities that are bought and sold), and activities that substantially affect interstate commerce. See United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). By definition, anything regulated under the Clean Water Act must have a substantial connection to interstate commerce. That's why the Act prohibits certain discharges to "navigable waters" and not to all waters. Therefore, the proposed regulation of all interstate waters exceeds both statutory and constitutional authority.

Nevertheless, the proposed rule also asserts (79 Fed. Reg. 22254-22259) that the precursor statutes to the Clean Water Act always subjected interstate waters and their tributaries to federal jurisdiction. But this is not so. As the plurality observed in Rapanos, "[f]or a century prior to the [Clean Water Act], we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible to being rendered so." Rapanos, 547 U.S. at 723 (emphasis added). In fact, "[a]fter the passage of the [Clean Water Act], the Corps initially adopted this traditional judicial definition of the Act's term 'navigable waters.'" Id.

Based on this understanding, the Supreme Court set out the contours of the Clean Water Act in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); SWANCC; and, Rapanos. Riverside Bayview authorized federal regulation of wetlands "adjacent" to (i.e., physically abutting) "traditional navigable waters." The court did not, however, equate interstate waters with "traditional navigable waters." SWANCC prohibited federal regulation of "isolated water bodies" but did not carve out an exception for interstate waters. Likewise, in Rapanos, the plurality authorized federal regulation of relatively permanent rivers, lakes and streams (and certain "adjacent" wetlands) connected to "traditional navigable waters." But the plurality did not equate interstate waters with "traditional navigable waters." Nor did Justice Kennedy. In Rapanos, Justice Kennedy authorized federal regulation of wetlands that have a "significant nexus" with "traditional navigable waters." But, like the plurality, Justice Kennedy did not equate interstate waters with "traditional navigable waters."

Both the plurality and Justice Kennedy were quite explicit in defining jurisdictional waters under the Clean Water Act. In all cases, the covered water must be or have a connection or nexus to a "traditional navigable water." According to the plurality, "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographics features' that are described in ordinary parlance as 'streams[,] ...oceans, rivers [and] lakes.'" Rapanos, 547 U.S. at 739. These, in turn, must be "connected to traditional interstate navigable waters." Id. at 742.(emphasis added). Under the plurality opinion, therefore, nonnavigable interstate waters may not be deemed "traditional navigable waters." And, according to Justice Kennedy: "In [SWANCC], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonable be so made." Id. at 759 (emphasis added). Thus, Supreme Court precedent precludes categorical regulation of all interstate waters and the treatment of nonnavigable interstate waters as "traditional navigable waters." (p. 4-5)

Agency Response: **See Summary Response, TSD and Preamble**

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

2.121 *Waters of the United States Should Include All Waters Used In Interstate Or Foreign Commerce*

Because Congress intended to extend its jurisdiction as broadly as possible, and because Congress has direct constitutional power over interstate and foreign commerce, the rule should apply to waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce. (…)

Waters of the United States Should Include Interstate Waters And Wetlands

The Clean Water Act was enacted to replace an ineffective state---by---state system of regulation. An important reason that the previous system was ineffective was because regulations in one state would frequently affect water quality in a downstream state. A uniform system of federal regulation helps prevent a race to the bottom, where states compete to enact laxer regulations in part because water quality is already poor because of neighboring states'lax regulation. Waters that cross state boundaries are within the wheelhouse of congressional power and their restoration is a prime goal of the Act, §101. Therefore, if the Act is to function to protect interstate waters from a race to the bottom, Waters of the United States must include

3. Interstate waters, including interstate wetlands (p. 6-7)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

Clean Wisconsin (Doc. #15453)

2.122 Consistent federal water protections mitigate out-of-state water quality impacts.

Beyond Wisconsin, this rulemaking is necessary to recognize that water quality impacts are not confined by state lines. Wisconsin's waters and habitats are affected by water quality in other states, despite Wisconsin's in-state protections for water bodies. For example, the state of Wisconsin itself has legally recognized the importance of protections for water bodies affected by the current proposed rule. Following the SWANCC decision, Wisconsin immediately enacted 2001 Wisconsin Act 6 to restore protections for wetlands that were left ambiguous or unprotected at the federal level by the decision. However, action beyond the state level is necessary to comprehensively protect waters of the United States. As noted in a Wisconsin DNR overview of Wisconsin's wetland regulations, habitat in the Mississippi flyway and prairie pothole region affects Wisconsin's waterfowl hunting and outdoor recreation industries[71]. Defining protections for such water bodies at the federal level helps ensure that inter-state connected waters are subject to the same consistent protections across the entire system. (p. 2)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

2.2.1. Definition

Agency Summary Response

The existing regulations define "waters of the United States" to include interstate waters, including interstate wetlands. The rule does not change that provision of the regulations. Therefore, interstate waters are "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, the rule protects impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters because they have a significant nexus to interstate waters. Protection of these waters is thus critical to protecting interstate waters. The assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. § 10, 62 Stat. 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress.

Specific Comments

Water Advocacy Coalition (Doc. #17921.1)

2.123 Moreover, the proposed rule is problematic because it does not provide a definition of interstate waters, thereby failing to provide clarity. The preamble provides an unhelpful footnote, stating, "'Interstate waters' in this preamble refers to all interstate waters including interstate wetlands." 79 Fed. Reg. at 22,188 n.1. This raises several questions:

- What are considered "interstate waters"?

[71] Cain, M. J. (2008, August 21). *Wisconsin's Wetland Regulatory Program*. Retrieved November 2014, from http://dnr.wi.gov/topic/wetlands/documents/OverviewWIRegulatoryProg.pdf

- The 2011 Draft Guidance, for example, defined "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." Is this the interpretation that the agencies intend to use? If so, what is the scientific basis? (p. 41)

Agency Response: **See Summary Response, TSD and Preamble**

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

2.124 The Agencies propose to broaden their CWA jurisdiction in several ways, including:

This Proposed Rule expands the scope of the definition of "Traditional Navigable Waters." Under the Rivers and Harbors Act, Traditional Navigable Waters are generally those waters capable of transporting interstate commerce among states. This Proposed Rule expands the scope of the term "Traditional Navigable Waters" beyond the existing definition and case law to regulate a waterbody that can support "one-time recreational use." This Proposed Rule ignores the court's findings and sets up a structure where many ditches remote from a navigable water are categorically jurisdictional. The terms ditches, canals, constructed storm water conveyances such as swales, channels, and retention ponds should be removed from the definition of a tributary. (p. 3)

Agency Response: **See Summary Response, TSD and Preamble**

Michigan Farm Bureau, Lansing, Michigan (Doc. #10196)

2.125 [T]he proposed rule eliminates the reference to interstate commerce affected by the use, degradation, or destruction of the waters under that provision, which takes the proposal one step further away from the Commerce Clause upon which the Clean Water Act provisions are based, and moves federal jurisdiction that much further into waters that should be under the purview and jurisdiction of states. (p. 5)

Agency Response: **See Summary Response, TSD and Preamble**

Walker River Irrigation District (Doc. #14562)

2.126 All Waters Flowing Across State Lines Should Not Be Jurisdictional.

Under the proposed rule, waters of the United States includes all interstate waters, including interstate wetlands. Although "interstate waters" are not defined, the preamble indicates that the phrase includes waters flowing across state lines, even if they are not a traditional navigable water and even if they do not connect to a traditional navigable water.

There is no support for the inclusion of all interstate waters in the definition of "waters of the United States" in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), or in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ("Riverside Bayview"), or in Rapanos. Neither the plurality opinion nor the Kennedy concurrence in Rapanos even discussed interstate waters. The plurality opinion in Rapanos distinguished between relatively permanent bodies of water and ordinarily dry channels through which water occasionally flows. The Kennedy concurrence in Rapanos considered "waters" that had a significant

nexus to a traditional navigable water. The significant nexus principles referenced in SWANCC and Rapanos relate to traditional navigable waters, not to all interstate waters.

As a result of the proposed rule's inclusion of all interstate waters, minor streams, some of which may be ephemeral, which happen to cross a state border, will be considered waters of the United States. Waters that provide flow to "interstate waters" will also be deemed jurisdictional "tributaries" under the proposed rule. In addition, because interstate waters are deemed jurisdictional, other waters or wetlands may also be jurisdictional because of their relationship to these "interstate waters." (p. 3-4)

Agency Response: **See Summary Response, TSD and Preamble**

Texas Wildlife Association (Doc. #12251)

2.127 Additional uncertainty is created by (…) according "interstate waters" the same status as traditional navigable waters while failing to provide a definition of "interstate waters," (p. 3)

Agency Response: **See Summary Response, TSD and Preamble**

2.2.2. Scope of Jurisdiction

Agency Summary Response

The existing regulations define "waters of the United States" to include interstate waters, including interstate wetlands. The rule does not change that provision of the regulations. Therefore, interstate waters are "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, the rule protects impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters because they have a significant nexus to interstate waters. Protection of these waters is thus critical to protecting interstate waters. The assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. § 10, 62 Stat. 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress.

Specific Comments

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

2.128 The Proposed Rule also classifies any and all "interstate waters, including interstate wetlands" as core waters. 40 C.F.R. § 230.3(s)(2). This sweeps non-navigable interstate waters into the definition of core water. With non-navigable interstate waters deemed core waters, every water or occasional wet land connected to that water under the Proposed Rule's broad tributary, adjacency and catch-all provisions will also be swept into the Agencies' jurisdiction. This is plainly unlawful. Both Rapanos opinions held that core waters must be navigable waters or at least reasonably made to be so. The Rapanos plurality held that "a 'wate[r] of the United States,'" meant "a relatively permanent body

of water connected to traditional interstate navigable waters," 547 U.S. at 742 (emphasis added), which would obviously not apply to non-navigable waters. Similarly, Justice Kennedy's understanding of core waters is "waters that are or were navigable in fact or that could reasonably be so made," 547 U.S. at 759, which similarly excludes most non-navigable interstate waters. The Agencies' attempt to expand the categories of core waters to include non-navigable waters should thus be withdrawn. (p. 10-11)

Agency Response: **See Summary Response, TSD and Preamble**

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

2.129 In the proposed rule, all interstate waters are deemed jurisdictional. Although this is not a change from prior rule, it is not consistent with the holding in *Rapanos*. The fact that a water crosses a state border in no way predicts whether it will have a significant nexus with a traditionally navigable water, a continuous surface connection with a traditionally navigable water or otherwise be used in interstate commerce. **In light of the Supreme Court's holding, EPA can no longer treat every interstate water as jurisdictional.** (p. 8)

Agency Response: **See Summary Response, TSD and Preamble**

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

2.130 Similarly, the definition of interstate waters, which are subject to jurisdiction, is expanded to include any water that flows directly or indirectly into interstate waters regardless of distance. Interstate water jurisdiction could be claimed for traditional intrastate waters, which are governed by the State, even if indirectly situated several thousand miles away from a traditional interstate water body. (p. 2)

Agency Response: **See Summary Response, TSD and Preamble**

Federal Water Quality Coalition (Doc. #15822.1)

2.131 The proposed rule also expands the agencies' asserted jurisdiction over interstate water by expanding the concept of "water." As discussed below, under the proposed rule "waters" can be dry; they can be erosion features on the land; they can be ponds or pools that are hydrologically isolated from any navigable water. Moreover, under the rule, if so-called "water" crosses state lines, it is automatically subject to federal jurisdiction, and other "water" connected to this "interstate water" also would be per se jurisdictional.

The agencies cite a number of cases to support jurisdiction over interstate waters. 79 Fed. Reg. at 22256-57. But each of the cases cited involved waters that were traditional navigable waters and the geographic scope of federal Clean Water Act jurisdiction was not a question presented to the Court. See Illinois v. Milwaukee, 406 U.S. 91 (1972) (Lake Michigan); City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (Lake Michigan); International Paper v. Ouellette, 479 U.S. 481 (1987) (Lake Champlain); Arkansas v. Oklahoma, 503 U.S. 91 (1992) (a tributary of the Illinois River twenty-two miles from the state border). We are not aware of any case where the issue of federal jurisdiction over interstate water that was not traditional navigable water was litigated. We also are

not aware of any jurisdictional determination issued by the Corps finding federal jurisdiction over an interstate wetland.

The proposed expansion in jurisdiction over navigable and interstate water has created tremendous uncertainty regarding the status of a ditch or pond or wetland that has no connection to navigable water but lies on a state boundary. (p. 9)

Agency Response: See Summary Response, TSD and Preamble

Water Advocacy Coalition (Doc. #17921.1)

2.132 Moreover, the preamble argues at length that interstate waters can be non-navigable, but the proposed rule does not discuss how far this concept extends. Presumably, this would mean that the agencies would treat ephemeral drainages, ditches, wetlands, and ponds that happen to cross a State border as automatically jurisdictional (even if they lack a significant nexus to an (a)(1) through (a)(3) waters), and that any tributaries and adjacent waters connected to those features would be jurisdictional, and other waters connecting to those features could be jurisdictional. For example, the agencies would equate minor streams shown in Exhibit 8 that happen to cross the border between Arizona and New Mexico to TNWs. These small features that happen to cross the border are a far cry from the Colorado River, the closest TNW, yet the proposed rule likely treats them the same. Such an interpretation would go too far. As our prior comments explained,[72] there is no legal or scientific basis for equating small non-navigable features that happen to cross State boundaries with TNWs. Similarly, the agencies' proposed interpretation of interstate waters would include thousands of manmade and altered ditches that cross State lines, such as road or highway drainage required for safe operation under engineering standards, rail drainage required for safety pursuant to 49 C.F.R. Part 213, and stormwater management provided under the CWA's MS4 programs pursuant to CWA section 402. These features should not be equated to TNWs. The agencies must reassess the concept of interstate waters and define the term to be consistent with the limits of the CWA. (p. 41)

Agency Response: See Summary Response, TSD and Preamble

Duke Energy (Doc. #13029)

2.133 Interstate Waters: The concept for interstate waters should be reassessed. Small, isolated ponds that just happen to reside on a state boundary should not be equated at the same level as traditional navigable waters. (p. 12)

Agency Response: See Summary Response, TSD and Preamble

North Dakota EmPower Commission (Doc. #13604)

2.134 The proposed rule also gives new status to interstate waters by allowing for certain features to be jurisdictional based on a relationship to interstate waters. For example, "other waters" can now be jurisdictional if they have a significant nexus to non-navigable interstate waters.[73] As such, interstate waters do not need to be navigable. For the first

[72] WAC Comments on 2011 Draft Guidance, Exhibit 1 at 35-36.
[73] 79 Fed. Reg. at 22,200

time interstate waters will be equated to traditional navigable waters for purposes of CWA jurisdiction.

This broad definition of interstate waters will allow the EPA and Corps to include any waters or wetlands with a significant nexus to interstate waters under its jurisdiction. Moreover, waters providing flow to interstate waters will be deemed jurisdictional tributaries. Neither Justices Kennedy nor Scalia discussed interstate waters in Rapanos, and there is no support for this definition in SWANCC, Rapanos, or Riverside Bayview cases.[74] Again, the EPA and Corps seek to expand the universe of waters to which a significant nexus can be made, making it easier for them to establish jurisdiction. (p. 2-3)

Agency Response: **See Summary Response, TSD and Preamble**

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

2.135 As stated in the Federal Water Quality Coalition comments, the case law on interstate waters is clear in addressing traditionally navigable waters or tributaries of traditionally navigable waters, rather than the proposed rule's more expansive definition of any water that straddles a state boundary.[75] The test set forth by the Supreme Court requires a traditionally navigable water to be a "highway of commerce".[76] The potential presence of an isolated water including erosional features prevalent in the Western U.S. (other than those specifically excluded), and ponds or pools that happen to be geographically situated on a border between states does not appear to meet the intent of Congress. The proposed rule must be modified to more specifically follow case law that interstate waters are restricted to traditionally navigable waters and tributaries of traditionally navigable waters. (p. 6)

Agency Response: **See Summary Response, TSD and Preamble**

Southern Environmental Law Center et al. (Doc. #13610)

2.136 The proposed rule states that the agencies will assert jurisdiction over all interstate waters, consistent with the agencies' current regulations defining "waters of the United States." This means that the agencies will assert jurisdiction over waters that that cross state boundaries even if they would not otherwise be considered traditional navigable waters. It also means that jurisdiction would extend to stream reaches upstream and downstream of the point where a water crosses a state line. And it means that waters would be covered if they have a significant nexus with an interstate water. We agree with every element on this approach because it treats interstate waters in a manner consistent with the Clean Water Act. (p. 12)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

Western Resource Advocates (Doc. #16460)

2.137 In the states of the Interior West, waters of the state means:

[74] *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121.
[75] FWQC comments at page 3 and 4.
[76] *The Daniel Ball*, 77 U.S.C. 557 (1870).

In Arizona, "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."[77]

In Colorado, "any and all surface and subsurface waters which are contained in or flow in or through this state, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed."[78]

In New Mexico, "all surface waters situated wholly or partly within or bordering upon the state, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs or natural ponds. Surface waters of the state also means all tributaries of such waters, including adjacent wetlands, any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, and any 'waters of the United States' as defined under the Clean Water Act that are not included in the preceding description. Surface waters of the state does not include private waters that do not combine with other surface or subsurface water or any water under tribal regulatory jurisdiction pursuant to Section 518 of the Clean Water Act. Waste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act (other than cooling ponds as defined in 40 CFR Part 423.11(m) that also meet the criteria of this definition), are not surface waters of the state, unless they were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state."[79]

In Nevada, all waters situated wholly or partly within or bordering upon the state, including but not limited to: "(1) All streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems, and drainage systems; and (2) All bodies or accumulations of water, surface and underground, natural or artificial."[80]

In Utah, "all streams, lakes, ponds, marshes, water-courses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state; and does not include bodies of water confined to and retained within the limits of private property, and which do not develop into or constitute a nuisance, or a public health hazard, or a menace to fish and wildlife."[81]

In Wyoming, "all surface and groundwater, including waters associated with wetlands."[82]

[77] Ariz. Rev. Stat. Ann. § 49-201 (2014).
[78] Colo. Rev. Stat. § 25-8-103(19), (2013).
[79] N.M. Code R. § 20.6.4.7.S(5) (2014).
[80] Nev. Rev. Stat. § 445A.415 (2014).
[81] Utah Code Ann. §19-5-102(23) (2014).
[82] W.S. 35-11-103(a)(xiii) (2013).

These states have all decided that applying their water quality protections broadly is the appropriate means of protecting the relatively scarce water resources. With adoption of the proposed rule, the federal agencies will simply be clarifying the reach of the Clean Water Act so that it more closely corresponds to the water quality protections afforded by the states of the Interior West. (p. 5-6)

Agency Response: **See Summary Response, TSD and Preamble**

2.138 With regard to interstate waters, WRA supports the agencies' proposal that all inter-state waters, including those that are not traditionally navigable, be defined as waters of the US. In the headwaters states of the Rockies, every major river system is the subject of either an interstate compact that allocates its waters or a US Supreme Court decree for an equitable apportionment thereof. The State of Colorado alone is party to nine interstate compacts (two on the Colorado River), one interstate agreement and two equitable apportionment decrees. Yet, the Corps had formally designated only one of these waterways as a traditionally navigable water prior to this proposed Guidance. Even Costilla Creek, which does not qualify to be named a river in New Mexico and Colorado, is subject to its own interstate compact. These compacts reflect the importance of even relatively small interstate water bodies in the semi-arid West. The southwest is also home to the Bonneville Basin, where the rivers and lakes (including the Great Salt Lake) are fed exclusively from precipitation and upwelling groundwater and do not connect to the sea.[83] Both its largest river, the Bear, and many of its tributaries cross state lines between Idaho, Nevada, Utah and Wyoming. (p. 9-10)

Agency Response: **See Summary Response, TSD and Preamble**

2.2.3. Jurisdiction over Interstate Waters that Cross Tribal or International Boundaries

Agency Summary Response

The existing regulations define "waters of the United States" to include interstate waters, including interstate wetlands. The rule does not change that provision of the regulations. Therefore, interstate waters are "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, the rule protects impoundments of interstate waters, tributaries to interstate waters, waters adjacent to interstate waters, and waters adjacent to covered tributaries of interstate waters because they have a significant nexus to interstate waters. Protection of these waters is thus critical to protecting interstate waters. The assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. § 10, 62 Stat. 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress.

[83] RANGE-WIDE CONSERVATION AGREEMENT & STRATEGY FOR ROUNDTAIL CHUB GILA ROBUSTA, BLUEHEAD SUCKER CATOSTOMUS DISCOBOLUS, & FLANNELMOUTH SUCKER CATOSTOMUS LATIPINNIS, available at http://wildlife.utah.gov/pdf/UT_conservation_plan_5-11-07.pdf.

Specific Comments

Navajo Nation Environmental Protection Agency (Doc. #10117)

2.139 The term "interstate waters" is not defined. The rule should make clear that the term includes waters crossing the boundaries of federally recognized tribes. There are water bodies on the Navajo Nation which: 1) flow into adjacent States and 2) receive flow from adjacent States. (p. 2)

Agency Response: **See Summary Response, TSD and Preamble**

Washington State Senate (Doc. #10871)

2.140 We also believe you should consider the international implications of these policies. Washington shares the Columbia River, significant ground water resources, and major marine waters with British Columbia, Canada. It's important that we not inadvertently undermine our credibility with British Columbia as we advocate for high water quality standards on their side of the border, for the waters that flow south to Washington and Oregon. (p. 3)

Agency Response: **See Summary Response, TSD and Preamble**

Region 10 Tribal Caucus (Doc. #14927)

2.141 Fourth, the rule should include a definition of interstate waters that includes the cross of waters into or from a federally recognized tribe and not just crossing of state borders. (p. 3)

Agency Response: **See Summary Response, TSD and Preamble**

Imperial County Board of Supervisors (Doc. #10259)

2.142 International waters: The proposed rule should address flows from international waters. This is an issue for Imperial County - as well as San Diego County - because we must deal with the flow of polluted water from Mexico into the U.S. We suggest that the proposed rule clearly define the federal government's role and responsibility regarding this issue. (p. 3)

Agency Response: **EPA has considered this comment and has concluded that it is not necessary for this rule to address the federal government's role and responsibility regarding flows of polluted waters from Mexico or any other country. EPA notes that since the adoption of the Clean Water Act, the United States (often with EPA in the lead) has worked with Mexico and Canada on addressing issues related to cross-boundary pollution. For example, Congress enacted CWA section 118 to enhance cooperation between the United States and Canada in addressing pollution of the Great Lakes. Additionally, in the early 1990's EPA established a total maximum daily load under CWA section 303(d) to address dioxin contamination in the Columbia River. EPA's TMDL addressed dioxin contributions entering the United States from the Canadian portion of the Columbia River. EPA's TMDL was reviewed and upheld by the United States Court of Appeals for the Ninth Circuit. EPA also has many ongoing cooperative efforts with**

Mexico to address cross-boundary pollutions issues. See also Summary Response, TSD and Preamble

National Association of Counties (Doc. #15081)

2.143 The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).47 Approximately 56.2 million acres of land is held in trust for the tribes48 and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation: We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition (p. 17)

Agency Response: See Summary Response, TSD and Preamble

Western Coalition of Arid States (Doc. #14407)

2.144 An additional ambiguity is that "interstate water" is unclear as to whether this term applies to sovereign entities such as Native American lands. Thus if an interstate water is jurisdictional by definition, would all water courses that cross Native American boundaries be jurisdictional as well? (p. 5)

Agency Response: See Summary Response, TSD and Preamble

Water Advocacy Coalition (Doc. #17921.1)

2.145 Are waters that cross tribal boundaries going to be considered "interstate waters"? The agencies give no direction on this issue, but including such features would expand the

universe of interstate waters and waters that are jurisdictional by virtue of being connected to interstate waters. (p. 41)

Agency Response: **See Summary Response, TSD and Preamble**

County of San Diego (Doc. #14782)

2.146 The proposed rule should be amended to specifically address flows from international waters. A major issue in San Diego County is the flow of polluted waters from Mexico into the U.S., adversely impacting waters in the United States. The proposed rule should clearly define the federal government's role and responsibility regarding international waters, which should include federal development, implementation and funding for mitigation plans to address the trash and debris flowing downstream into the Tijuana River Valley from the other side of the border. (p. 7)

Agency Response: **See Agency Response above to Imperial County (2.142). See also Summary Response, TSD and Preamble**

Ducks Unlimited (Doc. #11014)

2.147 We do not find it explicitly stated, but we must presume that "interstate waters" would also include "international waters" based on the same reasoning used to categorically include "interstate waters" in this category of being jurisdictional by rule. If that is not the case, we would recommend that "international waters" such as rivers, wetlands, and other water bodies that are on the Canadian or Mexican borders with the U.S. or flow across the border between nations, also be expressly designated as jurisdictional. The same scientific facts and legal foundation should provide the basis for extending CWA protections to these international waters, as well. (p. 12)

Agency Response: **See Summary Response, TSD and Preamble**

2.3. TERRITORIAL SEAS

2.3.1. Definition

Agency Summary Response

The definition of navigable waters in the statute explicitly includes the territorial seas.

Specific Comments

Texas Commission on Environmental Quality (Doc. #14279.1)

2.148 In the current rule, 33 CFR §328.3(a)(6) identifies the territorial seas as waters of the United States. 33 CFR §328.3(a)(5) identifies tributaries of waters identified in paragraphs (a)(r) through (4) as waters of the United States. In the proposed rule, 33 CFR §328.3(a)(3) identifies the territorial seas as waters of the United States, and 33 CFR §328.3(a)(5) identifies tributaries of waters identified in paragraphs (a)(i) through (4) as

waters of the United States. Under the proposed rule, a tributary of territorial seas is by rule a water of the United States; whereas, previously, the tributary was not explicitly by definition a water of the United States. (p. 5-6)

Agency Response: **See Summary Response, TSD and Preamble**

2.3.2. Scope of Jurisdiction

The Agencies did not identify substantive comments that addressed this topic.

2.4. IMPOUNDMENTS

Agency Summary Response

The existing regulations provide that impoundments of "waters of the United States" remain "waters of the United States," and the rule does not make any changes to the existing regulatory language. Impoundments are jurisdictional because an impoundment of a "water of the United States" remains a "water of the United States," and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

Specific Comments

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

2.149 Proposed Rule, 79 Fed. Reg. at 22,262. The category of impoundments as waters of the United States has proven unclear and ambiguous in practice. Some instances are straightforward and clear, such as a jurisdictional stream with a manmade dam in place creating a lake behind the dam. However, there have been assertions that containment features for industrial facilities may be impoundments, sometimes premised on nothing more than the fact that rain water may become "impounded" in the feature. And now further adding to the confusion, and as discussed in greater detail below, impoundments are also identified as a jurisdictional "tributary" under the Proposed Rule. (p. 13)

Agency Response: **See Summary Response, TSD and Preamble**

2.150 Unfortunately, the Proposed Rule does nothing to clarify existing confusion and uncertainty with regard to this category of water of the United States and, in fact, adds new ambiguity. As noted, the textbook concept of an impoundment is a clearly jurisdictional river or stream which has been dammed, resulting in the formation of a lake (i.e., the "impoundment") behind the obstruction. Little or no confusion or controversy.

However, claims that a feature is jurisdictional as an impoundment are not limited to this prototypical "lake" example. In fact, Corps districts have claimed that containment

features on industrial facilities are jurisdictional impoundments, sometimes based upon their containment of nothing more than rain water. This may be true even in the absence of any hydrologic interaction with any traditional navigable water.

Even more concerning, however, is the Proposed Rule's statement that impoundments are not only jurisdictional under the (a)(4) provision, but the Proposed Rule also expressly includes impoundments in the definition of "tributaries." See Proposed Rule at 22,263. Indeed, there is a circular basis of justifying jurisdiction in the Proposed Rule in that the Agencies can establish (a)(5) tributary jurisdiction by showing any level of flow from the purported tributary feature into an (a)(4) impoundment, but the impoundment can be established as jurisdictional itself as an (a)(4) tributary. Further ensuring the categorical sweep of jurisdiction – with or without any showing of the significance of the purported effect on traditional navigable waters – either feature, whether an (a)(4) impoundment or an (a)(5) tributary, can also be declared jurisdictional under the Proposed Rule based solely upon "adjacency," the deficiencies of which are discussed below.

Finally, the Proposed Rule allows any (a)(1) – (a)(3) water or (a)(5) tributary to be the basis for the finding of impoundment. This broad inclusion necessarily sweeps into the determination of whether or not a given feature is an impoundment all of the infirmity and uncertainty of the other categories of waters of the United States – i.e., (a)(1) – (a)(3) waters and (a)(5) tributaries – discussed herein. (p. 18)

Agency Response: **See Summary Response, TSD and Preamble**

Kerr Environmental Services Corp. (Doc. #7937.1)

2.151 We recommend that items 4 and 5 be switched in order so that the first four elements are: traditional navigable waters, interstate waters, territorial seas and tributaries. Item 5 would therefore be impoundments of the first 4 types of Waters of the United States. Without this re-ordering, there is circular logic between Item 4 Impoundments, and Item 5 Tributaries. Item (4) Impoundments states that an Impoundment of a Tributary is a water. This is correct. Item (5) indicates that all tributaries of impoundments located on a tributary are WOUS. We believe that is confusing, illogical and in some cases will be misapplied. An example of a problem given the current proposed rule is a ditch which drains to an impoundment, where the impoundment is located along a tributary. While the impoundment should be jurisdictional, the ditch should not be, as long as the ditch was excavated through and drains only uplands. Simply reorganizing items 4 and 5 eliminates this confusion. (p. 2)

Agency Response: **See Summary Response, TSD and Preamble. Also see Ditch Compendium for greater clarity regarding ditches**

Continental Resources, Inc. (Doc. #14655)

2.152 The same problems that plague the agencies' jurisdictional reach over "interstate waters" apply to "impoundments." First, impoundment is not defined in the Proposed Rule and its definition and scope are unclear. The lack of a definition has created interpretation problems in the past and will continue to do so. For example, it appears that any feature that holds water-no matter how small or transient-would be considered an impoundment.

Because the definition of tributary also includes "impoundments" the rule creates further confusion. 79 Fed. Reg. at 22,263 (Proposed 33 C.F.R. § 328.3(c)(5)).

Second, the Proposed Rule allows for waters to be jurisdictional based on their relationship to impoundments. Without adequate scientific support, the preamble assumes "impoundments do not sever the effects" and that "impoundments have chemical, physical, and biological effects on downstream waters." 79 Fed. Reg. at 22,201. Despite the lack of evidence, the Proposed Rule would assert jurisdiction over tributaries to impoundments, waters and wetlands adjacent to impoundments, and waters adjacent to the tributaries of impoundments.

Third, the agencies ignore the Supreme Court's holding in Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). In SWANCC, the Supreme Court held that the Corps of Engineers exceeded its authority under Section 404(a) when it asserted CWA jurisdiction over isolated, intrastate non-navigable waters. The Supreme Court found that neither the CWA nor its legislative history supported jurisdiction over isolated, intrastate waters based upon their use as habitat for migratory birds and that the Corps of Engineers' assertion of jurisdiction raised serious constitutional questions because its administrative interpretation invoked the outer limits of Congress' commerce power. Id. at 172, 174. Both Justice Kennedy's and Justice Scalia's opinions in Rapanos reaffirmed and cited approvingly to SWANCC. See, e.g., Rapanos, 547 U.S. 731 n.3 (plurality opinion) (Justice Scalia noting "[a]s traditionally understood, [waters of the United States] excludes intrastate waters, whether navigable or not") (emphasis added), 737-38; id. at 776 (Kennedy, J., concurring):

> In SWANCC, as one reason for rejecting the Corps' assertion of jurisdiction over the isolated ponds at issue there, the Court observed that this "application of [the Corps'] regulations" would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation. As SWANCC observed ... the [CWA] states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."... In SWANCC, by -interpreting the [CWA] to require a significant nexus with navigable waters, the Court avoided applications-those involving waters without a significant nexus-that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.

(lst, 3rd, and 4th alterations in original).

The agencies' proposed treatment of impoundments in the Proposed Rule is at odds with SWANCC, which clearly held such an assertion of jurisdiction over these types of waters raised both statutory and constitutional questions.

Continental is particularly troubled by the addition of impoundments. When Continental selects sites and constructs its locations, it intentionally constructs water recycling impoundments and other impoundments in the form of storm water retention ponds and run-on/run-off ditches. Continental also utilizes stock watering dams in Montana and North Dakota. Continental's water recycling impoundments promote conservation and

reduce water consumption, and Continental's other impoundments (e.g., storm water retention ponds and run-on/run-off ditches) are necessary to prevent storm water from collecting on its locations. A spill from one of these impoundments or from a dam in a geographic area that is not currently considered jurisdictional may become jurisdictional under the Proposed Rule and thereby subject to a new or different federal or state permitting regime. The practice of constructing impoundments is prevalent not only throughout the oil and gas industry but also other industries. Nevertheless, under the Proposed Rule, Continental's man-made impoundments (and ditches) could become jurisdictional, particularly if they overflow or route water to roadside ditches that now become "tributaries" under the Proposed Rule. (p. 5-6)

Agency Response: The agencies are not adding Impoundments to the definition. It remains unchanged. Impoundments must be of another category of waters of the U.S. Ditches, ponds and stormwater controls are also addressed in the Ditch Compendium and the Waters Not Jurisdictional Compendium. Also see Summary Response, TSD and Preamble

Illinois Coal Association (Doc. #15517)

2.153 Moreover, the Agencies state on pg. 22201 of the Proposed Rule that (1) "impoundments do not de-federalize a water, even where there is no longer flow below the impoundment," (2) impoundments can become jurisdictional, and (3) "an impoundment does not cut off a connection between upstream tributaries and a downstream water so tributaries above the impoundment are still considered tributaries even where the flow of water is impeded due to the impoundment. " We note that this may conflict with the ruling in OVEC v. Aracotna Coal, 556 F.3d 177 (4th Cir., Feb. 13, 2009), where the court rejected claims that stream segments connecting fill areas and treatment systems were "waters of the U.S." See 556 F.3d at 211-16. Under the Proposed Rule , even though waste treatment systems remain exempt, stream segments flowing into them may be deemed to be jurisdictional, thus creating the illogical outcome where section 402 permits would be required, not just for the effluent point from the waste treatment system, but also the influent point into that system. (p. 18)

Agency Response: See Summary Response, TSD and Preamble. See also Waters Not Jurisdictional Compendium with respect to the waste treatment system exclusion.

Alpha Natural Resources, Inc. (Doc. #15624)

2.154 The Agencies Lack a Legal Rationale to Categorically Regulate Impoundments

In Rapanos, Justice Kennedy made clear that when a water's "effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Rapanos, 547 U.S. 715, 780 (2006). In the preamble, however, the agencies assert that "[a]s a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment." Id. at 22,201. These two statements cannot be reconciled. Where impoundments disrupt or sever the physical, chemical, and biological connection between upstream waters and

traditionally navigable waters downstream, those upstream waters cannot categorically be considered jurisdictional under Rapanos. (p. 9)

Agency Response: **See Summary Response, TSD and Preamble**

North Carolina Farm Bureau Federation (Doc. #15078)

2.155 Ponds should not be captured as jurisdictional "impoundments."

It appears that ponds, including agricultural ponds, might be considered "impoundments" and therefore categorically jurisdictional as impoundments because they may impound the new category of "tributaries," even ephemeral tributaries. This is clearly an expansion of jurisdiction and if rule should be withdrawn. If the Agencies revise the rule, the rule should clearly state that ponds are not impoundments and are not categorically jurisdictional. (p. 6)

Agency Response: **Summary Response, TSD and Preamble. See also Waters Not Jurisdictional Compendium**

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

2.156 If waters of the United States are impounded, they should not lose their jurisdictional status. [Northwest Colorado Council of Governments Water Quality/ Quantity Committee (]QQ[)] agrees with the approach in the proposed rule because CWA requirements are essential to protecting water quality in reservoirs and other man-made water bodies. These water bodies are important to the headwaters economy because they host a wide variety of recreational activities. In addition, waters that flow from impoundments support recreation. More than 38,000 people rafted the Upper Colorado River in 2013 below several impoundments, spending an estimated $4.5 million dollars.[84] (p. 2-3)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

Duke Energy (Doc. #13029)

2.157 [T]he proposed rule again broadens the scope of jurisdictional waters by asserting automatic jurisdiction over tributaries to impoundments, wetlands and waters adjacent to impoundments, and waters adjacent to tributaries to impoundments, all without providing a clear definition of the term "impoundment." This is important since the term "impoundment" can be interpreted to mean different things. For example, under the Steam Electric Effluent Guidelines, impoundments can include various types of industrial wastewater ponds that are not necessarily connected to a "waters of the United States." There is the potential for these industrial ponds be considered impoundments under this rule. Adding to the confusion, impoundments also show up in the definition of tributaries. It is unclear under what circumstances an impoundment be an (a)(4) water versus an (a)(5) tributary. The differences between these two types of waters are ill-defined.

[84] Colorado River Outfitters Association, "Commercial River Use in the State of Colorado, 1988-2013" <http://www.croa.org/wp-content/uploads/2014/05/2013-Commercial-Rafting-Use-Report.pdf>.

By failing to provide a definition for impoundments, the agencies have increased regulatory uncertainty by requiring a judgment call on the part of the permitting agency for jurisdictional determinations of impoundments. Various agencies may interpret the definition differently. Duke Energy recommends that additional clarification be provided that clarifies the specific types of impoundments that would (or would not) be considered an (a)(4) water. (p. 20-21)

Agency Response: The exclusion for waste treatment systems remains unchanged. See Waters Not Jurisdictional Compendium. See also Summary Response, TSD and Preamble

Murray Energy Corporation (Doc. #13954)

2.158 Moreover, the Agencies state on pg. 22201 of the Proposed Rule that (1) "impoundments do not de-federalize a water, even where there is no longer flow below the impoundment," (2) impoundments can become jurisdictional, and (3) "an impoundment does not cut off a connection between upstream tributaries and a downstream water so tributaries above the impoundment are still considered tributaries even where the flow of water is impeded due to the impoundment." We note that this may conflict with the ruling in *OVEC v. Aracoma Coal*, 556 F.3d 177 (4th Cir., Feb. 13, 2009), where the court rejected claims that stream segments connecting fill areas and treatment systems were "waters of the U.S." See 556 F.3d at 211-16. Under the Proposed Rule, even though waste treatment systems remain exempt, stream segments flowing into them may be deemed to be jurisdictional, thus creating the illogical outcome where section 402 permits would be required, not just for the effluent point from the waste treatment system, but also the influent point into that system. (p. 20)

Agency Response: See Summary Response, TSD, Preamble and Waters Not Jurisdictional Compendium.

Santa Clara Valley Water District (Doc. #14776)

2.159 It is well recognized when a jurisdictional river or stream has been dammed, the resulting "impoundment" of water behind the obstruction is itself also a jurisdictional water. Confusion arises, though, when the term "impoundment" is extended to other types of features. For instance, claims may be made that containment features on industrial facilities are jurisdictional impoundments, sometimes based on their containment of nothing more than rain water, even in the absence of any hydrologic interaction with any traditional navigable water.

The Proposed Rule adds to such confusion and concern by encompassing not only impoundments of other waters, but also by treating impoundments as "tributaries" and by considering them jurisdictional solely on the basis of their "adjacency" to other waters. (79 Fed.Reg. 22262-22263.) (p. 4)

Agency Response: See Summary Response, TSD and Preamble

Salt River Project Agricultural Improvement and Power District et al. (Doc. #14928)

2.160 The agencies do not discuss the science that supports this decision in the rule's preamble, in Appendix A to the preamble, or the agencies' draft Connectivity Report. As a result, the regulation of isolated impoundments and the upstream tributary waters that connect to them is likely to cause confusion among permitting agencies and field personnel. The agencies should not regulate these types of "cut-off" impoundments and cut-off tributary waters unless the agencies can provide a clear scientific basis for doing so. (p. 14)

Agency Response: See Summary Response, TSD and Preamble

Utility Water Act Group (Doc. #15016)

2.161 [T]he Agencies fail to adequately address whether the definition would apply to impoundments of waters that predate enactment of the CWA or to impoundments created by pumping water from an (a)(1), (a)(2), (a)(3), or (a)(5) water (rather than impoundments "in" these waters). The Agencies should not use a "small federal handle" to try to capture private, man-made waters that were created in or by impounding WOTUS, in whole or in part, so long as an impoundment was undertaken in accordance with the laws in effect at the time the feature was created. Anything contrary would amount to a retroactive application of new law, which is disfavored generally and which Congress never suggested it intended here. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1998) ("[R]etroactivity is not favored in the law . . . . [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). (p. 52-53)

Agency Response: The definition of impoundments remains unchanged. See Summary Response, TSD and Preamble. See also TNWs above.

Montana-Dakota Utilities Co. (Doc. #15066)

2.162 Impoundments should not be regulated as "Waters of the U.S." for numerous reasons. Similar to industrial ponds, impoundments are features required for water and waste management associated with industrial, construction and agricultural facilities that are typically subject to regulation under other regulatory programs and statutes. Montana-Dakota asserts the inclusion of impoundments and use of impoundments to include tributaries and adjacent wetlands and waters is unnecessary from a water quality protection standpoint and duplicative with other regulatory programs in most cases. Impoundments are utilized for the treatment of wastewaters and are already regulated under NPDES at our facilities mentioned above. (p. 4)

Agency Response: The definition of waters applies to all of the CWA, including NPDES. The exclusion for waste treatment systems remains unchanged. See Waters Not Jurisdictional Compendium. See also Summary Response, TSD and Preamble

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

2.163 Impoundments are often excavated in upland areas in Pennsylvania for the storage of freshwater for well development. They are typically equipped with overflow piping to maintain freeboard. When necessary, these overflow pipes discharge water to ditches that

directly or indirectly connect to a water of the United States. Under the Proposed Rule, these impoundments could be considered to be jurisdictional (as tributaries or adjacent waters). Conflict with state law would arise because many times these impoundments are lined to contain the water and must maintain two feet of freeboard. Maintaining the liner and periodically cleaning out the impoundment typically require work within the impoundment. Under the proposed rule, such work would be prohibited by the Corps without a Section 404 permit. Further, any additives placed in the impoundment to control algae or other water quality parameters could be construed as the introduction of a pollutant, which could require a Section 402 permit. (p. 14)

Agency Response: See Summary Response, TSD and Preamble

Lower Colorado River Authority (Doc. #16332)

2.164 The Proposed Rule includes impoundments as jurisdictional waters. 79 Fed. Reg. at 22,262. The Proposed Rule also asserts categorical jurisdiction over tributaries to impoundments and waters adjacent to impoundments (and waters adjacent to tributaries to impoundments). See Id. LCRA has concerns that including impoundments and all associated tributaries and adjacent waters is unnecessary from a water quality protection standpoint and duplicative of other regulatory programs. LCRA respectfully requests that the Agencies withdraw the proposed inclusion of impoundments as categorically jurisdictional waters. (p. 9)

Agency Response: See Summary Response, TSD and Preamble

Ducks Unlimited (Doc. #11014)

2.165 We agree with and support the relatively minor, clarifying changes made with respect to the issue of whether or not impoundments fall within the definition of "waters of the U.S." (p. 13 & repeated on p. 75)

Agency Response: Summary Response, TSD and Preamble

Potomac Riverkeeper, Inc. (Doc. #15013)

2.166 Protect impoundments of any water of the United States. The language of the proposed rule limits the types of impounded waters subject to the protection of the Act, by only including impoundments of traditionally navigable waters, interstate waters, the territorial seas, and certain defined tributaries. No scientific or logical basis exists for excluding impoundments of adjacent waters—indeed, that exclusion invites evasion of the Act and thus invites water degradation by allowing polluters to drain pollutants into portions of, e.g., wetlands that happen to have been impounded. If, as the preamble to the proposed rule states, impoundments significantly affect the chemical, physical or biological integrity of downstream waters, this is equally as true for impoundments of all waters. (p. 4)

Agency Response: The Rule does not change the existing regulatory text on impoundments. See also Summary Response, TSD and Preamble.

Waterkeeper Alliance et al. (Doc. #16413)

2.167 With regard to impoundments, although the agencies state in the Preamble that they are not making any substantive changes to this portion of the regulatory definition, the proposed language for impoundments would limit the types of impounded waters that will be subject to CWA protections. The existing regulatory definition includes "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition." The proposed language only includes impoundments of traditionally navigable waters, interstate waters, the territorial seas, and certain defined tributaries. No scientific or legal basis exists for excluding impoundments of adjacent waters and other waters included on the basis of a significant nexus analysis, and none was provided in the Preamble. As stated in the preamble, "[i]mpoundments are jurisdictional because as a legal matter an impoundment of a 'water of the United States' remains a 'water of the United States' and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas."[85] There is equally true for adjacent waters and "other waters." (p. 26)

Agency Response: The Rule does not change the existing regulatory text on impoundments. See also Summary Response, TSD and Preamble.

Earthjustice (Doc. #14564)

2.168 B. Subsection (s)(4)—Impoundments.

Subsection (s)(4) provides that all impoundments of waters identified in paragraphs (s)(1)-(5) are defined as waters of the U.S. See also, "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'" (August 14, 2014) (hereinafter "Member Comments")[86] Rains at 70. This is consistent with the clearly expressed intent of Congress, and with case law, and is also reasonable.

Earthjustice, however, strongly disagrees with the failure to include impoundments of adjacent waters, subpart (s)(6), and impoundments of "other waters," including similarly situated waters located in the same region, subpart (s)(7). If a waterbody is defined as a water of the U.S. by operation of (s)(6) or (7) there is no reason, scientific or legal, why an impoundment of that water is not also a water of the U.S. For example, if a wetland is adjacent to the Missouri River or San Francisco Bay and is thereby considered a water of the U.S., the fact that the wetland has been impounded, in whole or in part, with a dike, or a corner of the wetland has been excavated and impounded to created a pool, should not suddenly result in that portion of the adjacent wetland losing protection under the Clean Water Act. Such a result is plainly contrary to the statute and does not even comport with

[85] S. D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them"), and U.S. v. Moses, 496 F.3d 984 (9th Cir. 2007), cert. denied, 554 U.S. 918 (2008) ("[I]t is doubtful that a mere man---made diversion would have turned what was part of the waters of the United States inot something else and, thus, eliminated it from national concern.").
[86] The Compilation of Preliminary Comments is attached hereto. [See Attachment #14564.2 at the end of this compendium.]

EPA's efforts to apply the "significant nexus" test. Similarly, if a water has been identified, case by case, as a water of the U.S. because it has a significant nexus, then impounding that waterbody should not alter its status and it should remain protected by the Clean Water Act. In addition to lacking a basis in science or law, omitting adjacent waters and other waters with a significant nexus from the inclusion in the impoundment provision creates incentives for impounding those waters in order to weaken the protections over them.

EPA must address this issue and amend subpart (s)(4) to include impoundments of all of the identified waters in subpart (s). At a minimum, protecting impoundments of adjacent waters is a permissible and reasonable interpretation of the Act that satisfies Step Two of Chevron—and indeed, excluding such impoundments would not be a reasonable interpretation. Moreover, given the clear scientific support for including these impounded waters, and the absence of any basis for excluding them, a final decision to exclude them would not constitute reasoned decision making supported by the record. (p. 5)

Agency Response: The Rule does not change the existing regulatory text on impoundments. See also Summary Response, TSD and Preamble.

Texas Wildlife Association (Doc. #12251)

2.169 Impoundments Should Not Be Regulated as "Waters of the U.S."

Similar to industrial ponds, impoundments are features required for water and waste management associated with industrial, construction and agricultural facilities that are typically subject to regulation under other regulatory programs and statutes. In addition to considering impoundments categorically jurisdictional, the proposed rule asserts jurisdiction over tributaries to impoundments, wetlands and waters adjacent to impoundments, and waters adjacent to tributaries of impoundments. See Fed. Reg. at 22,262-63. The inclusion of impoundments and use of impoundments to include tributaries and adjacent wetlands and waters is unnecessary from a water quality protection standpoint and duplicative with other regulatory programs in most cases. The agencies should consult with stakeholders to better understand how agricultural and industrial impoundments are constructed and regulated and reevaluate the regulation of such features. (p. 5)

Agency Response: The exclusion for waste treatment systems remains unchanged. See Waters Not Jurisdictional Compendium See also Summary Response, TSD and Preamble

Anacostia Riverkeeper et al. (Doc. #15375)

2.170 Subsection (s)(4) provides that all impoundments of waters identified in paragraphs (s)(1(5) are defined as waters of the U.S. See also "Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Title "Definition of 'Waters of the United States ' Under the Clean Water Act" (August 14,2014) (hereinafter "Member Comments") Rains at 70. Waterkeepers Chesapeake, however, strongly disagrees with the failure to include impoundments of adjacent waters , subpart (s)(6) and impoundments of "other waters", including similarly situated waters located in the same region, subpart (s)(7). If a waterbody is defined as a

water of the U.S. by operation of (s)(6) or (7) there is no reason, scientific or legal , why an impoundment of that water is not also a water of the U.S . For example, if a wetland is adjacent to the Missouri River or San Francisco Bay and is thereby considered a water of the U.S. , the fact that the wetland has been impounded, in whole or in part, with a dike, or a corner of the wetland has been excavated and impounded to created a pool , should not suddenly result in that portion of the adjacent wetland losing protection under the Clean 'Water Act. Such a result is plainly contrary to the statute and does not even comport with EPA' s efforts to apply the "significant nexus" test. Similarly, if a water has been identified, case by case, as a water of the U. S. because it has a significant nexus, then impounding that waterbody should not alter its status and it should remain protected by the Clean Water Act. In addition to lacking a basis in science or law, omitting adjacent waters and other waters with a significant nexus from the inclusion in the impoundment provision, creates incentives for impounding those waters in order to weaken the protections over them. EPA must address this issue and amend subpart (s)(4) to include impoundments of all of the identified waters in subpart (s). (p. 5)

Agency Response: The Rule does not change the existing regulatory text on impoundments. See also Summary Response, TSD, Waters Not Jurisdictional Compendium and Preamble

2.4.1. Definition

Agency Summary Response

The existing regulations provide that impoundments of "waters of the United States" remain "waters of the United States," and the rule does not make any changes to the existing regulatory language. Impoundments are jurisdictional because an impoundment of a "water of the United States" remains a "water of the United States," and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

Specific Comments

Water Advocacy Coalition (Doc. #17921.1)

2.171 The proposed rule's categorical regulation of impoundments is unsupported and is likely to cause confusion.

"Impoundment" is a broad, amorphous term that should not be per se regulated. As with interstate waters, without legal[87] or scientific[88] support, the proposed rule allows for

[87] Neither of the cases cited by the agencies in the preamble discussion of impoundments support categorical jurisdiction over impoundments or jurisdiction over features based on their connections to impoundments. See 79 Fed. Reg. at 22,201 (citing S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 379

features to be jurisdictional based on their relationship to impoundments without requiring impoundments to have a significant nexus or any meaningful connection to TNWs. See 79 Fed. Reg. at 22,262-63. Indeed, the preamble does not even go as far as making a finding that all impoundments categorically have a significant nexus with (a)(1) through (a)(3) waters – it simply states that "impoundments have chemical, physical, and biological effects on downstream waters." Id. at 22,201. This is hardly a strong reasoned statement supporting categorical jurisdiction over impoundments and other features based on their relationship to impoundments. Nevertheless, the proposed rule asserts jurisdiction over tributaries to impoundments, wetlands and waters adjacent to impoundments, and waters adjacent to tributaries of impoundments. Id. at 22,262-63.

There have been many practical problems with understanding what an "impoundment" is under current regulations because the term is undefined. But the agencies have not taken this opportunity to explain this category of jurisdiction. In outreach meetings, EPA officials have referred to impoundments as "lakes made by damming a water of the U.S." If this is what the agencies mean to regulate, why not just use this language in the proposed rule? Rather than provide clarity, the agencies provide no definition of "impoundment" and leave fundamental questions unanswered:

- What is an impoundment?
- Can any feature on the landscape holding water be considered an impoundment? If yes, what is the scientific justification for regulation of these features?
- Can farm ponds be considered impoundments? Stock ponds? Industrial ponds? If yes, what is the scientific justification for regulation of these features?
- In what circumstances do impoundments qualify for the waste treatment exclusion?
- The proposed rule lists "impoundment" in the definition of "tributary" as an example of a feature that can be considered a tributary. When will an impoundment be treated as an (a)(4) impoundment rather than an (a)(5) tributary?

Again, the agencies fail to provide the requisite clarity and, as a result, the regulation of impoundments is likely to continue to cause confusion and inconsistency in the field. We recommend that the agencies revisit the regulation of impoundments. If the agencies cannot identify a legal and scientific basis for regulating impoundments, they should not

n.5 (2006) (Court's decision is focused on the meaning of the term "discharge," and footnote cited by agencies simply states that "one can[not] denationalize national waters by exerting private control over them." This statement does little to inform whether impoundments categorically have a significant nexus and should be per se jurisdictional); United States v. Moses, 496 F.3d 984 (9th Cir. 2007) (Issue was "whether a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States," and although there was likely an impoundment upstream of the intermittent stream at issue, it played no part in the court's decision.).

[88] The Connectivity Report does not examine impoundments, and the studies cited in the preamble's Appendix A, which merely state that impoundments can be subject to seepage in certain circumstances, do not demonstrate that impoundments have significant physical, chemical, and biological effects on downstream waters. If an impoundment cuts off a physical connection, and the flow has stopped, for example, then the upstream water would lack a significant nexus with downstream waters. Id. at 22,235.

be regulated. If the agencies intend to regulate impoundments, however, they should provide a clear definition of the term. (p. 42-43)

Agency Response: See Compendium on Waters Not Jurisdictional Exclusions. See also Summary Response, TSD and Preamble

Southpace Properties, Inc. (Doc. #6989.1)

2.172 Respectfully, the proposed rulemaking creates confusion instead of clarity. We fear the proposed changes to the CWA will constrain our ability to grow jobs by failing to provide guidance on the definitions created by the varying interpretations of legal and constitutional precedent. For instance, uncertainty is created by allowing certain features to be considered jurisdictional based on their relationship to "impoundments" while leaving "impoundment" undefined. (p. 1)

Agency Response: See Summary Response, TSD and Preamble

NAIOP, Commercial Real Estate Development Association (Doc. #14621)

2.173 §328.3(a)(4) and (5). Impoundments and Tributaries.

We recommend that you reverse the order of these subsections and correct the numbering accordingly. The order proposed is simply illogical. Currently these subsections read as:

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

Revising it as proposed below would not eliminate any jurisdictional WOTUS based upon any scenario we can envision and would eliminate the "circular argument." We recommend that it be changed as follows:

(4) All tributaries of waters identified in paragraphs (a)(1) through (3) of this section;

(5) All impoundments of waters identified in paragraphs (a)(1) through (4) of this section; (p. 6)

Agency Response: The rule retains the existing language on impoundments and that solved the numbering problem. See Summary Response, TSD and Preamble

Sinclair Oil Corporation (Doc. #15142)

2.174 If, instead, the Agencies insist on promulgating the proposed rule, at a minimum the following revisions should be incorporated into the final rule:

• Define "impoundments" so as to (i) exclude zero discharge waste treatment systems such as those present at Sinclair's refineries and (ii) clarify that collections of process water from industrial facilities do not constitute "waters of the United States" solely because the process water was drawn from a "water of the United States." (p. 3)

Agency Response: The exclusion for waste treatment systems remains unchanged. See Waters Not Jurisdictional Compendium. See also Summary Response, TSD and Preamble

2.175 The Agencies assert that including impoundments of otherwise jurisdictional waters is appropriate because "as a legal matter an impoundment of a 'water of the United States' remains a 'water of the United States' and because the scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, and biological integrity of downstream waters, traditional navigable waters, interstate waters, or the territorial seas." 79 Fed. Reg. 22,201. While this rationale may be true for the more traditional types of impoundments, such as in-flow reservoirs, it does not hold true for the vast universe of surface features that could be considered impoundments in the absence of a concrete definition of the term. The scientific analysis supporting the proposed rule simply does not address the breadth of circumstances to which the term "impoundment," without further definition, could be applied.

In the absence of further regulatory definition, a reasonable approach would be to rely on a dictionary definition of "impoundment." The dictionary defines "impoundment" as any body of water created by the collection and confinement of water.[89] Applying this definition, the potential features that could be considered impoundments are nearly limitless. Indeed, almost any industrial or agricultural activity that utilizes water from a "water of the United States" could be considered jurisdictional. As just one example, the Sinclair refinery maintains water in a lined pond on the southeast comer of the refinery for fire suppression in the event of an incident. This water is drawn directly from the North Platte River and is stored in the pond as an essential element of the refinery's safety plan. Based on the dictionary definition, this pond, which is integral to the safe operation of the refinery, could be deemed a jurisdictional water solely because it is filled with water from the North Platte River. While the Agencies almost certainly do not intend for every industrial activity that draws process water from a "water of the United States" to itself become a "water of the United States," that is exactly what the proposed rule does by failing to define the term "impoundment" with any specificity.

As outlined above, both Sinclair refineries draw process water from the North Platte River, a traditional navigable water. This water is used in the refineries, treated and sent to the evaporation ponds. Using the dictionary definition of impoundment to implement the proposed rule, a regional staffer for either Agency or a third-party looking to file a citizen suit could reasonably interpret the proposed rule as defining the entire refinery as a "water of the United States." That same staffer or third-party could apply the same flawed analysis to assert that the evaporation ponds and other ponds at the refineries, such as the lire suppression water discussed above, are "a water of the United States." Such an interpretation leads to absurd results: internal refinery operations would become subject to CWA permitting and water quality standards. The fact that the refinery happens to draw process water from a navigable water is insufficient to establish that pond as a "water of the United States." (p. 12)

Agency Response: **The agencies cannot answer fact specific questions about the jurisdictional status of a particular water. See Waters Not Jurisdictional Compendium. See also Summary Response, TSD and Preamble**

[89] Merriam-Webster defines an impoundment, in relevant part, as "a body of water formed by impounding." In turn, impounding is defined, in relevant part, as "to collect and confine (water) in or as if in a reservoir."

Eagle River Water and Sanitation District (Doc. #15116)

2.176 Under the current definition "waters of the United States" include "All impoundments of waters otherwise defined as waters of the United States under this definition." 40 CFR Part 230.3(s)(4) With the proposed new definition, the language pertaining to impoundments has been modified as follows:

(4) All impoundments of water identified in paragraphs (s)(1) through (3) and (5) of this section;

Federal Register, Vol. 79, No. 76, April 21, 2014, p. 22262

This change appears to specifically exclude the following waters:

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters, alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

Federal Register, Vol. 79, No. 76, April 21, 2014, p. 22262

The intended purpose of this change in the language and to the construct of the proposed rule and how it would be interpreted and applied is not clear and not addressed in the background information, the legal basis, or in the supporting scientific rationale for the proposed changes. Would this change be applied to exclude from jurisdiction impacts to adjacent waters if such impacts were the result of inundation associated with an impoundment? Further explanation is needed to clarify the purpose and meaning of this proposed change. (p. 2-3)

Agency Response: **The existing regulations provide that impoundments of "waters of the United States" remain "waters of the United States," and the rule does not make any changes to the existing regulatory language. Impoundments are jurisdictional because an impoundment of a "water of the United States" remains a "water of the United States," and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."**

2.177 [I]t is curious and inconsistent that waters adjacent to impoundments would be jurisdictional, while impoundments of adjacent waters (…) would not be jurisdictional. Please clarify this confusing inconsistency. (p. 7)

Agency Response: **The existing regulations provide that impoundments of "waters of the United States" remain "waters of the United States," and the rule does not make any changes to the existing regulatory language. Impoundments are**

jurisdictional because an impoundment of a "water of the United States" remains a "water of the United States," and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."

Texas Wildlife Association (Doc. #12251)

2.178 Additional uncertainty is created by (…) allowing certain features to be considered jurisdictional based on their relationship to "impoundments" while leaving "impoundment" undefined (p. 3)

Agency Response: See Summary Response, TSD and Preamble

2.4.2. Scope of Jurisdiction

Agency Summary Response

The existing regulations provide that impoundments of "waters of the United States" remain "waters of the United States," and the rule does not make any changes to the existing regulatory language. Impoundments are jurisdictional because an impoundment of a "water of the United States" remains a "water of the United States," and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. *See* Technical Support Document. The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

Specific Comments

Alpha Natural Resources, Inc. (Doc. #15624)

2.179 Many Impoundments Contain Waters of Unknown Jurisdictional Status

The preamble's discussions of impoundments focus on situations in which traditional jurisdictional waters are impounded. Many impoundments, however, fall outside of this limited jurisdictional framework. It is often difficult to determine whether impounded waters would be traditionally jurisdictional waters if they were not impounded (e.g., impoundments that pre-date the Clean Water Act or impoundments constructed in mountainous uplands).

Furthermore, some impoundments, such as coal refuse impoundments, completely and permanently fill any natural waterways that existed prior to the impoundment. The preamble provides no legal or scientific justification for regulating as per se jurisdictional

an impoundment that has completely and permanently filled pre-existing waters and presently lacks a surface connection to downstream waters. The preamble should make clear that such impoundments are non-jurisdictional unless a case-by-case investigation demonstrates otherwise. (p. 8-9)

Agency Response: See Summary Response, TSD and Preamble. See also TNW responses above and Waters Not Jurisdictional Compendium.

Montana Wool Growers Association (Doc. #5843.1)

2.180 Regulating Land: *The Proposed Rule would not regulate land or land use.* (…) The Proposed Rule and Preamble refer to land features interchangeably with water. For example, Section (a)(4) says WOTUS means "all impoundments of waters." This use of "impoundments" implies the land feature itself would be regulated, not just the water within it. (p. 9-10)

Agency Response: See Summary Response, TSD and Preamble

North American Meat Association and American Meat Institute (Doc. #13071)

2.181 Exacerbating the problem is the proposed rule's inclusion of "impoundments" as tributaries. Because the proposed rule identifies impoundments as a separate category of "waters of the United States" questions arise about tributaries to impoundments, e.g., when is an impoundment regulated under (a)(4) or when is it regulated under (a)(5)? (p. 6)

Agency Response: A water may be jurisdictional under more than one provision of the rule. See Summary Response, TSD and Preamble

Duke Energy (Doc. #13029)

2.182 Impoundments: The specific types of impoundments that would or would not be considered per se jurisdictional under this category should be clarified. (p. 12)

Agency Response: See Summary Response, TSD and Preamble

Washington County Water Conservancy District (Doc. #15536)

2.183 Accordingly, the Agencies should revise their jurisdictional-by-rule proposal as follows:

(…) Clarify that jurisdictional "impoundments" under category (4) do not include manmade, off-stream facilities that lawfully appropriate and remove water from the natural environment, such as a drinking water system, off-stream storage pond, intake canal for a power plant, or forebay for a hydro-electric plant; (p. 13)

Agency Response: See Waters Not Jurisdictional Compendium

Western Resource Advocates (Doc. #16460)

2.184 Finally, for all the scientific and legal reasons set out in the preamble (p. 22201, col. 1-2), WRA supports including impoundments of jurisdictional waters automatically as waters of the US pursuant to Clean Water Act §122(a)(4). Especially in the West, where the highly variable seasonal and annual hydrographs make storage necessary to support

consumptive uses of water by cities and farms, it would make no sense for the Clean Water Act to fail to protect water diverted from a jurisdictional stream into a reservoir, or pass over impounded water behind a dam built across a natural water course. (p. 10)

Agency Response: The agencies agree. See Summary Response, TSD and Preamble

2.5. SUPPLEMENT TO TRADITIONAL NAVIGABLE WATERS, INTERSTATE WATERS, TERRITORIAL SEAS, IMPOUNDMENTS

G. E. Michael (Doc. #1597)

2.185 **The Proposed Rule & Changes**

40 CFR 230.3(s) "'(2) All interstate waters, including interstate "wetlands";" Although this definition is not being changed, it is not in line with the CWA's expressly stated requirements. It is because this definition includes interstate waters and wetlands whether they are navigable or susceptible to navigable waters or not. Just because a stream crosses a State's boundary does not mean they have automatic federal control.

Congress specifically stated in 33 USC 1370, that even boundary waters of the State would not be precluded or barred from State jurisdiction. The only exception, of course would obviously be navigable waters and "adjacent' wetlands. Also, it should be noted that Congress only gave one definition; navigable waters: "means the waters of the United States". (33 USC 1 362 (7))

The express terns used by Congress in 1251 (b) & (g) and in 1370 (2) statutes and its numerous use of the tern "navigable waters" reveal a serious limiting factor on EPA for expanding its jurisdiction not found in the CWA. All interstate waters, including wetlands need to be removed in this revision of EPA's definition,

(3) is being proposed as changed to "'(7) And on a case-specific bases, other waters..." This includes waters and wetlands that are ""located in the same region" and having a significant traditional navigable water or interstate water or territorial sea. Regions are more likely whole watershed, which are generally outside the ordinary high water mark of navigable waters. Just because these non-navigable waters have an ordinary high water mark of their own, it does not make a stronger connection to a traditional navigable waters ordinary high water mark boundary.

Although some of the opinions in the *Rapanos/Carabell* ease did discuss non-navigable streams having a connection to ditches and wetlands, the majority opinion vacated the fines and remanded the case back. There was no opinion that allowed the extension of the term navigable waters in the CWA to go beyond the limiting effect from Riverside case and the traditional understanding of navigable waters as upheld later in the SWANCC case.

The only real authority EPA might have would be authority to "co-operate" with the State using programs offered and accepted by State entities as expressly stated in 1251 (g). I call anything else a mission creep and outside EPA control. This proposed definition should not be wed as a definition of waters of the United Sates. (p. 8 – 9)

Agency Response: **See TSD and Preamble. See also Tributaries and Significant Nexus Compendium**

2.186 (4) & (5)- In (4), EPA needs to remove "interstate water" from the definition and in (5), EPA needs to remove all tributaries to traditional navigable, interstate, territorial seas and impoundments. The intent in the CWA for these areas of water is for the agencies to "cooperate" with State entities, which have the "primary responsibility". There is no intent in the Act to have a duplicative control or a wresting of control from the States and their development and we, or an allowance for EPA to provide a means for mission creep by expanding its jurisdiction. (p. 9)

Agency Response: **See Summary Response, TSD and Preamble**

2.187 (7) being changed to (6) now includes all "waters, including wetlands adjacent a traditional navigable water... or tributary". The bulk of these new definitions are extending EPA's jurisdiction for pollution for miles and miles into traditional State primary jurisdiction of non-navigable tributaries (including interstate non-navigable tributaries) and adjacent wetlands associated with the non-navigable tributaries.

This definition also extends beyond the scope of the CWA's express language and broadens the definition of waters next to a "waters of the United States." It is now including non-navigable tributaries to non-navigable tributaries by including "ail waters" adjacent to interstate water. (p. 9)

Agency Response: **See Summary Response, TSD and Preamble**

Anonymous (Doc. #7430)

2.188 My request is that the Environmental Protection Agency (EPA) replace all phrases of traditional navigable water with waters or waters of the United States, for the following reasons:

1) This phrase introduces ambiguity as to whether it modifies water or modifies navigable, which would complicate interpretation.

2) The ambiguity is inconsistent with the stated purpose of the proposal of increased CWA program predictability and consistency by increasing clarity as to the scope of waters of the United States.

3) The actual definitions of Waters of the United States and navigable waters do not include the word traditional.

4) Because traditional navigable waters is not previously defined, in the Clean Water Act or its subsequent amendments, the use of the phrase in regulation is subject to interpretation.

5) Introduction of traditional navigable water in the proposed definition on page 22198 and characterizing it as a legal term on page 22227, compels a definition as a legal term and consistent use in the definition throughout.

6) The use of traditional navigable waters and downstream traditional navigable waters cannot be clearly distinguished from non-navigable. Because use of traditional implies

there is a non-traditional, and use of downstream implies there is an upstream; and the terms non-traditional and upstream are not used or defined.

7) The use of downstream water and downstream traditional navigable water on pages 22227 and 22247 implies there is a difference between the two, but is not clear whether the difference is with respect to tradition or navigable.

8) The proposal contains contradictions regarding the meaning of traditional navigable waters as evidenced by the following excerpts from the proposal:

a. This section of the regulation encompasses those waters that are often referred to as traditional navigable waters. These agencies do no propose to make any changes to this section of the regulation. (p.22200).

b. While a traditional navigable water need not be capable of supporting navigation at all times, the frequency, volume, and duration of flow are relevant considerations for determining if a water body has the physical

characteristics suitable for navigation. (p. 22200).

c. Clarification of waters could be made through a separate process under section 404(g). (p.22200).

d. The scientific literature does not use legal terms like traditional navigable water. While the agencies define as waters of the United States tributaries only in watersheds which drain to a traditional navigable water that distinction does not affect the conclusions of the scientific literature with respect to the effects of tributaries on downstream waters. (p.22227).

e. In 1961, Congress amended the FWPCA to substitute the term interstate or navigable waters for interstate waters. (p.22255).

f. Those statutes covered interstate waters, defined interstate waters without requiring that they be a traditional navigable water or be connected to water that is a traditional navigable water, and demonstrated that Congress knew that there are interstate waters that are not navigable for purposes of Federal regulation under the Commerce Clause. (p. 22256).

g. Thus, it is reasonable to conclude that by defining navigable waters as the waters of the United States in the 1972 amendments, Congress included not just traditionally navigable waters, but all waters previously regulated under the Federal Water Pollution Control Act, including non-navigable interstate waters. (p. 22256).

h. The intent of Congress is clear that the term navigable waters includes interstate waters as an independent basis for CWA jurisdiction, whether or not they themselves are traditional navigable waters or are connected to a traditional navigable water. (p. 22256).

i. The Agencies Longstanding Interpretation of the Term Navigable Waters To Include Interstate Waters. (p.22258).

j. The House and Senate Committees rationale for removing the word navigable from the definition of navigable waters. (p.22258).

k. Most fundamentally, the agencies believe that the scientific literature demonstrates that tributaries, as a category and as the agencies propose to define them comprising traditional navigable waters within the meaning of the Clean Water Act. (p.22260). (p. 1 – 2)

Agency Response: **See Summary Response, TSD and Preamble**

National Federation of Independent Business (Doc. #8319)

2.189 Most fundamentally, the Proposed Rule fails to make clear that "traditional navigable waters" must be conducive to interstate or foreign commerce. This omission—in conjunction with the Proposed Regulation's liberal suggestion that navigability may be established without regard to the physical characteristics of the water body—suggests that the Proposed Regulation will lead to expansive jurisdictional assessments, without regard to the question of whether in fact the water body is susceptible to interstate or foreign commerce. (p. 4)

Agency Response: **See Summary Response, TSD and Preamble**

2.190 The Proposed Regulation inappropriately treats all interstate waters as "waters of the United States," regardless of whether they are in fact navigable, or even "connect[ed] to such waters." But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact. Rapanos, 547 U.S. at 739. (p. 5)

Agency Response: **See Summary Response, TSD and Preamble**

New York State Attorney General (Doc. #10940)

2.191 Second, the proposed rule advances the statute's protection of state waters downstream of other states by securing a strong federal "floor" for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution. Of note is the fact that all of the lower forty-eight states have waters that are downstream of the waters of other states. By protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges which might otherwise go unregulated. (p. 2)

Agency Response: **See Summary Response, TSD and Preamble**

Anonymous (Doc. #11350)

2.192 What impact does expanding the definition of traditional navigable waterways to include recreational uses have on Corps Section 10 permitting? Would this increase the number of waterways falling under Section 10? What kind of recreational uses are considered

susceptible uses for commerce? Need clarification as there are many recreational uses such as fishing boats, pirogues, canoes, paddle boards, etc. (p. 1)

Agency Response: The Rule makes no changes to Rivers and Harbors Act Section 10. See Summary Response, TSD and Preamble

Neuse Riverkeeper Foundation (Doc. #15095)

2.193 Our organizations support the Proposed Rule to the extent that it maintains protections for Traditionally Navigable Waters ("TNWs"), Interstate Waters, and Territorial Seas. Additionally, we support the agencies' and the Science Advisory Board's ("SAB") work to document the "significant nexus" between these historically regulated waters and tributaries and adjacent waters. We agree that all of these waters (including headwaters, intermittent streams, ephemeral streams, and adjacent waters) are connected to downstream waters that are covered under the CWA, and that they should be categorically protected. (p. 2)

Agency Response: The agencies agree. See Summary Response, TSD and Preamble

2.194 FULLY PROTECTS JURISDICTIONAL COVERAGE OF ALL IMPOUNDMENTS OF ANY WOTUS: The new rule only includes impoundments of TNWs, Interstate Waters, Territorial Seas, and Certain Tributaries. (p. 3)

Agency Response: The Rule does not change the existing regulatory text on impoundments. See also Summary Response, TSD and Preamble.

J. Canfield, Jr. (Doc. #15237)

2.195 These Supreme Court rulings have led not only to regulatory confusion but also to environmental risk. As a result, this more limited definition of "waters of the United States" has left approximately 60 percent of stream miles in the in U.S. without CWA protection.[90] These waterways currently do not qualify as "navigable" since they exist entirely within one state, flow only seasonally or after rain, or sometimes go dry. The proposed rule would clarify the definition of waters of the U.S. in the CWA by defining them as traditional navigable waters, as well as "interstate waters, including interstate wetlands; the territorial seas; impoundments of waters otherwise defined as waters of the United States; tributaries, as defined, to traditional navigable waters, interstate waters, or the territorial seas; adjacent waters, including wetlands.[91]" This more specific definition is particularly important because it would protect the majority of seasonal and rain dependent streams as well as vital wetlands near rivers and streams.[92] Under the proposed rule, water bodies with less certain connection with downstream water would be

[90] "Waters of the U.S." Waters of the U.S. U.S. EPA, 29 Sept. 2014. Web. 02 Oct. 2014.
[91] United States Environmental Protection Agency and United States Army Corps of Engineers. "Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule." Federal Register 79, no. 76. (21 April 2014): 2218822274. Accessed November 6, 2014. http://www.gpo.gov/fdsys/pkg/FR20140421/pdf/201407142.pdf.
[92] United States Environmental Protection Agency. "Waters of the U.S." 2014. Accessed November 6, 2014. http://www2.epa.gov/uswaters.

evaluated on a case by case basis to determine whether the connection is significant.[93] (p. 1 – 2)

Agency Response: **The agencies agree. See Summary Response, TSD and Preamble**

Cook County, Minnesota, Board of Commissioners (Doc. #17004)

2.196 (…) WHEREAS, when the CWA uses the term "navigable waters" to modify "waters of the United States", there should be no question that the EPA and Corps 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?; and (…) (p. 5)

Agency Response: **See Summary Response, TSD and Preamble**

Kevin and Nicole Keegan (Doc. #19128)

2.197 From the two-page paper titled "proposed Definition of Waters of the United States under the Clean Water Act" the following definitions would affect us and we oppose:

- "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;"
    - How will the average homeowner, business owner, farmer or rancher determine if water can be classified under this definition? All water is subject to the ebb and flow of the tide at one point or another. (p. 3)

Agency Response: **No change is being made to this existing regulatory text. See Summary Response, TSD and Preamble**

Chairman, Broadwater County Commissioner, Broadwater County Commissioners, Broadwater County, Montana (Doc. #20489)

2.198 The definitions of "waters" and "navigable" must have very clear definitions. One size does not fit all; for example, creeks in western Montana and eastern Montana are two vastly different things. (p. 1)

Agency Response: **See Summary Response, TSD, General Compendium and Preamble**

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

[93] Ibid.

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:

Batzer, David. Letter to B. Sapp on Evidence of Significant Impacts on Coastal Plain Depressional Wetlands on Navigable Waters. (Doc. #14281.1)

Clearwater County Highway Department. Listing of Navigable Waters of the United States in Minnesota. (Doc. #1762.1)

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.

Alaska v. Ahtna, 891 F.2d 1404, 1405 (9th Cir. 1989) (Doc. #13951, p. 18; Doc. #15020, p. 25, 27)

Appalachian Elec. Power Co., 311 U.S. at 408 (Doc. #15020, p. 25)

Ariz. Rev. Stat. Ann. § 49-201 (2014). (Doc. #16460, p. 5)

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Arkansas v. Oklahoma, 503 U.S. 91 (1992) (Doc. #15822.1, p.9)

Association of Data Processing Service Organizations v. Board of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Doc. #14564, p. 5)

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Colorado Whitewater Competition, http://www.coloradowhitewater.org/racing-competition (last visited on Oct. 1, 2014). (Doc. #16460, p. 8)

Colo. Rev. Stat. § 25-8-103(19), (2013). (Doc. #16460, p. 5)

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" submitted as Doc. #14564.2 (Doc. #14564, p. 5)

David Batzer Letter to B. Sapp on Evidence of Significant Impacts on Coastal Plain Depressional Wetlands on Navigable Waters, Exhibit C (Doc. #14281.1, p. 1-2).

Defenders of Wildlife v. Hull, 199 Ariz. 411 (App. 2001). (Doc. #13951, p. 16)

Economy Light & Power Co. v. U.S., 256 U.S. 113, 123 (1921) (Doc. #13591, p. 15; Doc. #15020, p. 25)

EPA, Region 9, Special Case Evaluation Regarding Status of the Los Angeles River, California as a Traditional Navigable Water (July 1, 2010), available at http://www.epa.gov/region09/mediacenter/LAriver/LASpecialCaseLetterandEvaluation.pdf (Doc. #17921.1, p.40)

EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWO-2007-1550.pdf (Doc. #17921.1, p. 40)

EPA and Corps Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_MVP-2007-1497.pdf (Doc. #17921.1, p. 40)

EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/BahLakeEPA_memo2007-04488.pdf (Doc. #17921.1, p. 40)

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John Hill, The Right to Float in Colorado: Differing Perspectives, 26 COLORADO WATER 18 (2009). (Doc. #16460, p. 7)

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http://adventuresportsjournal.com/water_sports/kayaking/california%E2%80%99s-dearth-of-whitewater-parks. (Doc. #16460, p. 8)

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