



**Comments of the Waters Advocacy Coalition
on the Environmental Protection Agency's and U.S. Army Corps of Engineers'
Proposed Rule to Define "Waters of the United States" Under the Clean Water Act
EPA-HQ-OW-2011-0880**

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3. Foundation for Environmental and Economic Progress, *et al.*, “Comments in Response to the U.S. Army Corps of Engineers’ and the U.S. Army Corps of Engineers’ and the U.S. Environmental Protection Agency’s Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States’” Docket No. EPA-HQ-OW-2002-0050-1829 to -30 & -1832 to -35 (Apr. 16, 2003, corrected Apr. 30, 2003) (“FEPP Comments on 2003 ANPRM”) (Appendix 2: Case Studies to Exhibit 3 submitted on disc.)
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 6. Robert Gensemer, Ph.D., Shaun Roark, Ph.D., Grant De Jong, GEI Consultants, “Scientific Comments on U.S. EPA’s Definition of ‘Waters of the United States’ Under the Clean Water Act; Proposed Rule” (Nov. 11, 2014) (“GEI Report”)
 7. Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, Memorandum to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled “definition of ‘waters of the United States’ under the Clean Water Act,” transmitting “Individual Comments from Members of the SAB Panel for the Review of the EPA Water Body Connectivity Report on the Scientific and Technical Basis of the Proposed Rule Titled ‘Waters of the United States’ Under the Clean Water Act” (Sept. 2, 2014), [http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/\\$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf) (“SAB Panel Member Comments on Proposed Rule”)
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18. EPA Documents Produced in Response to Freedom of Information Act Request Regarding Science Advisory Board Review of Connectivity Report and Proposed Rule, FOIA-EPA-HQ-2014-005918, (July 31, 2014) (Exhibit 18 submitted on disk.)
19. David Sunding, Ph.D., The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (May 15, 2014) (“Sunding Review”)
20. Waters Advocacy Coalition, Letter to Administrator McCarthy and Secretary McHugh regarding Proposed Rule to Define “Waters of the United States,” Docket ID No. EPA-HQ-OW-2011-0880 (Sept. 29, 2014)
21. Nancy Stoner, blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014) <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>

**Comments of the Waters Advocacy Coalition (WAC)
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EPA-HQ-OW-2011-0880**

I. Introduction

The Waters Advocacy Coalition (“WAC” or “Coalition”) writes to provide comments on the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) proposed rule to re-define “waters of the United States” under the Clean Water Act (“CWA” or “Act”), 79 Fed. Reg. 22,188 (Apr. 21, 2014) (“proposed rule”). In enacting the CWA, Congress exercised its commerce power over navigation and granted EPA and the Corps (together, the agencies) very specific, limited powers to regulate navigable waters, defined as “waters of the United States.” Congress recognized and sought to preserve the States’ traditional and primary authority over land and water use. For years, the agencies’ regulations and guidance documents have attempted to expand the definition of “waters of the United States” beyond its constitutional and statutory limits. On two occasions, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court has recognized the Congressional limits placed on CWA jurisdiction and invalidated the agencies’ sweeping assertions of regulatory authority. Despite this history, the agencies’ proposed rule ignores the limits and structure that Congress put in place, as well as the limits recognized by the Supreme Court, and continues the agencies’ practice of overreaching in their assertions of CWA jurisdiction and impinging on the traditional power of the States to regulate land and water.

As detailed in our comments, the Coalition sets forth numerous concerns with the proposed rule. Fundamentally, the Coalition asks that the agencies not finalize such a flawed rule on this important topic. We recommend that the agencies withdraw the proposed rule, revise the rule in light of these important concerns in coordination with stakeholders, and re-issue a revised proposed rule that is supported by the CWA, judicial precedent, and scientific justification.

A. The Coalition’s Members Are Diverse and of Critical Importance to the Nation’s Economy.

The Coalition’s members are committed to the protection and restoration of America’s wetlands and waters. Members of the Coalition include:

Agricultural Retailers Association
American Coke & Coal Chemicals Institute
American Exploration & Mining
Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Iron and Steel Institute
American Petroleum Institute

American Public Gas Association
American Public Power Association
American Road & Transportation Builders
Association
American Society of Golf Course Architects
Associated Builders and Contractors, Inc.
Associated General Contractors of America
Association of American Railroads
Association of Equipment Manufacturers

Association of Oil Pipe Lines	National Association of State Departments of Agriculture
Club Managers Association of America	National Cattlemen’s Beef Association
Corn Refiners Association	National Club Association
CropLife America	National Cotton Council
Edison Electric Institute	National Council of Farmer Cooperatives
Federal Forest Resource Coalition	National Golf Course Owners Association of America
Fertilizer Institute	National Industrial Sand Association
Florida Sugar Cane League	National Mining Association
Foundation for Environmental and Economic Progress	National Multifamily Housing Council
Golf Course Builders Association of America	National Oilseed Processors Association
Golf Course Superintendents Association of America	National Pork Producers Council
Independent Petroleum Association of America	National Rural Electric Cooperative Association
Industrial Minerals Association – North America	National Stone, Sand, and Gravel Association
International Council of Shopping Centers	Portland Cement Association
International Liquid Terminals Association	Professional Golfers Association of America
Interstate Natural Gas Association of America	Public Lands Council
Irrigation Association	RISE – Responsible Industry for a Sound Environment
Leading Builders of America	Southeastern Lumber Manufacturers Association
NAIOP, the Commercial Real Estate Development Association	Southern Crop Production Association
National Association of Home Builders	Sports Turf Managers Association
National Association of Manufacturers	Texas Wildlife Association
National Association of REALTORS®	Treated Wood Council, Inc.
	United Egg Producers
	U.S. Chamber of Commerce

The Coalition represents a large cross-section of the nation’s construction, real estate, mining, manufacturing, forestry, agriculture, energy, and public health and safety sectors, all of which are vital to a thriving national economy, including providing much needed jobs. For example, many of the Coalition’s members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, and other utility facilities. From March 2010 to March 2011, public and private investment in the construction of residential and commercial structures alone totaled over \$300 billion.¹ Every \$1 billion of residential construction generates around 16,000 jobs. *Id.* at 3. Spending on commercial and institutional facilities such as shopping centers, schools, office buildings,

¹ See David Sunding, Economic Incentive Effects of EPA’s After the Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal, at 3 (May 30, 2011) (“Sunding Report on EPA Veto”), Ex. 2 to Waters Advocacy Coalition, *et al.*, “Comments in Response to the EPA’s and Corps’ Draft Guidance on Identifying Waters Protected by the Clean Water Act, EPA-HQ-OW-2011-0409 (July 29, 2011), (“WAC Comments on 2011 Draft Guidance”) (incorporated by reference herein) (attached to these comments as Exhibit 1).

factories, libraries, and fire stations has a somewhat larger job creation effect, at around 18,000 jobs per \$1 billion of spending. *Id.*

Many of the Coalition's members construct and maintain critical infrastructure: highways, bridges, railroads, tunnels, airports, electric generation, transmission, and distribution facilities, and pipeline facilities. Research has shown that infrastructure investments can increase economic growth, productivity, and land values. *Id.* at 2. Not only are investments in infrastructure critical to quality of life throughout the nation, but, as with residential and commercial construction, their effect on job creation is substantial. Every \$1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs. *Id.* at 3. These investments are critical to our economy because "every \$1 of spending on residential construction, utility, and transportation infrastructure or commercial construction generates roughly \$3 of economic activity throughout the economy." *Id.*

The Coalition's agricultural members produce virtually every agricultural commodity produced commercially in the United States, including but not limited to significant portions of the U.S. milk, corn, sugar, egg, pork, and beef supply. In addition, other Coalition members sell and distribute fertilizer, crop protection, and biotechnology products used by American farmers. Agriculture and agriculture-related industries contributed \$775.8 billion to the U.S. gross domestic product (GDP) in 2012, a 4.8 percent share.²

Additionally, Coalition members represent producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. In 2012, U.S. mining activities directly and indirectly generated over 1.9 million U.S. jobs and \$118 billion in U.S. labor income, and \$225.1 billion in contribution to U.S. GDP.³ Based on 2013 data, America's steel industry directly or indirectly generates more than one million U.S. jobs and produces annual steel shipments valued at \$75 billion.⁴

The Coalition also has member groups representing the energy industry that generate, transmit, transport, and distribute our Nation's energy to residential, commercial, industrial, and institutional customers. The electric power industry is an \$880 billion industry that employs more than 500,000 workers and represents 2.3 percent of the U.S. GDP.⁵ Together, oil and

² U.S. Department of Agriculture, Economic Research Service, *Ag and Food Statistics: Charting the Essentials*, <http://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials.aspx#.VC1yfflSano> (last visited: Oct. 27, 2014).

³ National Mining Association, *The Economic Contributions of U.S. Mining (2012)*, at E-1 (Sept. 2014), http://www.nma.org/pdf/economic_contributions.pdf.

⁴ American Iron and Steel Institute, *Profile of the American Iron & Steel Institute 2014*, at 4, http://www.steel.org/~media/Files/AISI/Reports/AISI_Profile_14_FINAL.pdf; *2014 Steel Industry Profile*, <http://www.steel.org/About%20AISI/Industry%20Profile.aspx> (last visited Nov. 10, 2014)..

⁵ Edison Electric Institute, "Electricity 101," <http://www.eei.org/electricity101/pages/value.aspx> (last visited Oct. 27, 2014).

natural gas supply more than 60 percent of our nation's energy.⁶ Overall, as of 2011, the oil and natural gas industry supported 9.8 million U.S. jobs and 8 percent of the U.S. economy.⁷

Both individually and collectively, the Coalition's members are of critical importance to the nation's economy. In addition, Coalition members possess a wealth of expertise directly relevant to the proposed rule to define "waters of the United States."

B. Summary of Key Comments and Recommendations

The preamble claims that the proposed rule "would enhance protection for the nation's public health and aquatic resources . . . by increasing clarity." 79 Fed. Reg. at 22,188. As discussed more fully throughout these comments, this proposed rule will not resolve the inconsistency and confusion surrounding CWA jurisdiction. Although we recognize the value of improving the clarity of CWA regulation and in improving the process for making permit decisions and jurisdictional determinations, the proposed rule's broad categories and ambiguous definitions are not the answer. **Clarity is very different from expansion.** If the agencies are interested in developing a meaningful, balanced, and supportable rule, they must take a more methodical approach, one that is supported by science, informed by a robust understanding of the State and local laws that address water issues, and is true to Congress's intent and Supreme Court precedent.

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

Our comments set forth numerous concerns with the proposed rule. In particular, we provide the following specific comments:

- The rule does not provide clarity and indeed creates confusion. Definitions of numerous key terms and concepts, like "uplands," "floodplain," "shallow subsurface connection," "waters," and "waste treatment," are unclear.
- The proposed rule unlawfully expands CWA jurisdiction beyond the limits intended by Congress and recognized by the U.S. Supreme Court.
- The proposed rule ignores the *Rapanos* plurality opinion and *SWANCC*, and misinterprets Justice Kennedy's significant nexus standard.

⁶ American Petroleum Institute, "Oil & Natural Gas Overview," <http://www.api.org/oil-and-natural-gas-overview> (last visited Oct. 27, 2014).

⁷ American Petroleum Institute, *Oil and Natural Gas Stimulate American Economic and Job Growth*, at 2 (2014), <http://www.api.org/policy-and-issues/policy-items/jobs/~media/Files/Policy/Jobs/Oil-Gas-Stimulate-Jobs-Economic-Growth/API-State-Vendor-Survey-Findings-Report.pdf>.

- By its terms, the proposed rule expands CWA jurisdiction to ephemeral drainages, ditches (including roadside, flood control, irrigation, stormwater, railroad right-of-way, and agricultural ditches), waters in riparian and floodplain areas, industrial ponds, and isolated waters that have not previously been regulated as “waters of the United States.”
- The proposed rule applies the new definition of “waters of the United States” throughout *all* CWA programs, and will result in fundamental changes to those programs. The agencies have not considered the implications of this application.
- The proposed rule will have unintended consequences and economic impacts because it allows for the agencies to treat ditches, stormwater drainages, municipal separate storm sewer systems (MS4s), and water supply and flood control structures, as waters of the United States.
- The proposed rule federalizes waters (and “aquatic systems”) not intended to be covered by the CWA, thereby impinging on the states’ traditional and primary power over land and water use.
- The agencies have flouted federalism policies and have not consulted with their State partners. Nor have they consulted with small businesses as required by the Regulatory Flexibility Act.
- The proposed rule improperly removes authority of local regulatory authorities over their local land and waters.
- The proposed rule was developed via a flawed process before review of the underlying science was complete.

Many of these concerns are not new. We have previously submitted comments on the agencies’ 2011 Draft Guidance on Identifying Waters Protected by the Clean Waters Act,⁸ 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*,⁹ and the 2003 Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,”¹⁰ raising many of these same issues.¹¹ We look forward to the agencies’ careful consideration of our comments below.

⁸ See WAC Comments on 2011 Draft Guidance.

⁹ See American Farm Bureau Federation, *et al.*, “Comments in Response to the U.S. Environmental Protection Agency’s and U.S. Army Corps of Engineers’ Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*,” Docket No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008), (“AFBF Comments on 2008 *Rapanos* Guidance”) (incorporated by reference herein) (attached hereto as Exhibit 2).

¹⁰ See Foundation for Environmental and Economic Progress, *et al.*, “Comments in Response to the U.S. Army Corps of Engineers’ and the U.S. Environmental Protection Agency’s Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States,’” Docket No. EPA-HQ-OW-2002-0050-1829 to -30 & -1832 to -35 (Apr. 16, 2003, corrected Apr. 30, 2003), (“FEPP Comments on 2003 ANPRM”) (incorporated by reference herein) (attached hereto as Exhibit 3).

II. The Proposed Rule Raises Significant Legal Concerns Because it Fails to Comply with Applicable Constitutional, Statutory, and Judicial Constraints.

The proposed rule suffers from numerous legal infirmities that must be addressed by the agencies. This section outlines our overarching legal concerns and addresses the proposed rule's failure to comply with the applicable constitutional, statutory, and judicial constraints.

A. The Proposed Rule Provides for Expanded Assertions of Jurisdiction that Are Beyond the Limits of the Commerce Clause.

Although the Supreme Court has found on two separate occasions that the agencies' broad assertions of CWA jurisdiction stretched the outer limits of the Commerce Clause, the proposed rule again asserts expansive jurisdiction that is well beyond the commerce authority Congress exercised in enacting the CWA. Even EPA and the Corps acknowledge in the preamble to the proposed rule that "constitutional concerns . . . led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos*." 79 Fed. Reg. at 22,259.

The *SWANCC* Court held that although the term "navigable waters" is to be interpreted broadly, the term "navigable" has meaning and cannot be read out of the statute. *SWANCC*, 531 U.S. at 172. The word "navigable," the Court found "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." *Id.* at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)). In light of Congress's intent to exercise its traditional "commerce power over navigation," *id.* at 168 n.3,¹² the Corps' assertion of jurisdiction over sand and gravel pits based on their use by migratory birds raised "significant constitutional questions," *SWANCC*, 531 U.S. at 174. As such, the Court held that extending CWA jurisdiction to isolated, non-navigable waters like those at issue in *SWANCC* "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* Similarly, the Supreme Court in *Rapanos* found that the agencies' assertion of jurisdiction under the "any connection" theory over wetlands that were *not* adjacent to traditional navigable waters "stretch[ed] the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738 (plurality). Therefore, according to the Supreme Court, the Constitution allows for the CWA to reach more than "navigable-in-fact" waters, but

¹¹ The organizations listed as Coalition members for the purpose of these comments are not necessarily identical to those that participated with the Coalition in previous comments.

¹² The Supreme Court has divided Congress's commerce power into three broad categories, the power to regulate (1) "channels of interstate commerce," (2) the "instrumentalities of commerce," (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The *SWANCC* decision squarely forecloses the argument that the CWA authorizes regulation of certain marginal waters or wetlands based on the "substantial effects" that activities in those areas may have on interstate commerce. 531 U.S. at 173. Rather, the power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2001) (including "navigable rivers, lakes, and canals" among the channels of commerce).

asserting jurisdiction over an area based on a mere connection to a non-navigable water raises serious constitutional concerns.¹³

The proposed rule extends jurisdiction so far that it extends well beyond the commerce power over navigation that Congress exercised in enacting the CWA. With the proposed rule, the agencies are attempting to assert authority even broader than the authority they claimed under the sweeping jurisdictional theories that were struck down in *SWANCC* and *Rapanos*. The proposed rule provides for jurisdiction over non-navigable features, such as isolated wetlands, ephemeral drainages, and isolated ponds, that lack any meaningful connection to navigable waters and that have previously been non-jurisdictional. Like the features at issue in *SWANCC* and *Rapanos*, these features are a far cry from the “navigable waters” over which Congress sought to exercise its commerce power. The proposed rule wholly ignores the limits recognized by the Supreme Court, and once again the agencies’ expansive jurisdictional interpretations run afoul of the limits of Congress’s commerce power over navigation.

B. The Proposed Rule Would Result in Significant Impingement of the States’ Traditional and Primary Power over Land and Water Use.

In addition to exceeding the limits of Congress’s authority under the Commerce Clause, the proposed rule also runs afoul of the Constitution by encroaching on the traditional power of the States to regulate land and water. “Where an administrative interpretation of a statute invokes the outer limits of Congress’s power,” the *SWANCC* Court reminded, “we expect a clear indication that Congress intended that result.” *SWANCC*, 531 U.S. at 172. This is especially true “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173.

The regulation of land and water use within a State’s borders is a “quintessential” State and local function. *Rapanos*, 547 U.S. at 738. The CWA contains no such clear statement that Congress intended to alter that scheme. To the contrary, Congress chose to expressly “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b); see also *id.* § 1251(g). There was “nothing approaching a clear statement from Congress” that it intended CWA jurisdiction to extend to features like the abandoned sand and gravel pits at issue in *SWANCC*. *SWANCC*, 531 U.S. at 174. Accordingly, the *SWANCC* Court found that permitting the agencies to assert jurisdiction over isolated ponds and mudflats based on their migratory bird theory “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* The *Rapanos* plurality similarly found that the agencies’ “any

¹³ Professor Jonathan Adler, a prominent constitutional scholar, has noted that, by defining “navigable waters” to “include all waters and wetlands irrespective of their navigability or relationship to interstate commerce, . . . the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause.” See, *Constitutional Considerations: State vs. Federal Environmental Policy Implementation*, Hearing before the House Subcomm. on Environment and the Economy (Testimony of Jonathan H. Adler) at 11 (July 11, 2014), available at <http://docs.house.gov/meetings/IF/IF18/20140711/102452/HHRG-113-IF18-Wstate-AdlerJ-20140711.pdf>.

connection” theory of jurisdiction would bring “virtually all planning and development and use of land and water resources by the States under federal control,” and therefore could not be a lawful interpretation of “waters of the United States.” *Rapanos*, 547 U.S. at 737.

Likewise, the proposed rule’s sweeping assertions of jurisdiction over features with little or no relationship to navigable waters (e.g., channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters) raise serious federalism concerns. As was the case with *SWANCC* and *Rapanos*, the proposed rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Most of these areas are already regulated by States as “waters of the State.” Contrary to agency statements that States will continue to be the primary regulators of water,¹⁴ many types of waters and features that were previously regulated as “waters of the State” or that States purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would now be subject to federal regulation as “waters of the United States” under the proposed rule. Accordingly, the proposed rule’s interpretation of “waters of the United States” is unlawful because it would result in a “significant impingement” on the States’ traditional authority over land and water use.

C. Contrary to the ELI Study Relied on by the Agencies, States Have Many Regulatory Mechanisms to Protect Non-CWA Waters.

The agencies have claimed this rule is needed to broaden the definition of “waters of the United States” because the States cannot be relied upon to “fill the gap” in CWA coverage that would result from faithful interpretation of *SWANCC* and *Rapanos*.¹⁵ In support of this assertion, they cite a study published in May 2013 by the Environmental Law Institute (“ELI”) that concludes that “State laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace . . . [, and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently ‘filling the gap’ left by U.S. Supreme Court rulings . . . , and face significant obstacles to doing so.”¹⁶ The agencies’ reliance on this concern over “filling the gap” in CWA coverage essentially functions as an admission that the proposed rule increases jurisdiction and seeks to take on a role previously considered to be solely within the authority of the States.

¹⁴ Bryan Schutt, McCarthy outlines EPA methane emissions plans, notes delay in fracking study, SNL (Sept. 2, 2014) (EPA Administrator McCarthy stated, “The states are the primary regulator of water in this country. They will remain so.”).

¹⁵ EPA, Waters of the United States Proposed Rule Website, <http://www2.epa.gov/uswaters> (last visited Oct. 29, 2014); EPA, *Transcript for the Watershed Academy Webcast Series: Waters of the U.S. Proposed Rule* at 7 (Apr. 7, 2014) (“Watershed Academy Webcast Transcript”), <http://water.epa.gov/learn/training/wacademy/upload/040714-wous-transcript.pdf>.

¹⁶ Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, at 2 (May 2013), available at <http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters> (“ELI Study”).

Tellingly, the agencies touted this gap in coverage as a primary reason the rule is needed during their roll out of the proposed rule,¹⁷ but it is not discussed in the rule itself nor in the preamble. That the agencies do not mention State constraints or the ELI Study in the proposed rule suggests that it is not an important justification – if it were, the Administrative Procedure Act (“APA”) would require the agencies to identify this as a basis for the rule. Indeed, the agencies’ claims that the proposed rule does not expand jurisdiction would suggest that there are few gaps in coverage that need to be filled by the federal agencies.

Based on the ELI Study, EPA expresses concern that “36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act.”¹⁸ But, as discussed in more detail in Exhibit 4, there are a number of problems with ELI’s study and EPA’s conclusion.¹⁹

First, as its title indicates, the ELI Study looks at regulation of water beyond the scope of the CWA, and therefore the study cannot be used to justify the agencies expanding their authority under the Act. A State’s legal authority to protect the waters within the State’s jurisdiction is virtually unfettered. More importantly, how and to what degree a State chooses to regulate waters within the State has no relation whatsoever to the question of federal jurisdiction.²⁰ State jurisdiction is solely at the discretion of the State legislature and can be broad or more limited; federal jurisdiction is derived from the U.S. Constitution and is limited. The breadth of federal jurisdiction is not a creature of State decisionmaking, be it limited or broad. Indeed, “non-CWA” waters are simply that: waters that fall beyond the scope of authority granted Congress and EPA under the Constitution. What EPA may allege is a “failure” of State decisionmaking may well be a conscious decision by State authorities to use their authority in a manner best suited for the needs and benefits of their own citizens. The fact that EPA disagrees with a State’s decision on “non-CWA” waters bears no relationship whatsoever to the question of federal jurisdiction and cannot be used to boot-strap an imagined federal authority where the Constitution has provided none.

¹⁷ See, e.g., Watershed Academy Webcast Transcript at 7; EPA, Press Release, “EPA and Army Corps of Engineers Clarify Protection for Nation’s Streams and Wetlands: Agriculture’s Exemptions and Exclusions from Clean Water Act Expanded by Proposal (Mar. 25, 2014), <http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30> (“The proposed rule also helps states and tribes – according to a study by the Environmental Law Institute, 36 states have legal limitations on their ability to fully protect waters that aren’t covered by the Clean Water Act.”).

¹⁸ EPA, Waters of the United States Proposed Rule Website, <http://www2.epa.gov/uswaters> (last visited Oct. 29, 2014).

¹⁹ See State Practitioner Review of ELI Study, Exhibit 4.

²⁰ Often, States’ “waters of the State” definitions incorporate the federal definition of “waters of the United States” as a subset of the term “waters of the State.” See, e.g., Fla. Stat. s. 403.031(13) (Solely for purposes of implementing the NPDES program in Florida, “waters of the state also include navigable waters or waters of the contiguous zone as used in s. 502 of the Clean Water Act, as amended, 33 U.S.C. §§ 1251 et seq., as in existence on January 1, 1993, except for those navigable waters seaward of the boundaries of the state set forth in s. 1, Art. II of the State Constitution.”). Thus, what is interpreted as a “water of the United States” is automatically also considered a “water of the State,” in addition to other waters covered by the more expansive state term. See Frank Matthews and Susan Stephens, ELI Report: State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act: Florida, at 3-4 (May 12, 2014), Exhibit 4, Attachment D.

Second, the results of the Study do not support ELI's conclusions. To the contrary, they indicate that whether a "constraint" exists under State law has little bearing on whether the State regulates waters that are not regulated by the CWA.²¹ Indeed, roughly half of the States in each category (constraint or no constraint) regulate non-CWA waters. *Id.*²²

Third, most of the laws characterized as "constraints" in the Study do not prohibit or limit regulation. The "qualified" stringency provisions claimed to limit water quality laws in 23 States – which ELI admits "stop[] short of creating a bar to state agency action," ELI Study at 1 – are nothing more than procedural requirements common to administrative practice, such as notice-and-comment rulemaking requirements.²³ As noted by West Virginia practitioner Robert McLusky, contrary to the ELI Study's characterization, these provisions are not "burdens," they are "legitimate legislative check[s]" on State agencies.²⁴ And many of the other cited provisions are very narrow, focusing on State-specific concerns. They are not across-the-board prohibitions against regulating more broadly than the CWA. For example, Oregon focuses on effluent limitations for nonpoint source pollutants from forest operations, Virginia addresses treatment levels for sewage treatment works, Colorado addresses agricultural irrigation flows, and Minnesota has a provision that would come into effect should Minnesota assume section 404 permitting authority. ELI Study at 12, n.27.

Fourth, some of the restrictions cited by ELI do not actually restrict State regulation under State law, but merely limit what the State can do when it is exercising federal authority under the CWA.²⁵ It is hardly surprising that when a State elects to take over the NPDES program, it would also decide that its program should not outrun the CWA unless certain conditions are met.

²¹ ELI's data indicate a near-even split among States that regulate non-CWA waters and those that do not, regardless of whether a "constraint" exists under State law. Of the 36 jurisdictions ELI characterizes as having constraints, 17 (47%) regulate non-CWA waters and 19 (53%) do not. *See* ELI Study at 2, 34-35. And of the 15 States without constraints, eight (53%) regulate non-CWA waters and seven (47%) do not. *Id.*

²² For instance, the ELI Study identifies Pennsylvania as a State where a constraint exists, citing a generally applicable executive order requiring justification before promulgating regulations that exceed federal standards. However, the ELI Study ignores that Pennsylvania's Clean Streams Law, which was enacted long before the executive order, unambiguously requires regulation of all "waters of the Commonwealth," broadly defined to include all surface and groundwater, both artificial and natural, without exception. *See* Craig P. Wilson, Tad J. Macfarlan, Response to ELI Report on State Constraints: The Scope of Regulated Waters in Pennsylvania, at 4 (June 4, 2014), Exhibit 4, Attachment I.

²³ These provisions include such things as notice-and-comment rulemaking, written justifications of the need for regulation, findings regarding the need to address particular issues, and reports to state legislature. *See* ELI Study at 13-14. Also, in many instances, these so called "constraints" are irrelevant because expansion of the State program is not necessary to reach non-CWA waters. *See, e.g.,* Exhibit 4, Attachment I at 4.

²⁴ *See* Robert G. McLusky, Jackson Kelly, ELI Report on State Constraints: State Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act – West Virginia, at 1 (June 3, 2014), Exhibit 4, Attachment K.

²⁵ *See, e.g.,* ELI Study at 169 (The North Dakota Department of Health "is prohibited from adopting a rule for purposes of administering a program under the federal Clean Water Act that is 'more stringent than corresponding federal regulations which address the same circumstances,' or for which there is no corresponding federal regulation—unless the [state] satisfies additional requirements.") (describing N.D. Cent. Code § 23-01-04.1 (1)-(3), (5)) (emphasis added); *id.* at 213 (Utah has a similar law).

Fifth, ELI’s “property-based” limitations²⁶ do nothing to limit the ability of State agencies to act – they simply “create additional processes for an agency to follow when a proposed regulation is likely to affect private property rights,”²⁷ and require State agencies to compensate property owners in the event that regulation results in a physical or regulatory²⁸ taking. ELI Study at 20-21.

Sixth, ELI simply misrepresents data from some States: some States counted in ELI’s study as *not* regulating non-CWA waters actually *do* regulate non-CWA waters.²⁹ Finally, and most importantly, ELI misunderstands many of the State laws it references. State experts who have examined ELI’s “State Profiles” (contained in the ELI Study’s Appendix 2) have identified serious errors in ELI’s assessments of their States’ laws. *See* Exhibit 4.³⁰ Indeed, the ELI Study shows a fundamental misunderstanding of State regulation. The Pennsylvania Department of Environmental Protection’s (“PDEP”) comments on the proposed rule explain, “[o]ne of DEP’s significant concerns with this rulemaking is EPA’s unfamiliarity with existing state law programs reflected by its reliance on the ELI study”³¹ PDEP notes that the ELI Study characterizes Pennsylvania as one State program where protection of water resources are lacking,

²⁶ These limitations “are an outgrowth of ‘takings’ law,” which is “based on the Takings Clause of the Fifth Amendment of the U.S. Constitution.” ELI Study at 20.

²⁷ As noted by Charles M. Carvell, “During my 26 years as an Assistant Attorney General for the State of North Dakota, . . . I don’t recall an instance in which a state agency refrained from rule-making due to processes and procedures imposed by the legislature. . . . I am unaware of any instance in which an agency backed away from rule-making because it was required to conduct a takings assessment.” Charles M. Carvell, Proposed Federal Rule Defining “Waters of the United States” – Comments on the Environmental Law Institute’s Interpretation of North Dakota Law, at 2 (Sept. 2, 2104), Exhibit 4, Attachment G.

²⁸ As ELI acknowledges, “most regulation does not meet the threshold constitutional standards that would require compensation under principles of takings law.” ELI Study at 20.

²⁹ ELI lists 26 States as having “no” coverage of non-CWA waters, but acknowledges in a footnote that “[e]ven for states [categorized as not regulating non-CWA waters], the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal [CWA].” ELI Study at 8-9, Table 1 & n.3. Thus, by ELI’s own admission, at least, nine of the States in ELI’s “no” columns may, in fact, cover non-CWA waters (Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, and Texas).

³⁰ For example, the ELI Study states that Arizona State law does not cover non-CWA waters, but this is simply incorrect. Arizona’s statute defines “waters of the State” much more broadly and includes groundwater. Moreover, the Arizona Department of Environmental Quality has the authority to set enforceable water quality standards for protecting the broader category of “waters of the State.” Robert D. Anderson, General Comments on the Environmental Law Institute’s *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, at 1-2 (Sept. 29, 2014), Exhibit 4, Attachment A.

Likewise, the ELI Study presents Florida’s coverage of non-CWA waters as much more limited than it is. It does not acknowledge that Florida regulates far more waters, and far more activities in those waters, than does the CWA. Moreover, ELI scarcely mentions Florida’s Environmental Resources Permitting (ERP) program. By contrast, a report issued by ELI in 2006 praised the ERP program for its “comprehensive wetland protection strategy.” The State’s wetland program has expanded since the 2006 report was issued. *See* Exhibit 4, Attachment D at 7-8.

³¹ PDEP, Comments on Proposed Rulemaking: Definition of “Waters of the United States” Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880-7985, at 2 (Oct. 8, 2014).

and PDEP states that “[t]his characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with the states.”³²

For all these reasons, the ELI Study cannot be relied upon to draw legitimate conclusions about whether States are constrained from regulating non-CWA waters. In fact, States have primary authority to regulate water resources. If States have chosen not to regulate non-CWA waters, it is not necessarily because they are prevented by law. Rather, in many cases, the States have determined that certain non-CWA waters and features do not require regulation. In sum, the agencies cannot rely on false claims that States are limited in their ability to protect non-CWA waters to justify a rulemaking that captures such an expansive scope of “waters of the United States.”

D. The CWA Already Provides a Wide Array of Protections Against Illegal Discharges.

The agencies have stated that the proposed rule is necessary because “[t]he lack of clarity in Clean Water Act protection has made enforcement of the law difficult in many cases.”³³ Again, this justification for the proposed rule was discussed in the agencies’ outreach on the proposed rule, but not in the rule itself. And EPA “has struggled to identify specific examples of waters and wetlands that have not been protected as a result of confusion over the scope of the Clean Water Act”³⁴ Indeed, if the agencies are finding it difficult to point to specific factual instances involving specific drainage features, showing that a point source discharge into one feature is actually making it to a down-gradient water of the United States,³⁵ how can the agencies make a categorical finding of jurisdiction that the same feature has a significant nexus to traditional navigable waters, as they have done in the proposed rule? It is difficult to understand how the proposed rule’s categorical assertions that all tributaries and adjacent waters have a significant nexus are anything more than “speculative” findings, when in the enforcement cases the agencies reference, the government could not present empirical evidence that such features have a significant nexus to downstream waters.³⁶

³² *Id.*

³³ EPA, Waters of the United States Proposed Rule Website, <http://www2.epa.gov/uswaters> (then go to “Why do a Rulemaking >Enforcement of the law has been challenging” hyperlink) (last visited Oct. 29, 2014) (citing examples in Lake Blackshear, Georgia, and San Pedro River, Arizona).

³⁴ Bridget DiCosmo, *EPA Struggles to Identify Cases to Bolster Rule Defining Water Law’s Reach*, InsideEPA (May 22, 2014), available at <http://insideepa.com/201405222471692/EPA-Daily-News/Daily-News/epa-struggles-to-identify-cases-to-bolster-rule-defining-water-laws-reach/menu-id-95.html>.

³⁵ Although EPA has cited two examples of enforcement actions where EPA found it too costly and time-intensive to prove that the water was subject to CWA jurisdiction, see Watershed Academy Webcast Transcript, at 4-5, the fact that it was challenging for the agencies to put together the evidence to prove that the features were jurisdictional does not warrant expanding the scope of jurisdiction. Simply because asserting categorical jurisdiction over all wet features would make enforcement easier for the agencies does not mean that it is within the bounds of the agencies’ CWA authority.

³⁶ See EPA, Waters of the United States Proposed Rule Website, <http://www2.epa.gov/uswaters> (then go to “Why do a Rulemaking >Enforcement of the law has been challenging” hyperlink) (last visited Oct 29, 2014) (citing examples in Lake Blackshear, Georgia, and San Pedro River, Arizona).

It is not surprising that EPA has struggled to find examples of waters and wetlands that have not been protected under the current CWA regulations because the CWA already provides a wide array of protections against the type of “midnight dumping” that the agencies are claiming to address through the proposed rule. The CWA contemplates all waters, including ditches (some as waters of the United States, some as point sources, some as collecting runoff), would be addressed differently by different actors with different tools – e.g., permits for point source discharges, permits for discharge of dredged or fill material, and basic planning by state and local agencies for nonpoint source runoff. The discharge of pollutants, fill, and oil or hazardous substances to “waters of the United States,” whether direct or *indirect*, is already illegal and enforceable under the CWA. *See* 33 U.S.C. §§ 1311(a), 1321, 1342, 1344. As the plurality noted in *Rapanos*, “the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” *Rapanos*, 547 U.S. at 743 (Scalia, J., plurality). The agencies do not need to call such conveyances “waters of the United States” to protect these features against such discharges of pollutants. The agencies have other ways to protect remote waters. *See e.g.*, 33 U.S.C. §§ 1342 (National Pollutant Discharge Elimination System); 1321 (Oil and Hazardous Substance Liability). Indeed, the preamble recognizes the other regulatory mechanisms available under the CWA. 79 Fed. Reg. at 22,191 n.5. Moreover, many States and local governments have robust water quality programs. In addition, discharges to land are already regulated under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, and state hazardous waste laws, such as the California Health and Safety Code § 25100 *et seq.* The agencies do not need to treat all waters and features on a landscape as “waters of the United States” to protect them, much less to protect the traditional navigable waters (“TNWs”) that are the focus of the Act.

E. The Proposed Rule Has No Bounds and Is Tantamount to the Broad Theories of Jurisdiction Rejected by the Supreme Court in *SWANCC* and *Rapanos*.

The agencies claim that the proposed rule does not broaden the historical coverage of the CWA.³⁷ But, as discussed above, the “historical coverage” has twice been determined by the Supreme Court to be overbroad. In *SWANCC*, the Supreme Court rejected the agencies’ attempts to assert jurisdiction over an abandoned sand and gravel pit based on the theory that the isolated pond was used by migratory birds. (This theory was known as the Migratory Bird Rule.) *SWANCC*, 531 U.S. at 174. And in *Rapanos*, five Justices rejected the agencies’ attempts to assert jurisdiction over wetlands not adjacent to navigable waters based on the theory that CWA jurisdiction extends to any non-navigable water that has a “mere hydrologic connection” to navigable waters. *Rapanos*, 547 U.S. at 739-40. The proposed rule allows for sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the “any connection” theory that was rejected in *Rapanos*. Thus, the agencies’ assertions that they are not “changing” anything or “expanding” jurisdiction are impossible to support. In the Appendix to these comments, we provide a more detailed legal

³⁷ *See, e.g.*, EPA, Questions and Answers About Waters of the U.S. (July 2014), http://www2.epa.gov/sites/production/files/2014-07/documents/questions_and_answers_about_wotus_0.pdf. (“EPA WOTUS Questions and Answers”).

analysis of the proposed rule's specific categories of regulation and explain how they are inconsistent with *SWANCC* and *Rapanos*.

With the proposed rule's broadened concept of "tributary," the agencies seek to extend CWA jurisdiction to any channelized feature (e.g., ditches, ephemeral drainages, and stormwater conveyances), wetland, lake, or pond that directly or indirectly contributes flow to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters. *See* 79 Fed. Reg. at 22,201-02. The proposed rule also extends jurisdiction to "adjacent waters," which can include any wetland, water, or feature located in an undefined floodplain or riparian area, or that has a subsurface hydrologic connection to navigable waters. *Id.* at 22,206. If the agencies cannot find a way to assert jurisdiction under these broad "tributary" or "adjacent waters" categories, there is a catch-all "other waters" category that would cover isolated waters and wetlands that, when aggregated with all other "similarly situated" wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters. *Id.* at 22,211. Under the proposed rule, ditches, groundwater, and erosional features (i.e., gullies, rills, and swales) can serve as a hydrological connection that would render a feature a jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water." *Id.* at 22,219.

Essentially, under this proposed rule, the agencies' authority to assert jurisdiction is limitless. It will most certainly reach features like the remote waterbodies that troubled Justice Kennedy in *Rapanos* that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). The proposed rule would apply the "waters of the United States" definition to a whole host of features that are remote from TNWs and carry minor water volumes, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, manmade drainage ditches, and arroyos, all of which the *Rapanos* Court made clear are beyond the scope of federal jurisdiction. *Id.* at 734 (plurality); *id.* at 781 (Kennedy, J., concurring). Once again, the term "waters of the United States" "cannot bear the expansive meaning" the agencies would give it. *Id.* at 731 (plurality).

It is well settled that Congress – and only Congress – has the power to override U.S. Supreme Court statutory interpretation decisions.³⁸ Indeed, Congress has frequently overridden, or attempted to override, Supreme Court statutory interpretation decisions because it disagreed with the Court's reading of the relevant statute.³⁹ The *Rapanos* plurality made clear that this was a possible option, stating that it "would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Rapanos*, 547 U.S. at 738 (citations omitted). Indeed, in the wake of *Rapanos*, the agencies and others were pushing Congress to delete the term "navigable" from the CWA because they recognized it was

³⁸ *See* W. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331 (1991), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4816&context=fss_papers; *Lane v. Pena*, 518 U.S. 187, 198-199 (1996) (recognizing Congressional response to statutory interpretation decision); *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 304-305, n.5 (recognizing Congress's power to "alter the rule of law established in one of [the U.S. Supreme Court's] cases.")

³⁹ A recent example includes Congress's overriding the Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), by enacting the Lilly Ledbetter Fair Pay Act of 2009.

limiting. In 2008, Representative Jim Oberstar introduced a bill, H.R. 2421, that would have done just that, but Congress rejected it. In 2010, when asked if, in the absence of new legislation, EPA and the Corps could regulate all waters, as opposed to just those deemed “navigable,” Oberstar noted that if regulators could, “they would have done so.” He further noted, “EPA and the Army Corps and the Department of Agriculture and CEQ [the White House Council on Environmental Quality] all are constrained by the Supreme Court decision”⁴⁰ However, in the eight years since *Rapanos* was decided, Congress has declined to expand the definition of “water of the United States.”⁴¹

Additionally, the Supreme Court has made clear that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ [the Court] typically greet[s] the announcement with a measure of skepticism.” *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (citations and quotations omitted). Again, the Court points to Congress, stating that it “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” *Id.* (citations and quotations omitted).

Accordingly, for the foregoing reasons and those stated elsewhere in these comments, the proposed rule impermissibly attempts to expand jurisdiction beyond the agencies’ statutory authority under the CWA.

F. The Agencies’ Assurances that Nothing Will Change from the Current Regulatory Regime Are Cold Comfort Because the Current Regime Is Flawed.

The agencies claim that the proposed rule does not change the scope of what is jurisdictional today.⁴² But in fact the proposed rule is a substantial expansion from current practice and from appropriate application of the *SWANCC* and *Rapanos* decisions. Furthermore, the agencies’ claim is somewhat meaningless because CWA jurisdiction has been a moving and inconsistent concept for years. For decades, proceeding largely case-by-case and often through guidance, the agencies have “stretched the term ‘waters of the United States’ beyond parody.” *Rapanos*, 547 U.S. at 734 (plurality). Guidance documents have been unclear and inconsistently applied, leading to varied interpretations by regulatory offices within a single State and even between regulatory staff in the same office.⁴³ At the same time, as the agencies have eschewed notice and comment rulemaking, regulated parties generally have been unable to challenge the agencies’ overreaching. And when regulated parties have attempted to challenge agency guidance or case-by-case jurisdictional claims in court, the agencies have wrongfully persuaded

⁴⁰ Paul Quinlan, *Oberstar bearish on strengthening Clean Water Act*, E&E Reporter (Nov. 16, 2010), available at <http://www.eenews.net/eenewspm/stories/1059942202>.

⁴¹ In fact, on September 9, 2014, the House of Representatives passed H.R. 5078, legislation that would prevent EPA from implementing the proposed rule on the grounds that it is a regulatory overreach of EPA. While the bill’s chances of passage in the Senate are uncertain, and the White House has threatened to veto the bill, it makes clear that Congress itself is acting to prevent the proposed rule’s enactment on jurisdictional grounds.

⁴² See EPA WOTUS Questions and Answers.

⁴³ See, e.g., U. S. General Accounting Office, *Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO No. 04-297 at 26 (Feb. 2004) (“GAO No. 04-297”).

the lower courts that such jurisdictional claims are unreviewable. “Guidance” is argued by the agencies to be non-binding and immune from review⁴⁴ (although courts have disagreed with that position⁴⁵), and case-by-case claims are characterized by the agencies as “preliminary” and likewise immune.⁴⁶ In this way, the agencies have attempted to insulate themselves from judicial oversight as they slowly recaptured many of the remote features that were held to be beyond the reach of the CWA by the *SWANCC* and *Rapanos* decisions.

But “an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error.” *Summit Petroleum v. EPA*, 690 F.3d 733,746 (6th Cir. 2012). In *Summit Petroleum*, the U.S. Court of Appeals for the Sixth Circuit vacated EPA’s unreasonable interpretation of “adjacency” for purposes of determining whether multiple facilities could be aggregated as a single source for Clean Air Act permitting. *Id.* Although EPA pointed to previous guidance documents supporting its interpretation, the court declined to defer to EPA’s interpretations. *Id.* Similarly, here, the fact that the agencies are currently asserting broad jurisdiction well beyond the limits recognized by the Supreme Court does not provide legal justification for the inclusion of such a sweeping interpretation of “waters of the United States” in the proposed rule.

G. The Proposed Rule Incorrectly Applies Only Justice Kennedy’s *Rapanos* Opinion and Ignores *SWANCC* and the *Rapanos* Plurality Decision.

The proposed rule (and preamble) ignores *SWANCC* and misinterprets *Rapanos* in several key respects, consequently sows confusion instead of providing clarity, and sets forth a “waters of the United States” definition that does not comport with a true reading of the case law. Fundamentally, the agencies’ proposed rule fails to adhere to the appropriate legal standard because the rule incorrectly applies only Justice Kennedy’s *Rapanos* opinion and completely ignores the plurality decision. To comply with Supreme Court and common law precedent, the proposed rule should only find jurisdiction where both the plurality’s and Justice Kennedy’s standards are satisfied.

1. *Marks* requires identifying a single holding from *Rapanos* that reconciles the two opinions to find their common ground.

Under *Marks v. United States*, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the *holding* of the Court may be viewed as that position taken by those Members *who concurred in the judgment* on the narrowest grounds.” 430 U.S. 188, 193 (1977) (internal quotations omitted) (emphasis added). The *Marks*

⁴⁴ See, e.g., *Nat’l Mining Ass’n v. Jackson*, 758 F.3d 243 (D.C. Cir. 2014).

⁴⁵ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (holding that a guidance document reflecting a settled agency position was final because it had legal consequences for those subject to regulation and the regulators). See also, e.g., *New Hope Power Co. v. U.S. Army Corps of Eng’rs*, 746 F. Supp. 2d 1272, 1283-84 (S.D. Fla. 2010).

⁴⁶ See, e.g., *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383 (5th Cir. 2014) (denying review of an approved jurisdictional determination); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 593 (9th Cir. 2008) (same). We think these cases are wrongly decided and reserve our rights to challenge all these points.

Court’s reference to “the holding” and “that position” taken by the concurring Justices clearly reinforces the principle that a plurality decision, like all other Supreme Court decisions, must be read to produce a single holding on the point of law at issue in the case.

Supreme Court precedent and basic common law principles require that the agencies identify a single holding from *Rapanos*. *Id.* That holding is the readily identifiable common logic of the plurality and Justice Kennedy that was “necessary” and “pivotal” to the decision in the case.⁴⁷ The judgment of the *Rapanos* Court, by a 5 to 4 vote, announced by Justice Scalia and with which Justice Kennedy concurred, was to “vacate the judgments” against *Rapanos* and *Carabell*, and remand for further proceedings. The plurality opinion and Justice Kennedy’s opinion rejected the Corps’ assertion that the CWA regulates any non-navigable water that has “any hydrological connection” to navigable waters. Although *Rapanos* was decided by a plurality of four Justices and a separate concurring Justice, those Justices agreed on a common framework and provided several limiting principles that restrain the agencies’ jurisdiction under the CWA. This is the holding that is the narrowest, and under *Marks* is the holding the agencies must follow.⁴⁸

2. To faithfully implement the single holding of *Rapanos*, which is the restriction of CWA jurisdiction based on limiting principles articulated by both the plurality and Justice Kennedy, *only* those waters that would meet *both* the plurality and Justice Kennedy tests can be deemed jurisdictional.

The single holding from *Rapanos* is the plurality’s and the concurrence’s common reasoning on the boundaries of CWA jurisdiction. Although the plurality and Justice Kennedy did not agree on the specific tests for CWA jurisdiction, both found that the Corps had gone too far in its “any connection” theory, and both articulated principles that were intended to limit CWA jurisdiction.

Both the plurality and Justice Kennedy’s opinion start from a common understanding of TNWs – i.e., the waters that were subject to regulation under the Rivers and Harbors Act (“RHA”) prior to the passage of the CWA. *See Rapanos*, 547 U.S. at 731 (plurality), 767 (Kennedy, J., concurring). Both further agreed that “Congress intended to regulate at least some waters that are not navigable in the traditional sense,” *id.* at 767 (Kennedy, J., concurring), 731 (plurality), but that “the qualifier ‘navigable’ is not devoid of significance,” *id.* at 731 (plurality), and must be given “some meaning,” *id.* at 779 (Kennedy, J., concurring).

With respect to tributaries, both opinions would allow jurisdiction over certain non-navigable tributaries, but both the plurality and Justice Kennedy were concerned about far-reaching jurisdiction over features distant from navigable waters and carrying only minor volumes of flow. Justice Kennedy criticized the agencies’ “existing standard” which “deems a

⁴⁷ See Black’s Law Dictionary 849 (10th ed. 2004) (defining “holding” as “a court’s determination of a matter of law pivotal to its decision”); *see also United States v. Garcia*, 413 F.3d 201, 232 n. 2 (2d Cir. 2005) (Calabresi, J., concurring) (defining a holding as “what is necessary to a decision”).

⁴⁸ Our comments on the 2008 *Rapanos* Guidance provide an extensive *Marks* analysis and discuss the single holding of *Rapanos* at length. *See* AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 10-22.

water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark” because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Id.* at 781 (Kennedy, J., concurring). Similarly, the plurality criticized the agencies for extending jurisdiction to “‘ephemeral streams’, ‘wet meadows’, storm sewers and culverts, ‘directional sheet flow during storm events’, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert.” *Id.* at 734 (plurality). Both opinions agreed that the Corps had gone too far in its assertion of jurisdiction over tributaries and that “mere adjacency to a tributary” is insufficient. *Id.* at 786 (Kennedy, J., concurring).

With respect to wetlands, both opinions would require the agencies to demonstrate a meaningful relationship between non-abutting wetlands and TNWs for those non-abutting wetlands to be jurisdictional. Both the plurality and Justice Kennedy agreed that a mere hydrological connection between a wetland and a TNW is not sufficient to establish jurisdiction. *See id.* at 732 (plurality), 784 (Kennedy, J., concurring). Beyond this starting point, the plurality found that only wetlands with “a continuous surface connection” to waters of the United States, “making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins,” are covered by the Act. *Id.* at 742 (emphasis in original). By contrast, Justice Kennedy would require that there be a “significant nexus” such that wetlands “significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 779, 780. Wetlands with “speculative or insubstantial” effects on water quality do not satisfy this standard. *Id.* at 780. Again, the combined impact of these limiting principles is that the agencies must demonstrate that wetlands have a meaningful relationship with TNWs to be jurisdictional.

In sum, five Justices agreed that a mere hydrologic connection is not enough to establish jurisdiction under the CWA, that the CWA does not extend to features distant from navigable waters and carrying only minor volumes of flow, and that there must be a meaningful relationship between non-abutting wetlands and TNWs for those non-abutting wetlands to be jurisdictional. Under *Marks* and basic common law principles, this framework represents the single holding of *Rapanos* that the agencies are legally bound to follow.

Thus, in light of *Marks*, only those waters that would be jurisdictional under elements common to both the plurality and Kennedy opinions are jurisdictional under *Rapanos*. To implement the holding of the *Rapanos* Court, *only* those waters that would meet *both* the plurality and Kennedy tests can be deemed jurisdictional. Waters that meet only one or the other test are *not* jurisdictional “waters of the United States.” The proposed rule does not faithfully implement *Rapanos* because it is *not* based on determining which waters would meet both tests.

3. The agencies cannot rely solely on Justice Kennedy’s significant nexus standard as the governing holding of *Rapanos*.

Throughout the proposed rule, the agencies rely only on their misinterpretation of Justice Kennedy’s “significant nexus” standard. They ignore all limits on CWA jurisdiction that Justice Kennedy and the plurality agreed upon, and pay no attention whatsoever to the plurality’s “relatively permanent waters” or “continuous surface connection” standards. This proposed rule signals a shift from the agencies’ previous interpretations of *Rapanos*. In both the *Rapanos*

Guidance⁴⁹ and the Draft 2011 Guidance, the agencies found jurisdiction if either the plurality's or Justice Kennedy's standards was satisfied. As we noted in comments on those guidance documents and have reiterated here, the "either/or" approach is not true to *Marks*.⁵⁰ Now, the agencies have shifted from an "either/or" approach to a "Kennedy only" approach (using an approach that itself is flawed) without any explanation of why they now view the significant nexus test as controlling.⁵¹

But the agencies cannot pick and choose which Supreme Court opinion they like best. *Marks* precludes reading *Rapanos* in a manner that produces multiple and potentially inconsistent holdings and instead seeks a single holding reconciling the views of the Members of the Court who concurred in the judgment. See *Marks*, 430 U.S. at 193. The four-Justice *Rapanos* plurality rejected the "significant nexus" test. *Rapanos*, 547 U.S. at 755. There is no good reason to select one concurring opinion as the single "winner" when four of the five Justices who issued the Court's decision rejected that opinion's approach. Under *Marks* and common law practices, the agencies cannot wholly ignore the plurality and treat Justice Kennedy's opinion as the sole controlling holding of *Rapanos*.

Nor can the agencies rely on dissenting Justices to support the proposed rule's adoption of only Justice Kennedy's significant nexus standard. Without acknowledging that the rule is based only on Justice Kennedy's standard, the preamble notes that the four dissenting Justices in *Rapanos* would have upheld CWA jurisdiction for "all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." 79 Fed. Reg. at 22,192. The opinions of the dissenting Justices, however, are irrelevant. Only those opinions that "concur in the judgments" count toward determining the "holding of the Court."⁵² The dissenting Justices did not concur in the judgment, and therefore the agencies cannot head-count across all of the opinions to come up with a majority.

Rather, as directed by *Marks*, the agencies must find a single holding based on the common elements of the plurality's and Justice Kennedy's opinions. Although finding the common ground between the plurality and concurring opinions is more complicated than simply

⁴⁹ EPA and U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, (Dec. 2, 2008) ("*Rapanos* Guidance").

⁵⁰ Interpreting *Rapanos* as supporting jurisdiction if either the plurality or Justice Kennedy's test is satisfied results in the Supreme Court's decision being interpreted as having two inconsistent holdings. *Marks* cannot be interpreted as allowing cases such as *Rapanos* to have multiple holdings, as evidenced by its use of the phrases "the holding" and "that position." See AFBF Comments on *Rapanos* Guidance at 16-18.

⁵¹ The preamble does not explain why the agencies are relying solely on Justice Kennedy's standard. They do not claim that the significant nexus standard is the "narrowest" ground from *Rapanos* or that they are following the reasoning of any particular circuit court decisions. Rather, without explanation, the agencies create a new jurisdictional standard without relying on or abiding by the *Rapanos* plurality opinion. This is hardly reasoned decisionmaking.

⁵² See *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("Dissenters, by definition, have not joined the Court's decision. . . . *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. . . . It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day. . . ."); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

adopting wholesale one opinion or the other, this is what *Marks* requires.⁵³ Chief Justice Roberts recognized that it would be complicated to apply the holding of *Rapanos*, noting that “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.” *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

In sum, the agencies may not ignore the *Rapanos* plurality and rely solely on Justice Kennedy’s opinion. To be true to *Marks*, the agencies can only find jurisdiction where both the plurality’s and Justice Kennedy’s tests are satisfied.

H. The Proposed Rule Misconstrues Justice Kennedy’s Significant Nexus Standard.

As explained above, the agencies cannot rely solely on Justice Kennedy’s significant nexus standard as the governing holding of *Rapanos*. Yet the proposed rule relies heavily on the agencies’ misinterpretation of Justice Kennedy’s significant nexus standard, citing to Justice Kennedy’s opinion 99 times, and holding it up as the controlling rule of law. The proposed rule categorically determines that all “tributaries” and “adjacent waters” have a significant nexus to (a)(1) through (a)(3) waters (TNWs, interstate waters, and territorial seas), and are therefore jurisdictional “waters of the United States.” 79 Fed. Reg. at 22,204-05, 22,209-10. It also provides that, on a case-by-case basis, “other waters” will be jurisdictional if, when aggregated with all other waters in a watershed, the other waters have a significant nexus to an (a)(1) through (a)(3) water. *Id.* at 22,212. It is improper for the proposed rule to rely solely on Justice Kennedy’s opinion, but the proposed rule fails to apply even its hallmark test correctly. The proposed rule’s construction is problematic because it misconstrues and misapplies the significant nexus standard, resulting in much broader assertions of jurisdiction than Justice Kennedy’s *Rapanos* opinion allows.

⁵³ Indeed, the complicated nature of this inquiry is likely why the Circuit Courts of Appeals are not uniform as to the controlling standard for “waters of the United States” under *Rapanos*. The crux of the circuit split is how one defines “narrower.” In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the case interpreted by the *Marks* Court, the narrowest judgment is clear because it is a subset of the other two positions. In *Memoirs*, a plurality found that a particular book was not obscene. *Id.* at 421. Two concurring Justices also found the book was not obscene, but would have gone further regarding absolute First Amendment protections. *Id.* Thus, *Marks* held that the plurality opinion was based on the narrowest grounds and therefore constituted the holding of the Court and provided the governing standard. *Marks*, 430 U.S. at 194. Identifying the narrowest reasoning is not as straightforward with *Rapanos* because the two opinions do not create a nice, clear subset of jurisdictional waters – the concurring rationales do not fit within each other like Russian dolls. See *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); Joseph M. Cacace, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine After *Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 98 (2007). Instead the plurality’s and Justice Kennedy’s opinions overlap in some cases and would lead to opposite results in other cases. Some courts argue that Justice Kennedy’s is the narrower decision because it reins in federal authority less (e.g., *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006)), while others suggest that the plurality could be the narrower decision because it is most restrictive of government authority and avoids the expansion of the Commerce Clause (e.g., *Johnson*, 467 F.3d at 63). These circuit courts miss the mark, however. *Marks* does not require that we determine which opinion is narrowest. It requires determining the narrowest “position” taken by those members who concurred in the judgments. *Marks*, 430 U.S. at 193. Because the legal standards set by the two opinions create overlapping universes of jurisdictional waters, there is a clear narrow judgment that received the “assent of five Justices” in *Rapanos*. And that single holding is the framework discussed in section II.G.2.

1. The significant nexus standard should not be applied to non-wetlands.

The proposed rule states that although Justice Kennedy’s significant nexus standard involved wetlands, “it is reasonable to utilize the same standard” for non-wetland waters. 79 Fed. Reg. at 22,204; *see also* 22,209, 22,212. But the agencies do not explain why it is reasonable to extend the application of the significant nexus test to tributaries and non-wetland waters that may not be serving the same functions for those TNWs that wetlands are. Indeed, as we have noted in the past,⁵⁴ the plain language of Justice Kennedy’s concurrence and later case law interpreting the significant nexus standard demonstrate that the standard cannot be applied to non-wetlands as the agencies have done here.

Justice Kennedy’s significant nexus standard has its origins in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). The *Riverside Bayview Homes* Court upheld the Corps’ jurisdiction over wetlands abutting on navigable-in-fact waterways. 474 U.S. at 121. As later characterized by the *SWANCC* Court, “It was the *significant nexus* between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” *SWANCC*, 531 U.S. at 167 (emphasis added). In his concurring opinion, Justice Kennedy adopted this language as the standard for determining whether *wetlands* adjacent to non-navigable tributaries are jurisdictional. It is clear from his language that wetlands were the sole focus of his inquiry. Justice Kennedy explained, “[*W*]etlands possess the requisite nexus . . . if 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” *Rapanos*, 547 U.S. at 780 (emphasis added). Justice Kennedy instructed the agencies to apply a case-by-case significant nexus analysis when they “seek[] to regulate *wetlands* based on adjacency to nonnavigable tributaries.” *Id.* at 782 (emphasis added).

The U.S. Court of Appeals for the Ninth Circuit has squarely rejected the application of the significant nexus test to non-wetland waters, explaining that “*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps’ authority to regulate adjacent *wetlands* No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.” *See San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007) (rejecting Baykeeper’s argument that the Supreme Court has held that the CWA protects all waterbodies with a significant nexus to navigable waters). Thus, it is unreasonable for the agencies to extend Justice Kennedy’s significant nexus test to tributaries, adjacent non-wetlands, and other waters because it results in the assertion of jurisdiction beyond what both Justice Kennedy and the plurality intended and is unsupported by judicial precedent.

2. The proposed rule’s aggregation approach is inconsistent with Justice Kennedy’s opinion and results in overly broad assertions of jurisdiction.

Under the proposed rule, the agencies intend to aggregate “other waters” for purposes of assessing significant nexus. That is, to determine whether one water is jurisdictional, the

⁵⁴ *See* WAC Comments on the 2011 Draft Guidance, Exhibit 1 at 42-44; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 34.

agencies can aggregate all “similarly situated” waters within a watershed and look at whether all of those waters, taken together, have a significant nexus with (a)(1) through (a)(3) waters. 79 Fed. Reg. at 22,212. The agencies will deem waters to be “similarly situated” if they “perform similar functions” and are located “sufficiently close together.” *Id.* at 22,213. Again, the agencies may not rely on Justice Kennedy’s significant nexus standard as the governing holding of *Rapanos*. But this broad aggregation standard goes well beyond what Justice Kennedy authorized and will allow for assertions of jurisdiction over remote features with tenuous connections to (a)(1) through (a)(3) waters.⁵⁵

In his concurrence, Justice Kennedy rejected the agencies’ assertion of jurisdiction over non-navigable waters based on “a mere hydrologic connection” to navigable waters. *Rapanos*, 547 U.S. at 784. He repeatedly cautioned that “remote,” “insubstantial,” “speculative,” or “minor” flows are insufficient to establish a significant nexus. *Id.* at 778-79. In application of the significant nexus standard to the wetlands at issue in *Rapanos* and *Carabell*, Justice Kennedy did not aggregate wetlands in the same watershed, nor did he take the position that lower courts should determine jurisdiction over the wetlands at issue by aggregating impacts of all the wetlands surrounding the wetlands at issue. Rather, he focused on use of an individual significant nexus test and examination of the distance, quantity, and regularity of flow for each wetland at issue. *Id.* at 784-87.

With the proposed rule’s aggregation principle, however, the proximity to TNWs and the amount or regularity of flow are of little or no consequence to the significant nexus determination. The agencies acknowledge in the preamble’s discussion of “other waters” that in the arid West, “there may be situations where the single point of entry watershed is very large,” but still authorizes the use of the single point of entry watershed in all situations. 79 Fed. Reg. at 22,212. This rule will allow for aggregation of an astonishing numbers of features, regardless of quantity or frequency of flow, and enables the agencies to find a significant nexus in essentially every situation. *See, e.g.*, Colorado River watershed in Exhibit 1, Exhs. 7-8 thereto. As Dr. Michael Josselyn, a member of the SAB Panel, noted, aggregation of all features in a watershed is problematic because “this could be a very large area that may drain significant portions of a single State. It would be hard to argue that including all the streams within such a large area in one grouping would not have an effect on the downstream water.”⁵⁶ Moreover, this concept of aggregation creates a scenario where a jurisdictional decision in one small channel can effectively serve as the jurisdictional determination for similar channels in the entire watershed. In other words, one entity’s jurisdictional determination request would set the precedent for similar features in that watershed well beyond that entity’s property and could adversely affect

⁵⁵ *See* WAC Comments on 2011 Draft Guidance, Exhibit 1 at 44.

⁵⁶ Exhibit 7, Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled “definition of ‘waters of the United States’ under the Clean Water Act,” (“Rodewald Memo”) transmitting “Individual Comments from Members of the SAB Panel for the Review of the EPA Water Body Connectivity Report on the Scientific and Technical Basis of the Proposed Rule Titled ‘Waters of the United States’ Under the Clean Water Act,” (Sept. 2, 2014) (collectively “SAB Panel Member Comments on Proposed Rule”) at 45 (comments of Dr. Michael Josselyn), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/\\$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf), at 44 (comments of Dr. Michael Josselyn).

unknowing property owners in the same region. This is far beyond what Justice Kennedy intended.

3. The agencies misconstrue Justice Kennedy’s use of “similarly situated” in the proposed rule’s application of the significant nexus test.

Under the proposed rule, waters are similarly situated “when they perform similar functions and are located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a single landscape unit” 79 Fed. Reg. at 22,263. This standard is overbroad because, contrary to the guiding principles of Justice Kennedy’s concurrence, it allows for aggregation of features that are many miles apart from each other and are not in fact “similarly situated” with respect to proximity to navigable waters, regularity of flow, or duration of the function being performed.⁵⁷

This standard allows, for example, an ephemeral headwaters stream to be similarly situated as a perennial stream in the same watershed. But these two features are not similarly situated with respect to TNWs because an ephemeral stream will have a much lower quantity and regularity of flow and will likely be much more remote than a perennial stream. It would also allow for the agencies to consider a roadside ditch to be similarly situated to a perennial stream. Neither the Connectivity Report⁵⁸ nor the science discussed in the preamble provides any basis for treating all these features as similarly situated.⁵⁹

In addition to allowing for sweeping assertions of jurisdiction, this standard leaves substantial discretion to the agencies to choose which features to aggregate for any given significant nexus analysis, and does not further the agencies’ claimed benefit of improved certainty. As Dr. Michael Josselyn notes, “There is considerable geologic, vegetative, and topographic variation within such a large area and the determination of what constitutes similarity among tributaries within that region would be difficult.”⁶⁰ Such a discretionary standard also leaves the agencies and permittees vulnerable to third-party citizen suits that seize on vague standards and allege non-compliance.

⁵⁷ The agencies list functions that “might demonstrate a significant nexus,” including “sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of habitat.” 79 Fed. Reg. at 22,261. But they completely ignore the quantity and frequency of flow that were central to Justice Kennedy’s significant nexus analysis.

⁵⁸ EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Draft), EPA/600/R-11/098B (Sept. 2013) (“Connectivity Report” or “Draft Science Report”).

⁵⁹ Nor is there a basis for using a significant nexus determination for one water in a watershed to bind other “similarly situated” waters in the watershed. This practice would raise several due process concerns. First, a landowner’s interests can be compromised or destroyed by someone else who came before him without the landowner having the opportunity to be involved in the jurisdictional determination for his own property. Second, the landowner may not even have notice or be aware of jurisdictional determinations for other “similarly situated” waters in the same watershed. *See* WAC Comments on 2011 Draft Guidance, Exhibit 1 at 48-51.

⁶⁰ Exhibit 7 at 45 (comments of Dr. Michael Josselyn).

4. The proposed rule’s interpretation that a significant nexus exists whenever impacts are “more than speculative or insubstantial” runs afoul of the limits imposed by Justice Kennedy.

Under Justice Kennedy’s standard, the wetlands in question must “*significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos*, 547 U.S. at 780 (emphasis added). The proposed rule provides, “For an effect to be significant, it must be more than speculative or insubstantial.” 79 Fed. Reg. at 22,265. As we have noted previously,⁶¹ this construction turns Justice Kennedy’s test upside down and ignores the limits he carefully recognized in his concurrence.

Under the everyday use of the word “significant,” it is apparent that Justice Kennedy meant the nexus had to be “important” or “having or likely to have a major effect.”⁶² Justice Kennedy rejected the government’s argument that the agencies could assert CWA jurisdiction over any non-navigable water with “any hydrological connection” to navigable waters, instead requiring a showing of a significant nexus with TNWs. *Rapanos*, 547 U.S. at 784. When Justice Kennedy was applying the significant nexus standard to the facts of *Carabell*, he stated “a reviewing court must identify *substantial* evidence supporting the Corps’ claims.” *Id.* at 786 (emphasis added). He drew a sharp distinction between the two extremes on the continuum – those waters with a significant nexus on the one hand and those waters with only a speculative or insubstantial nexus on the other. *Id.* at 780 (“When, in contrast, wetlands’ effects on water quality are speculative and insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”). The proposed rule’s standard collapses this continuum by ignoring the plain meaning of the word “significant.” There is no scientific articulation for the agencies’ proposed standard.

Just because a connection is “more than speculative or insubstantial” does not mean that it is “significant.”⁶³ Rather, waters with a “speculative or insubstantial” connection fall far short of Justice Kennedy’s standard.⁶⁴ The agencies should revise the proposed standard so that effects must be “important” or “substantial” to satisfy the significant nexus standard.

⁶¹ See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 51; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 34.

⁶² See The American Heritage College Dictionary, Fourth Edition, at 1290 (2007); see also *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (stating that the commonly understood meaning of significant is “important”); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched “occasionally” are not “significantly viewed” channels).

⁶³ The preamble also states that use of language such as “may,” “could,” or “potential” when discussing the scientific effects does not necessarily mean that the effects are “speculative.” 79 Fed. Reg. at 22,263. Justice Kennedy’s “significant nexus” standard does not allow for assertions of jurisdiction based on “potential” impacts that “may” or “could” happen. In fact, in applying the significant nexus standard to the *Carabell* facts, Justice Kennedy noted that the “conditional language” in the Corps’ evaluation of the site (e.g., “potential ability,” “possible flooding”) “could suggest an undue degree of speculation.” *Rapanos*, 547 U.S. at 786. Furthermore, such reliance on potential functions could add a large degree of uncertainty to the regulatory process.

⁶⁴ In addition, this interpretation of “significant” is a stark contrast to the agencies’ interpretations in related contexts. In the section 404 permitting context, for example, a section 404 permit application will trigger the need for an Environmental Impact Statement (“EIS”) only if the proposed action will have “significant” impacts on the human environment. 42 U.S.C. § 4332(c). Yet, in the NEPA context, the term “significant” is a meaningful

5. Tracking the goals of the CWA, Justice Kennedy’s significant nexus standard requires chemical, physical, and biological effects.

Not only are the agencies vastly expanding the scope of the significant nexus test, but they are not accurately representing the plain language of the CWA. As explained by Justice Kennedy, “The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Rapanos*, 547 U.S. at 779 (citing 33 U.S.C. § 1251(a)) (emphasis added). Thus, Justice Kennedy’s significant nexus test requires that the wetland “significantly affect the chemical, physical and biological integrity” of TNWs – all three types of effects must be present. *Id.* at 780 (emphasis added). However, the proposed rule incorrectly treats the significant nexus test as satisfied if the water “significantly affects either the chemical, physical, or biological integrity” of an (a)(1) through (a)(3) water. 79 Fed. Reg. at 22,263 (emphasis added). By substituting *or* for *and*, the proposed rule improperly lowers the standard.

I. The Proposed Rule Fails to Quantify Significance or Explain When Chemical, Physical, and Biological Effects Amount to a Significant Nexus.

For years, we have urged the agencies to provide more specific criteria for “significant nexus,”⁶⁵ and again they have failed to do so. The significant nexus analysis is the lynchpin concept of the agencies’ proposed rule, but the rule provides no metrics or criteria for determining significance. This is also a major problem with the Connectivity Report that served as the scientific basis for the proposed rule.⁶⁶ The Science Advisory Board (“SAB”) tasked an *ad hoc* panel of experts with review of the Connectivity Report, and the SAB Panel produced a report with numerous recommendations to improve the Connectivity Report.⁶⁷ One of the SAB Panel’s main recommendations was that the Connectivity Report be revised to consider connections in terms of a connectivity gradient rather than treating connectivity as a binary property (connected versus not connected).⁶⁸ The SAB Panel “recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of connections.”⁶⁹ Although the proposed rule’s preamble acknowledges the gradient in some instances, its

criterion; the Corps does not prepare an EIS for every action with “more than speculative or insubstantial” impacts. *See* 40 C.F.R. § 1508.27.

⁶⁵ *See, e.g.*, AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 65.

⁶⁶ *See* Waters Advocacy Coalition, “Comments on the U.S. EPA Draft Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence,” Docket No. EPA-HQ-OA-2013-0582, at 6-7 (Nov. 6, 2013) (incorporated by reference herein) (“WAC Comments on Connectivity Report”).

⁶⁷ *See* SAB, Panel for the Review of the EPA Water Body Connectivity Report, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014), [http://yosemite.epa.gov/sab/sabproduct.nsf/WebBoard/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15001+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebBoard/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15001+unsigned.pdf) (“SAB Panel Review of Connectivity Report”) (attached hereto as Exhibit 5).

⁶⁸ SAB Panel Review of Connectivity Report, Exhibit 5 at 2.

⁶⁹ *Id.* at 3. Indeed, the gradient approach to connectivity is recommended at least 28 times in the SAB Panel Review of the Connectivity Report.

categorical assertions of jurisdiction over tributaries and adjacent waters do not account for instances where features may fall very low on the connectivity gradient.

Rather, the preamble and the Connectivity Report focus on the ability to simply identify the *presence* of connections. As explained by GEI Consultants in their report, the proposed rule is based on the agencies' "underlying assumption that *any observable* connection with a downstream water . . . *regardless of* frequency, duration, magnitude, predictability, and consequences, significantly affects the integrity of downstream waters."⁷⁰ Indeed, the SAB Panel, which was also tasked with reviewing the proposed rule, raised this concern, noting, "Panel members generally found that the term 'significant nexus' was poorly defined . . . and that the use of the term 'significant' was vague."⁷¹ Dr. Michael Josselyn raised this issue, explaining that "the Proposed Rule focuses on finding evidence of a connection; not evidence that such a connection actually plays a role in affecting the biological integrity of the navigable water in question."⁷² For example, the proposed rule identifies factors that could be evidence of chemical, physical, or biological activity (e.g., hydrologic connectivity, flood water or sediment retention). *See* 79 Fed. Reg. at 22,214. But it does not explain how "significance" is determined in applying these factors – i.e., is there a significant nexus when there are three or more factors present? when there is a certain quantity of storage? The agencies provide no guidance on when the presence of these factors rise to the level of significance and implicitly suggest that merely the presence of any of these factors is sufficient to satisfy the significant nexus standard.

The presence of a nexus does not provide a basis for assessing to what extent such connections may or may not significantly affect downstream navigable waters, and therefore does little to inform the analysis required by Justice Kennedy's concurrence. Again, asserting jurisdiction based on the presence of connections is the equivalent of the "any hydrological connection" standard that was rejected by five Justices in *Rapanos*. Moreover, without providing metrics to define whether connections are significant, the agencies provide no scientific basis to conclude which connections are significant and which are non-significant, and thereby provide no scientific basis for the proposed rule's conclusions that all tributaries and all adjacent waters have a significant nexus.⁷³ Nor does the proposed rule provide any real basis for regulators to assess the significant nexus of "other waters" on a case-by-case basis.

The lack of metrics to measure the importance of connections was a common concern raised by the SAB Panel.⁷⁴ The SAB Panel's Review of the Connectivity Report specifically requested that EPA revise the report to "discuss approaches to measuring or otherwise

⁷⁰ GEI Consultants, "Scientific Comments on U.S. EPA's Definition of 'Waters of the United States' Under the Clean Water Act; Proposed Rule," at 2 (Sept. 26, 2014) ("GEI Report") (attached hereto as Exhibit 6).

⁷¹ Exhibit 7, Rodewald Memo at 6; SAB Panel Member Comments on Proposed Rule at 6 (Comments of Dr. Genevieve Ali) ("The draft rule does include a definition for 'significant nexus'; however I find it rather vague and subject to interpretation.").

⁷² SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 47 (comments of Dr. Michael Josselyn).

⁷³ *See* GEI Report, Exhibit 6 at 2.

⁷⁴ SAB Panel Review of Connectivity Report, Exhibit 5 at 11 ("It would be useful to provide examples of the various dimensions of connectivity that are most appropriately quantified, ways to construct connectivity metrics (e.g., retrospective or prospective analyses, model simulations, spatial analyses), and the scientific methodological, and technical advances most needed to understand and estimate connectivity.").

quantifying connectivity.”⁷⁵ As Dr. Allison Aldous noted, “Specific scientifically grounded, objective methods must be put in place to draw the line between those waters having or not having a significant nexus to other jurisdictional waters . . . [E]valuating the technical accuracy of the definition is difficult in the absence of clear criteria.”⁷⁶ Dr. Siobhan Fennessy also raised this concern, stating that the proposed rule “require[s] the development of methods to determine when a nexus is significant, including metrics based on hydrologic, chemical, and biological connectivity.”⁷⁷ Other panel members had similar concerns.⁷⁸

EPA provides measurable metrics of significance in other regulatory programs.⁷⁹ For example, as noted by Dr. Mark Murphy, “Water quality criteria are an explicit result of measuring what constitutes a scientifically significant nexus between a surface water pathway exposure and a resident aquatic species.”⁸⁰ The SAB Panel Review of the Connectivity Report also suggested that EPA “draw on examples related to water quantity and quality modeling.”⁸¹ Yet, the agencies make no attempt to quantify significance here, and, as Dr. Murphy notes, “no reference to either water quality standards or the science for setting them appears in the proposed rule.” *Id.* As noted in the attached GEI Report, “well established scientific practice demands that ‘significance’ of effect or consequence be defined in a clear and rigorous way that is both transparent and repeatable.”⁸² It is puzzling how the agencies can claim that this proposed rule is grounded in science while also claiming that significant nexus, the key determinative factor for jurisdiction, is a matter of law and policy and not scientific metrics or criteria. Indeed, as recently as September 26, 2014, a member of the chartered SAB questioned why neither the Connectivity Report nor the SAB review assessed the level of importance of connectivity. He stated, “EPA scientists should consider *where* along the connectivity gradient there is an impact of sufficient magnitude to impact downstream waters,” and noted that, although there is a continuum, scientists are depended upon to make determinations of significant or critical effects.⁸³

⁷⁵ *Id.* at 14.

⁷⁶ *Id.* at 2 (comments of Dr. Allison Aldous).

⁷⁷ *Id.* at 31 (comments of Dr. Siobhan Fennessy) (“A key question is where, along the gradient of connectivity, do the effects of other waters becomes significant.”)

⁷⁸ *See, e.g., id.* at 47 (comments of Dr. Michael Josselyn) (“A section may need to be added to the Final Science Report that addresses what type of connections should be evaluated and the methods by which these connections can be measured . . . I concur with an approach that is more quantitative.”); *id.* at 90-91 (comments of Dr. Mark Murphy) (“if [the proposed rule] is to have any defensible basis in science,” “[t]he significance of the connection must be defined by the likelihood of a measureable effect . . .”); *id.* at 101 (comments of Dr. Duncan Patten) (“[T]here is little or no explanation (science or legal) of what ‘significant effect’ means.”).

⁷⁹ *See* GEI Report, Exhibit 6 at 2 (noting that the Agencies have clearly defined “significance” of effect or consequence in both the Ecological Risk Assessment (ERA) process and with development of water quality criteria).

⁸⁰ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 93 (comments of Dr. Mark Murphy).

⁸¹ SAB Panel Review of Connectivity Report, Exhibit 5 at 15.

⁸² GEI Report, Exhibit 6 at 2.

⁸³ U.S. EPA Science Advisory Board Quality Review Teleconference (Sept. 26, 2014) (Statements of Dr. Michael Dourson).

The SAB Panel has advised that the significant nexus analysis should be based on scientific criteria and has called for the agencies to provide metrics to quantify significance of connections.⁸⁴ For all of these reasons, we urge the agencies to do the same, providing notice and an opportunity for the public to comment on any such metrics.

J. The Proposed Rule Asserts Categorical Jurisdiction Without Legal or Scientific Support and Arbitrarily Shifts the Burden of Proof from Agencies to the Public.

As discussed above, the proposed rule and the Connectivity Report both recognize that connectivity occurs on a gradient, but the proposed rule gives no consideration for where on that continuum the threshold for significant nexus lies.⁸⁵ Instead, without scientific support or legal justification, the proposed rule finds that *all* “tributaries” and *all* “adjacent waters” have a significant nexus to jurisdictional waters and, therefore, are *per se* jurisdictional.⁸⁶

The agencies lack scientific support for their categorical assertions of jurisdiction over all waters that meet their definition of “tributary” or “adjacent water.” The Connectivity Report and the proposed rule’s categories of jurisdiction are framed in terms of a binary approach (connected/jurisdictional versus not connected/non-jurisdictional), without consideration of “variation in the frequency, duration, magnitude, predictability, and consequences of connections.”⁸⁷ The regulation of these categories of jurisdiction *by rule* violates the gradient principle emphasized by the SAB Panel. As noted by Dr. Mark Murphy, the inclusion by rule of all tributaries and adjacent waters “is not scientifically justified by the published literature, the Connectivity report or the SAB review.”⁸⁸ Dr. Michael Josselyn agreed, pointing out that “if the science demonstrates a gradient in ecological function,” there would be situations in which significant nexus cannot be assumed.⁸⁹ Similarly, the GEI Report explains, “all tributaries and adjacent waters exist on a gradient of connectivity, and the science has not identified the point on that gradient (i.e. the strength of connectivity) where the significant nexus falls.”⁹⁰ Thus, the GEI Report concludes, “the existing scientific literature and analyses presented by EPA do not support these categorical jurisdictional determinations.”⁹¹ Nor is this approach supported by *Rapanos* or other existing judicial precedent.

Moreover, the proposed rule’s categorical assertions of jurisdiction shift the burden of proof for permit decisions and jurisdictional determinations. Under current practice, the agencies

⁸⁴ See, e.g., SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 6-7 (comments of Dr. Genevieve Ali) (noting that there should be a “scientific definition of ‘significant nexus’” to provide “a more transparent determination process”).

⁸⁵ See GEI Report, Exhibit 6 at 3.

⁸⁶ 79 Fed. Reg. at 22,201, 22,207.

⁸⁷ See SAB Panel Review of Connectivity Report, Exhibit 5 at 2.

⁸⁸ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 95 (comments of Dr. Mark Murphy).

⁸⁹ *Id.* at 44.

⁹⁰ GEI Report, Exhibit 6 at 3.

⁹¹ *Id.*

must “document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus,” including the physical indicators of flow and information regarding the functions of the tributary and any adjacent wetlands.⁹² The agencies must “explain their basis” for finding a significant nexus.⁹³ But, under the proposed rule with its categories of *per se* jurisdictional waters, the agencies do not have to make this showing. The proposed rule effectively shifts the burden of the proof to the public to prove that the water or feature at issue *does not* meet the proposed rule’s broad “tributary” or “adjacent water” definitions. For example, a landowner who believes a ditch on his property is not a jurisdictional tributary will have to try to prove to the agencies that the ditch qualifies for one of the narrow ditch exemptions. He or she will have to show, through “[h]istorical evidence, such as photographs, prior delineations, or topographic maps,” that his or her ditch was excavated wholly in uplands *for its entire length*, drains only uplands, and has less than perennial flow, or that the ditch does not contribute flow to a jurisdictional water. *See* 79 Fed. Reg. at 22,203. Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. The agencies do not acknowledge the burden this imposes on applicants. Indeed, the agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public.

K. The Agencies Must Address the Proposed Rule’s Numerous Legal Infirmities.

In sum, as demonstrated throughout this section, there are numerous legal concerns with the proposed rule and the agencies’ failure to comply with the applicable constitutional, statutory, and judicial constraints. We recommend that the agencies withdraw the proposed rule, revise the rule in light of these important concerns and in discussion with States and the regulated community, and re-issue a revised proposed rule more in line with the Act and judicial precedent.

III. The Proposed Rule’s Categories and Definitions Are Ambiguous and Lack Scientific Justification.

Beyond the many legal infirmities addressed above, the proposed rule’s categories of “waters of the United States” and associated definitions are overbroad, ambiguous, and not supported by the science. Contrary to the agencies’ assertions, the proposed rule will lead to more confusion for regulators and the regulated community, and by no means establish the certainty or predictability the agencies claim. Rather, the rule is deliberately left vague and would still allow sweeping and subjective jurisdictional determinations and the continuation of the case-by-case analysis.⁹⁴ For example, even with ditches which are jurisdictional *by rule*, the agencies will have to do a case-by-case examination of each ditch feature to determine whether it qualifies for one of the two ditch exemptions. Case-by-case analysis of minor, insignificant channels and wetlands is what takes so long under the current rule and agency practice under the

⁹² 2008 *Rapanos* Guidance, at 11.

⁹³ *Id.*

⁹⁴ *See Rapanos*, 547 U.S. at 727 (“The Corps’ enforcement practices vary somewhat from district to district because ‘the definitions used to make jurisdictional determinations’ are deliberately left ‘vague.’”) (citing GAO Report 04-297 at 26).

2008 *Rapanos* Guidance, and this appears likely to continue and become worse under the proposed rule. If the agencies truly want to create consistency and a reasonable final rule, they must revise these definitions, meet with stakeholders to understand their concerns, gather further scientific evidence, and provide notice and an opportunity for public comment on a more reasonable replacement proposed rule.

A. 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) TNWs 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.

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

As we have noted in the past,⁹⁵ 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.⁹⁶ 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.⁹⁷ Similarly, in 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

⁹⁵ WAC Comments on 2011 Draft Guidance, Exhibit 1 at 25-29.

⁹⁶ 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.

⁹⁷ Industry groups challenged the Santa Cruz determination, but the district court found that the challengers 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).

months, a TNW.⁹⁸ 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.⁹⁹

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.

2. 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,¹⁰⁰ the proposed rule accords interstate waters the same status as TNWs, allowing for features to be jurisdictional based on their relationship to

⁹⁸ 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/LA-river/LASpecialCaseLetterandEvaluation.pdf>.

⁹⁹ *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).

¹⁰⁰ 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 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.

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”?
- 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?
- 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.

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,¹⁰¹ 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.

¹⁰¹ WAC Comments on 2011 Draft Guidance, Exhibit 1 at 35-36.

3. 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 legal¹⁰² or scientific¹⁰³ support, the proposed rule allows for 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?

¹⁰² 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 Env’tl. Prot.*, 547 U.S. 370, 379 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.).

¹⁰³ 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.

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

B. The Proposed Rule’s Treatment of Tributaries Is Not Supported by Science and Will Result in Confusion in the Field.

One of the most problematic aspects of the proposed rule is how the agencies propose to regulate tributaries. As we have noted in previous comments, the regulation of “tributaries” has caused longstanding problems.¹⁰⁴ The proposed rule categorically determines that tributaries, regardless of size or significance, have a significant nexus to TNWs, interstate waters, and the territorial seas. 79 Fed. Reg. at 22,201. Thus, any water that meets the rule’s broad definition of “tributary” will be a jurisdictional “water of the United States.” *Id.* And waters and wetlands adjacent to tributaries will be automatically jurisdictional. *Id.* at 22,263. As explained in the Appendix to these comments, the proposed rule’s categorical regulation of all channelized features with an ordinary high water mark (“OHWM”) and flow is contrary to the limits of CWA jurisdiction recognized by the plurality and Justice Kennedy in *Rapanos*. In addition to these legal concerns, the proposed treatment of tributaries is overbroad and would extend jurisdiction to many features that the agencies have not previously regulated. Equally troubling, the proposed definition of “tributary” is vague and confusing, and will likely lead to inconsistent application in the field.

1. The definition of “tributary,” which sweeps in any feature with a channel and flow (including ditches and ephemeral drainages), is unsupported.

CWA regulations have never before included a definition for “tributary.” With the proposed rule’s “tributary” definition, the agencies vastly expand the scope of features that are currently regulated as tributaries, extending jurisdiction to features like ephemeral drainages and stormwater conveyances that have not been and should not be jurisdictional. The proposed rule’s treatment of tributaries is overbroad and opens the door for EPA and the Corps to usurp authority over waters and features previously left to States and local authorities to regulate.

The proposed rule defines “tributary” to include all features with a bed, bank, and OHWM that contribute flow, directly or indirectly, to a TNW, interstate water, territorial sea, or impoundment. 79 Fed. Reg. at 22,263. This includes ephemeral, intermittent, or perennial flow. *Id.* at 22,202. In addition, even without a bed, banks, and OHWM, wetlands, lakes, and ponds

¹⁰⁴ See WAC Comments on 2011 Draft Rule, Exhibit 1 at 61-62; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 73-75; FEED Comments on 2003 ANPRM, Exhibit 3 at 20-21.

can be tributaries if they contribute flow, directly or indirectly, to a TNW, interstate water, or territorial sea. *Id.* at 22,263. Under the proposed definition, a tributary is not rendered non-jurisdictional by manmade breaks (e.g., bridges, culverts, pipes, or dams) or natural breaks (e.g., debris piles, boulder fields) of *any length* so long as a bed, banks, and OHWM can be identified upstream of the break. *Id.* The proposed rule, for the first time, calls out ditches, explicitly stating that “rivers, streams, lakes, ponds, impoundments, canals, and ditches” are tributaries. *Id.*

This definition allows for regulation of ephemeral drainages, ditches, and conveyances, including stormwater conveyances, that are not currently treated as “waters of the United States.” The agencies’ determination that these features, many of which may flow for only a few hours or days following a rain event, categorically have a significant nexus is not supported by science. As explained in the GEI Report, “all tributaries . . . exist on a gradient of connectivity, and the science has not identified the point on that gradient (i.e., the strength of connectivity) where the significant nexus falls.”¹⁰⁵ The studies cited by the agencies “largely fail to assess the significance of connectivity,” and therefore “the existing scientific literature and analyses presented by EPA do not support these categorical jurisdictional determinations.” *Id.*

Bed, banks, and OHWM can be seen even in features without ordinary flow. Particularly in the desert and semi-arid regions of the United States, field indicators of an OHWM can develop very easily. Naturally sparse vegetation and erodible soils of the deserts combined with monsoon storms results in a significant number of small channels (often only a few feet in width) yet with a defined bed and bank. Many of these features would likely not develop in humid regions of the U.S. and would be representative of unregulated sheet flow or upland-vegetated swales in humid regions. Therefore, the arid States are unfairly burdened by the OHWM concept, compared to Eastern and humid states. Crossing the threshold from a non-jurisdictional erosion feature to an albeit small channel with an OHWM in the desert occurs easily and is a significant source of jurisdictional uncertainty. Many of these exceedingly small channels would now become *per se* jurisdictional tributaries, even with discontinuous surface connections to another water and a speculative nexus to traditional navigable waters, interstate waters, territorial seas, and/or impoundments.

Ephemeral drainages, for example, should not be *per se* jurisdictional. Although they may exhibit a bed, bank, and OHWM, ephemeral drainages only flow in response to precipitation events, which in some parts of the country only occur occasionally during a portion of the wet season. In particular, the arid West is covered with dry washes, arroyos, seasonal waterbodies, and ephemeral drainages. Rarely can a development project or industrial facility be constructed without affecting one or more of these ubiquitous features. Many stormwater conveyances are constructed to prevent degradation of downstream waters and should not become a source of regulatory burden for property owners. Ephemeral drainages were

¹⁰⁵ GEI Report, Exhibit 6 at 4.

historically outside CWA jurisdiction,¹⁰⁶ and for good reason – they flow only rarely, and even more rarely in quantities that could affect other more permanent or significant waterbodies.¹⁰⁷

Indeed, the science does not demonstrate that treating ephemeral features as waters of the United States will have benefits for downstream waters. As Dr. Michael Josselyn notes, “These low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the [connectivity] gradient. . . .”¹⁰⁸ These are not features with significant effects on downstream navigable waters. The State of Missouri, for instance, determined, based on a U.S. Geological Survey (“USGS”) analysis, that data did not exist to support a significant connection between ephemeral streams and aquatic uses.¹⁰⁹ Accordingly, the State of Missouri (with EPA approval) determined that it would not set water quality standards for certain ephemeral streams.¹¹⁰ Similarly, if ephemeral drainages are now jurisdictional “waters of the United States,” as proposed, Kansas estimates a more than four-fold increase from 32,000 miles of streams to 134,000 miles of streams that will be “waters of the United States” and therefore subject to water quality standards.¹¹¹ Neither the Connectivity Report nor Appendix A of the preamble demonstrates that ephemeral features have significant chemical, physical and biological effects on TNWs. Instead, the agencies have not assessed the significance of these connections and have ignored the caution from the SAB Panel that “temporal and spatial predictability of connectivity is especially important to quantify when assessing potential for downgradient effects in systems without permanent or continuous flowpaths.”¹¹² Dr. Michael Josselyn of the SAB Panel notes that “the science needs to be more substantial than currently demonstrated in the Draft Science Report” for the agencies to assert jurisdiction over ephemeral drainages.¹¹³ Indeed, these “very small drainages” “are not usually considered in the scientific studies that deal with headwater streams,” and the agencies should recognize the “uncertainty and limits of the scientific knowledge” with respect to these

¹⁰⁶ Even the 2008 *Rapanos* Guidance, which is still in effect, requires “continuous flow at least seasonally (e.g., typically three months).” *Rapanos* Guidance at 5-6 (emphasis added). The agencies have failed to explain this change.

¹⁰⁷ In fact, the reasons cited by the agencies for not regulating puddles are similarly applicable for ephemeral drainages. The preamble states that a puddle, which “forms . . . immediately after a rainstorm,” “cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground.” 79 Fed. Reg. at 22,218. Such is the case with ephemeral drainages.

¹⁰⁸ SAB Panel Member Comments, Exhibit 7 at 42 (comments of Dr. Michael Josselyn).

¹⁰⁹ See Missouri Department of Natural Resources, Regulatory Impact Report In Preparation for Proposing An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards at 4, 25 (Nov. 9, 2012), available at <http://www.dnr.mo.gov/env/wpp/docs/master-rir-wqs-112312.pdf> (Based on USGS study, “A Gap Analysis for Riverine Ecosystems of Missouri” (2005), Missouri decided to designate all perennial rivers and streams, intermittent streams with permanent pools, and those waters spatially represented by the 1:100,000 scale NHD, but not ephemeral waters.)

¹¹⁰ See Mo. Code Reg. Ann. tit. 10, § 20-7.031.

¹¹¹ See Presentation of Mike Tate and Tom Stiles, Kansas Department of Health and Environment, Waters of the U.S. (May 2, 2014) (attached hereto as Exhibit 9) at 11-12 (map of currently designated “Waters of the United States” in Kansas and map of additional “waters of the United States” in Kansas if ephemerals are added).

¹¹² SAB Panel Review of Connectivity Report, Exhibit 5 at 15.

¹¹³ SAB Panel Member Comments, Exhibit 7 at 42 (comments of Dr. Michael Josselyn).

features.¹¹⁴ As Dr. Mark Murphy of the SAB Panel observed, “inclusion by rule of all ephemeral tributaries, ‘regardless of size or flow duration,’ is not scientifically justified.”¹¹⁵ Furthermore, by asserting jurisdiction over such attenuated waters and potentially wet features, the agencies will misuse their limited resources and the limited resources of the States and regulated community. For all these reasons, ephemeral drainages should not be considered “waters of the United States.”

Moreover, the proposed rule’s treatment of wetlands, lakes, and ponds as tributaries (even if they lack bed, bank, and OHWM) expands the concept of tributary to essentially any type of water. The common understanding of a tributary is that it is a stream that feeds into a larger stream or river. Few would consider a pond, lake, or wetland to be a tributary in common parlance. Many members of the SAB Panel raised this issue in their review of the proposed rule.¹¹⁶ The agencies provide no support for treating non-stream waters, such as wetlands, lakes, and ponds, as tributaries. By including them in the (a)(5) tributary definition, the proposed rule allows for jurisdiction over “adjacent waters” in the same floodplain or riparian area or that have a subsurface connection with these wetlands, lakes, and ponds. Again, this stretches the “tributary” definition too far.

Finally, waters should not be considered tributaries regardless of manmade and natural breaks “*for any length*.” The GEI Report notes that “the science does not support the Agencies’ assertion that a significant nexus between a tributary and a traditional navigable water is not broken where the tributary flows through a culvert or other structure.”¹¹⁷ Moreover, the SAB Panel noted that the Connectivity Report lacked sufficient information on the influence of human alterations on connectivity and “generally exclude[d] the many studies that have been conducted in human-modified stream ecosystems.”¹¹⁸ Such breaks can sever connectivity, even when a channel can be identified upstream.¹¹⁹ Dr. Mark Murphy points out that such categorical jurisdiction regardless of breaks is not scientifically justified, stating that “OHWM indicators are discontinuous because *flow paths* are discontinuous and connectivity across them can drop to a near-zero significance.”¹²⁰ As the preamble notes, for example, dams cut off flow and store water for any number of reasons, such as flood control, irrigation water supply, and energy generation. *See* 79 Fed. Reg. at 22,235. It is quite a leap for the agencies to determine that the waters behind such dams categorically have significant physical, chemical, and biological effects on downstream traditional navigable waters.¹²¹ Allowing for *per se* jurisdiction regardless of

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 99 (comments of Dr. Mark Murphy).

¹¹⁶ *See id.* at 108 (comments of Dr. Amanda Rodewald).

¹¹⁷ GEI Report, Exhibit 6 at 6.

¹¹⁸ *See* SAB Panel Review of Connectivity Report, Exhibit 5 at 31; *see also id.* at 11.

¹¹⁹ *See* GEI Report, Exhibit 6 at 5-6.

¹²⁰ SAB Panel Comments on Proposed Rule, Exhibit 7 at 94 (comments of Dr. Mark Murphy).

¹²¹ The agencies argue that the water behind the dam would still maintain a hydrologic connection to downstream waters, but do not point to any other physical, chemical, or biological effects. 79 Fed. Reg. at 22,235. Such reasoning equates to the “any hydrological connection” justification for jurisdiction that the Supreme Court rejected in *Rapanos*.

breaks for any length expands the concept of “tributary” beyond what the science supports and would include intrastate waters that lack meaningful connection to traditional navigable waters.

Asserting categorical jurisdiction over all features covered by the proposed “tributary” definition would result in huge land areas, in all parts of the country, becoming subject to federal control. For an illustration of the reach of the proposed rule’s “tributary” definition, one need look no further than the EPA maps, released to the public by Rep. Lamar Smith and the U.S. House of Representatives Committee on Science, Space, and Technology, that rely on USGS data and appear to depict the scope of CWA jurisdiction.¹²² These maps indicate a total of approximately 8.1 million miles of perennial, intermittent, and ephemeral streams across the 50 States, all of which would be categorically regulated as tributaries under the proposed rule.¹²³ Unfortunately, these maps are just the tip of the iceberg, as they depict only a fraction of the land and waters that would be “tributaries” subject to federal CWA jurisdiction because they do not depict ditches and other manmade conveyances that would be categorically jurisdictional tributaries under the proposed rule. The agencies go too far in asserting such broad jurisdiction over tributaries without legal or scientific support.

2. The tributary definition does not provide clarity, but creates confusion.

In addition to its broad reach, the tributary definition is problematic because it relies on vague language and confusing concepts, including the following:

- **Ordinary high water mark:** OHWM is the lynchpin concept of the “tributary” definition. As recently as March 2014, Corps experts have said that the term OHWM is one of the most inconsistent and ambiguous terms in the CWA regulatory program.¹²⁴ Inconsistent interpretations of the OHWM concept have led to inconsistent field indicators and delineation practices. *Id.* The agencies do not propose a new definition of OHWM in this rulemaking, but rely on the existing, imprecise regulatory definition, which is problematic because many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration. These indicators (e.g., changes in character of the soil, destruction of native terrestrial

¹²² See EPA State and National Maps of Waters and Wetlands , available at <http://science.house.gov/epa-maps-state-2013#overlay-context>. (last visited Oct. 29, 2014)

¹²³ In a blog post, EPA states that these maps “do not show the scope of waters . . . proposed to be covered under EPA’s proposed rule” and “cannot be used to determine Clean Water Act jurisdiction – now or ever.” Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), <http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/>. But why not? The proposed rule indicates that the agencies intend to treat all perennial, intermittent, and ephemeral streams as *per se* jurisdictional (no case-specific analysis), and the preamble suggests that the agencies will identify tributaries using USGS maps and other appropriate information. 79 Fed. Reg. at 22,202. How, then, can the agencies claim that these maps do not show the scope of streams subject to federal CWA jurisdiction under the proposed rule?

¹²⁴ Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, *Development of National OHWM Delineation Technical Guidance* (Mar. 4, 2014), available at http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014_0760.pdf.

vegetation, presence of litter and debris)¹²⁵ can be observed in very small drainages and even in upland areas, especially in arid areas. The agencies' proposed definition of "tributary" cannot possibly provide clarity when its fundamental concept is a well-known source of confusion for the regulators themselves.

Moreover, the standard for determining OHWM is currently in flux. Separate from the proposed rulemaking, the agencies are redefining OHWM without the required public notice and comment. In August 2014, the Corps Engineer and Research Development Center (ERDC) released three new guidance documents regarding OHWM, which indicate that the agencies are developing a new OHWM standard.¹²⁶ These guidance documents essentially ignore the current regulatory definition at section 328.3(e) and the Corps' RGL 05-05¹²⁷ and create a new method for determining OHWM based on the delineation of an "active channel signature" through the use of three primary indicators – topographic break in slope, change in sediment characteristics, and change in vegetation characteristics. In effect, other physical indicators explicitly referenced in section 328.3(e) are superfluous under this new methodology. This is a clear change in regulatory practice and will have a substantial effect on how CWA jurisdiction is interpreted. What OHWM standard will be applied in the field? How will the Corps account for potential inconsistencies with section 328.3(e) and RGL 05-05? Why are the Corps' efforts to redefine OHWM, a key term in the agencies' proposed "waters of the United States" definition, not a part of this rulemaking?

- **Non-stream features as tributaries:** Inclusion of wetlands, lakes, and ponds as tributaries, even when they do not have a bed, bank, and OHWM, makes the "tributary" definition confusing and conflicts with the way in which tributaries are traditionally defined in scientific literature.¹²⁸ For example, under the proposed rule, "waters, including wetlands, that are adjacent to a wetland that meets the definition of tributary would be considered adjacent waters." 79 Fed. Reg. at 22,209. This collapses and confuses the "adjacent wetlands" and "tributary" categories of jurisdiction.

¹²⁵ Robert W. Lichvar and Shawn M. McColley, U.S. Army Corps of Engineers, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States*, at 20 (Aug. 2008), available at http://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/Ordinary_High_Watermark_Manual_Aug_2008.pdf

¹²⁶ Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States* (Aug. 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036027>; Matthew K. Mersel, et al., *Occurrence and Distribution of Ordinary High Water Mark (OHWM) Indicators in Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* (Aug. 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036025>; Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), *A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification* (Aug. 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036026>.

¹²⁷ See U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, *Ordinary High Water Mark Identification* (Dec. 7, 2005), available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf>.

¹²⁸ See Rodewald Memo, Exhibit 7 at 2.

- **Impoundments as tributaries:** The proposed rule’s inclusion of “impoundments” as tributaries is confusing, given that the proposed rule identifies impoundments as their own separate category of “waters of the United States” such that tributaries *to* impoundments are jurisdictional. When is an impoundment regulated under (a)(4)? When is it regulated under (a)(5)?
- **Tributaries versus erosional features:** The preamble acknowledges the difficulty in distinguishing between tributaries, which are categorically jurisdictional under the proposed rule, and erosional features, such as gullies, which are categorically excluded from jurisdiction. 79 Fed. Reg. at 22,218. Both erosional features and ephemeral drainages are characterized as small features that typically only carry water during precipitation events. How will regulators distinguish between ephemeral drainages and gullies or rills? Given the difficulty in distinguishing between these two types of features, the agencies’ assertion of jurisdiction over one feature but not the other is arbitrary and not supported by science.

3. The agencies must reassess their regulation of tributaries.

In light of these major problems with the proposed regulation of tributaries, the agencies should go back and reexamine the tributary definition. Instead of categorically regulating all channels, canals, and ditches, and then trying to exempt particular features such as stormwater conveyances, the agencies should identify a new standard for tributaries that is based on scientific evidence and covers only traditionally understood tributaries that either themselves qualify as TNWs or have the requisite relationship under Supreme Court limits with TNWs. Constructed stormwater, process water, and wastewater conveyances (swales, channels, ditches, and detention/retention ponds), excavated or otherwise constructed as part of site development projects, agricultural fields, or other sites, should not be treated as jurisdictional “waters of the United States.”

C. The Proposed Rule’s Regulation of Ditches as “Waters of the United States” Results in Expansive Jurisdiction and Infringes upon State and Local Authority.

The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the nation. Ditch systems are very complicated and varied throughout the United States. In outreach meetings during the comment period, the agencies have indicated that they are seeking to regulate natural streams that have been channelized.¹²⁹ If this is the case, the proposed rule should cover channelized or human-altered streams, not all “ditches.” The term “ditch” as drafted covers most all ditches, many more than those that replace natural streams.

¹²⁹ See Nancy Stoner blog entry, Exhibit 21, Setting the Record Straight on Waters of the U.S. (June 30, 2014), <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/> (“Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.”).

Most ditches have not historically been regulated as “waters of the United States” under the CWA.¹³⁰ As noted above, the proposed rule, for the first time, expressly includes “ditches” in the definition of “tributary,” meaning that ditches with a bed, bank, and OHWM that contribute flow will be categorically jurisdictional unless they meet one of two narrow exclusions. 79 Fed. Reg. at 22,262. This categorical regulation of ditches is an expansion from current practice and impinges on traditional State and local authority over water and land use. The proposed rule’s two narrow ditch exclusions are unclear and unlikely to provide meaningful relief. Ditches are regulated in other ways under the CWA (e.g., as point sources); they do not need to be regulated as “waters of the United States” for the agencies to ensure the protection of waters connected to ditches.

1. The proposed rule’s tributary definition is contrary to prior positions taken by the agencies and finds no support in science.

By identifying ditches as jurisdictional tributaries in the proposed rule, the agencies significantly increase the scope of jurisdictional “waters of the United States.” Historically, the agencies took the position that ditches were not “waters of the United States,” but they have gradually expanded their claims of jurisdiction over ditches without any change in the law. The Corps’ 1975 regulations stated explicitly that “[d]rainage and irrigation ditches have been excluded” from CWA jurisdiction. 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). The Corps’ 1977 regulations similarly disavowed jurisdiction over ditches. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (“[M]anmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition.”). Signaling that if ditches were meant to be regulated at all under the CWA, they were meant to be regulated as point sources and not “waters of the United States,” in the preamble to the 1977 regulations, the Corps emphasized,

[N]ontidal drainage and irrigation ditches that feed into navigable waters will not be considered “waters of the United States” under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402.

Id. at 37,127.¹³¹

Nonetheless, the agencies’ position on ditches has equivocated over time, beginning in the mid- to late-1980s, when the agencies began treating ditches as “waters of the United States” in the section 404 context on a case-by-case basis, using OHWM and the Migratory Bird Rule

¹³⁰ See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 69.

¹³¹ Through the 1980s and 1990s, the Corps maintained that manmade upland ditches were not jurisdictional. For example, in proposed rules in 1980, the Corps stated that “man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States.” 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980). In addition, in 1983, in proposed jurisdictional rules, the Corps stated, “Waters of the United States do not include the following manmade waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.” 48 Fed. Reg. 21,466, 21,474 (May 12, 1983).

tests.¹³² The preamble to the 1986 regulations, which adopted the broad Migratory Bird Rule, continued to maintain the exclusion for ditches (“We generally do not consider [drainage and irrigation ditches excavated on dry land] to be ‘Waters of the United States.’”), but included a new reservation of “case-by-case” regulatory authority to claim jurisdiction after all. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).¹³³ Likewise, EPA had also historically resisted regulating ditches as “waters of the United States,” and did not even discuss the possibility that ditches might be waters of the United States until 1988, when it included a similar reservation of “case-by-case” authority to regulate upland ditches as “waters of the United States” in the section 404 context.¹³⁴ Without any Congressional authorization, the agencies have thus recently and incrementally expanded their claims of jurisdiction without any change in the law. And the proposed rule goes even further.

The proposed definition of “tributary” expands the agencies’ previous claims of jurisdiction. This is the first time the agencies are categorically proposing to regulate ditches in the regulations for all CWA programs. In the past, the agencies have said that, for purposes of the section 404 program, *some* ditches could be regulated as “waters of the United States” *on a case-by-case basis*. 51 Fed. Reg. at 41,217. That is a far cry from categorically regulating essentially *all* ditches as “waters of the United States” under *all* CWA programs, unless they satisfy one of two very narrow exclusions. The preamble states that manmade and man-altered tributaries, such as ditches, “usually continue to have chemical, physical, and biological connections downstream . . . [b]ecause these tributaries are hydrologically connected to downstream waters.” 79 Fed. Reg. at 22,235. This is the equivalent of the “any hydrological connection” standard rejected by five Justices in *Rapanos*.

Moreover, the categorical significant nexus determination for ditches is not supported by science. The GEI Report explains that “no scientific literature is presented that suggests ditches themselves should be considered water bodies, nor that evaluates the effects that ditches have on the integrity of downstream waters.”¹³⁵ The SAB Panel also pointed out the lack of scientific support for such categorical regulation, noting, “Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included.”¹³⁶ With respect to ditches and other manmade features regulated as “tributaries” by the proposed rule, Dr. Michael Josselyn of the SAB Panel noted, “The Draft Science Report focused on research from natural systems and therefore does not provide sufficient information

¹³² See e.g., 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000) (In the 2000 NWP regulations, the Corps’ disavowal of jurisdiction shrank to “ditches constructed entirely in upland areas,” finding that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States.).

¹³³ See also U.S. Army Corps of Eng’rs, Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the CWA, Regulatory Guidance Letter No. 07-02 (July 4, 2007), <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-02.pdf> (confirming that, pursuant to Corps and EPA guidance, upland ditches are generally not subject to CWA jurisdiction).

¹³⁴ See 53 Fed. Reg. 20,764, 20,765 (June 6, 1988) (noting that the agencies “generally do not consider” non-tidal drainage and irrigation ditches excavated on dry land to be ‘waters of the United States,’” but EPA reserved the right on a case-by-case basis to determine that such features are jurisdictional).

¹³⁵ GEI Report, Exhibit 6 at 4.

¹³⁶ Rodewald Memo, Exhibit 7 at 7.

on which to discuss the role of these man-made features.”¹³⁷ As a result, the GEI Report concludes that “there is a disconnect between the science cited and the text of the proposed rule.”¹³⁸

Without scientific justification, the proposed rule regulates all ditches with a bed, bank, and OHWM that contribute flow to a TNW, interstate water, territorial sea, or impoundment. 79 Fed. Reg. at 22,262-63. Irrigation ditches, railroad right-of-way ditches, roadside ditches, MS4 ditches, and other stormwater conveyances could now be *per se* jurisdictional waters of the United States. Treating these features as “waters of the United States” for purposes of *all* CWA programs is a vast expansion of CWA jurisdiction. What’s more, even if ditches do not have bed, bank, and OHWM and therefore are not tributaries, the proposed rule would allow for them to be jurisdictional as “adjacent waters” or “other waters.”¹³⁹

2. The two exclusions for ditches do not provide clear, meaningful relief.

Contrary to the agencies’ statements about the proposed rule’s treatment of ditches, the two narrow exclusions for ditches are not clear and, in practice, they are not likely to exclude many ditches from jurisdiction. The proposed rule excludes ditches in two very specific situations: (1) ditches that are excavated wholly in uplands for their entire length, drain only uplands, and have less than perennial flow; and (2) ditches that do not contribute flow, either directly or indirectly, to a TNW, interstate water, territorial sea, or tributary. 79 Fed. Reg. at 22,203. The proposed ditch exclusions are much more limiting than the language the agencies rely on from the 1986 preamble, which excluded “non-tidal drainage and irrigation ditches excavated on dry land,” without limitation based on flow regime, whether the ditch drains only uplands, or whether the ditch contributes flow.¹⁴⁰

The ambiguous language of these exemptions leaves their implementation subject to broad agency discretion and subjectivity. The following key concepts affecting the scope and meaning of the exemptions are left undefined or unclear:

- **Ditch:** The agencies do not provide a definition of “ditch.” What features qualify as ditches? Any manmade or man-altered features with water in them? How is a ditch distinguished from an ephemeral drainage or a gully, rill, or swale?
- **Uplands:** To qualify for the first exemption, one must show that a ditch was *excavated wholly in uplands* for its entire length. The agencies have not provided a definition of “upland,” and various definitions of “upland” exist and have been used by the agencies throughout this rulemaking process.¹⁴¹ Is anything that does not qualify as a wetland

¹³⁷ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 43 (comments of Dr. Michael Josselyn).

¹³⁸ GEI Report, Exhibit 6 at 5.

¹³⁹ In outreach during the comment period, EPA indicated that if a ditch does not qualify as a “tributary,” it is not a “water of the United States.” There is nothing in the preamble or the language of the proposed rule, however, that prevents the agencies from treating ditches as “adjacent waters” or “other waters.”

¹⁴⁰ See 79 Fed. Reg. at 22,219 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

¹⁴¹ For example, the Connectivity Report defines “uplands” to mean: “(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is

considered an upland? What if there are wetlands nearby? Can floodplains and/or riparian areas be uplands?

- **For the entire length:** From the language of the proposed “tributary” definition, it appears that breaks in ditches do not segment them for purposes of analyzing whether they meet the upland ditch exclusion, but EPA has suggested otherwise in statements during their outreach.¹⁴² Could part of a ditch that crosses wetlands be jurisdictional while another part of the ditch excavated in uplands would be non-jurisdictional? What about a 100-mile ditch? If it crosses wetlands at any point, is the entire ditch jurisdictional, or only downstream of the wetland crossing?
- **Drains only uplands:** This is a new requirement. The preamble states, “Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect to . . . an (a)(1) through (a)(3) water.” 79 Fed. Reg. at 22,219. But if a ditch was constructed under earlier exemptions (which did not have the limit about draining only uplands), how did the party have fair notice that the status of that drained area would be relevant? What if a ditch was constructed in wetlands but now drains only uplands (i.e., the ditch drained the wetland)?
- **Less than perennial flow:** This is a new requirement. The preamble states that “perennial flow” means that “the flow in the ditch occurs year-round under normal circumstances.” 79 Fed. Reg. at 22,219. Does this mean water must actually flow year round? Or does a ditch with the *presence* of water year round have “perennial flow”? For many ditches, particularly those in coastal plain, interior lowland, and coastal range areas of the United States where topography is flat, drainage may be poor resulting in presence of water, but not necessarily flow, in low-lying portions of roadside, railroad right-of-way, and stormwater management ditches. If ditches where water is merely present year round do not qualify as having “less than perennial flow,” large numbers of stormwater management ditches, roadside ditches, railroad right-of-way ditches, and MS4s would not qualify for the upland ditch exclusion and would therefore be jurisdictional.

How would “perennial flow” be evaluated in practice? Even long irrigation canals that only divert water seasonally, and thus could be considered intermittent, may intercept

not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition.” Connectivity Report at A-20-21. Yet, on stakeholder calls, the agencies have said uplands are anything that are not waters of the U.S. In EPA’s Watershed Protection Glossary, an upland is “an area of the terrestrial environment that does not have interaction with surface waters.” See http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=sDUeRbIYFjmmV3Wacx9opy1cw_6bZR0Hp44w22czO3EyxZb9yVGB!-325588870. And, in a September 2014 Q&A document, the agencies stated, “Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.” EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (“Sept. Q&A document”).

¹⁴² See, e.g. House Committee on Science, Space, and Technology, Navigating the Clean Water Act: Is Water Wet? (July 9, 2014), <http://science.house.gov/hearing/full-committee-hearing-navigating-clean-water-act-water-wet>.

groundwater at some point along their length. This could result in a potentially perennial trickle of water even outside the active water diversion season. This situation could occur even if a long canal does not intercept any wetlands along its route.

- **Time of excavation/showing required:** What must a landowner show to demonstrate that their ditches were excavated in uplands? What about a ditch that was constructed in wetlands prior to the CWA's enactment? The preamble mentions the use of historical evidence, 79 Fed. Reg. at 22,203, but historical evidence of what? For example, for a farm ditch constructed 40 years ago, must the farmer show that, when the ditch was excavated 40 years ago, the area that was excavated would not be considered wetlands under the agencies' current wetland delineation standards? Or is the required showing that the excavated area would not have been considered wetlands under the wetlands standards in place at the time? And how can the prior conditions of water and land in the area be determined?

Aside from the ambiguous language, each of these exclusions is very narrow, and it is likely that very few ditches could actually meet these standards. Those that could would likely require a costly and lengthy study to establish they are exempt. With these exemptions, the burden is placed squarely on the applicant to prove that their ditch is not a water of the United States, which often would require analysis and data collection well beyond the applicant's property. For the upland ditch exemption, the applicant would have to show through historical data (e.g., photographs or topographic maps) that the ditch was excavated wholly in uplands for its entire length and prove that the ditch drains only uplands. *Id.* But most ditches carry flow, contain standing water, and drain areas that have water because the purpose of ditches is to convey water away from a saturated or ponded area (e.g., field or roadway). Such a requirement would mean that a highway drainage ditch, even though constructed mostly through uplands, but perhaps impacting wetlands or streams along 1-2 percent of its length, would then be considered a "water of the United States." Now, if ephemeral drains are also waters of the United States as proposed, one would be hard pressed to find a ditch that at no point, along its entire reach, includes waters of the United States.

Likewise, it will be nearly impossible to find a ditch that does not contribute flow (directly or indirectly) to a TNW, interstate water, territorial sea, or impoundment. Ditches, after all, are designed to control and manage flow. Indeed, water rights in the western United States often require that irrigation ditches/canals return specified amounts of water to streams after irrigation use.

Indeed, these exclusions are so narrow it is hard to believe that they are real. Can the agencies point to a ditch that is *not* a water of the United States under the proposed rule? If so, the agencies should provide examples of ditches that would qualify for the exclusions. Otherwise, we anticipate that the regulators will assume that all ditches are jurisdictional.

Hundreds of thousands of miles of rail, road, MS4, and other ditches that currently are not regulated will become waters of the United States under the proposed rule. The result will be litigation; a substantial number of new and revised/modified NPDES and section 404 permits; the need to revise and modify Storm Water Pollution Prevention Plans ("SWPPPs") at substantial costs, expense, and uncertainty; extensive costs to mitigate any time any of the

nation's hundreds of thousands of miles of road, railway, and other drainage ditches are crossed or require relocation, expansion, or in some cases maintenance; and increased spill and emergency response expense and reporting. Such regulation will have no environmental benefit where such ditches receive spills due to roadway accidents because such spills already must be contained to avoid discharges to TNWs. But the proposed major increase in federal regulation will also substantially increase the associated regulatory burdens on both the regulated community and governmental agencies, in the form of increased study and permit requirements under the CWA and other federal statutes (e.g., when historic resource, protected species, and other consultation is required) for the simple prospect of crossing, moving, or constructing any of the nation's hundreds of thousands of miles of ditches.

3. Ditches are common features, and treating them all as jurisdictional would be problematic.

Rail, road, agriculture, irrigation, and MS4 ditches are prevalent throughout the United States. Treating all of these features as jurisdictional would drastically change the regulatory landscape. As an example, looking at rails alone, the national rail system consists of hundreds of thousands of miles of ditches spanning the continent. Ditches have been an integral part of rail construction since the inception of the rail industry in the 1800s. Ditches are critical to rail safety to avoid washouts, undermining of rail road bed material, and potential sloughing, shifting, uneven trackage. Rail drainage is required under federal regulations, and is subject to detailed industry specifications. 49 C.F.R. Part 213. Rail ditches are typically very flat, with a slope and grade of nearly 0.0 percent and ranging to a maximum (rarely applied) of 2 percent for most railroads. Rail ditches are also typically very wide, 10 feet is a standard width, and are often designed to handle storms much greater than standard 25-year storm common for municipal codes. As a result of these features, rail ditches very often contain standing water which may not flow, and often contain vegetation which can include facultative or obligate species (subject to maintenance schedule). Vegetation actually provides a benefit in many circumstances, reducing potential for scour and slowing the drainage or movement of water. These features exist regardless of ditch location – “upland” or other area. Finally, rail ditches are intended to drain rail lines, and often require crossings of streams and wetlands. This is well-recognized by the agencies, which authorize such impacts under nationwide permit (“NWP”) 14.

These features which are integral to safe rail design also result in a very high likelihood that rail ditches would be considered jurisdictional under the proposed rule because they would not qualify for the upland ditch exclusion. The flat slope and large ten foot width result in very slow flows except during substantial rain events. Due to stormwater encroachment from increases in adjacent development and impervious surfaces, especially in heavily populated counties and cities, many rail ditches are receiving much greater amounts of water than originally designed. All would have a bed, bank, and OHWM as specified in the proposed rule. Many would have “presence” of water – albeit exclusively or primarily stormwater drainage. Further, the characteristics of these ditches are such that wetland vegetation can be present (obligate, facultative, and often exotics, such as exotic phragmites or obligate cattail). Soil that is collected and deposited in these large ditches emanates from other areas that may include hydric soil types, and due to the flat nature of the ditches, hydrology indicators are often present.

Applying the proposed rule to rail ditches could very well result – erroneously and in contravention of the CWA – in a determination that rail ditches as a whole or segments of rail ditches are waters of the United States. In addition to being incorrect and an impermissible expansion of the CWA, identifying rail ditches as waters of the United States would restrict railroads’ ability to maintain ditches for safe operations, adjust ditch capacity or flow to manage the previously referenced stormwater encroachments, and result in extensive permitting delay and expense should a ditch be required to be removed or significantly altered. Thresholds for NWP allow impacts to only 300 linear feet of tributary in most cases, which means that any project where more than 300 linear feet of rail ditch were altered would require an individual permit under section 404 of the CWA. Three hundred linear feet of ditch is a very small amount, particularly compared to the hundreds of thousands of miles of rail ditch in the United States. Because rail ditches have no value in terms of chemical, physical, and biological integrity of the nation’s waters, there would be no commensurate environmental benefit. This would result in permitting for permitting’s sake. Increased section 404 permitting requirements for rail ditches would impose extensive expense and delay for the regulated entity as well as for consulting agencies for a simple ditch alteration project.

Individual section 404 permit requirements for rail ditches would result in mitigation requirements that could completely halt ditch alteration. The 2008 mitigation rule requires mitigation for even minor alterations or changes to waters of the United States. 73 Fed. Reg. 19,593 (Apr. 10, 2008). The compensatory mitigation regulations as applied to the proposed rule would treat a rail drainage ditch as a “stream” and require stream mitigation – difficult and in many cases impossible to obtain in many parts of the country. This issue alone could bring to a halt ditch alterations required for safety, optimization of transportation, and increases in passenger and freight rail offerings. Many other industries have similar concerns about the burdens they would face if ditches are *per se* jurisdictional “waters of the United States.”

4. Regulating ditches as “waters of the United States” oversteps the agencies’ CWA authority and infringes upon State and local agencies’ authorities.

With the proposed rule’s treatment of ditches, the federal government encroaches on purely local matters and local decisionmaking authority in contravention of Congress’s clear intent that local governments regulate local land use.¹⁴³ Ditches are usually constructed, operated, maintained, and managed at the local level for various beneficial public purposes, including transportation, flood control, and agricultural purposes. State and local regulations require that such ditches be maintained by local authorities, such as water management districts, flood control entities, and drain and road commissions, to assure protection of natural resources and prevent water pollution into such conveyances.¹⁴⁴ Local governments have the most

¹⁴³ When it enacted the CWA, Congress sought to “recognize, preserve, and protect” the States’ primary authority and responsibility over land and water resources. 33 U.S.C. § 1251(b). Accordingly, the Supreme Court recognized in *SWANCC* that the CWA should not be interpreted so as to “result in a significant impingement” on these traditional State powers. *SWANCC*, 231 U.S. at 174; *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“regulation of land use [is] a function traditionally performed by local governments”).

¹⁴⁴ In some States, there is an existing regulatory program to regulate ditches. If, in addition to States and local drain and road commissions, EPA and the Corps have jurisdiction over activities in ditches, there would be three tiers of regulatory permitting.

immediate knowledge of the geographic, hydrologic, and geomorphic conditions of the waterbodies within their jurisdictions, and should be given the right to decide how best to regulate their local land and water resources. Because State and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit to be gained by treating the same drainage systems as jurisdictional “waters of the United States,” and in many cases it will lead to duplicative regulation. Moreover, defining ditches as “waters of the United States” redirects scarce federal and State funding away from more environmentally sensitive and important resources. By asserting jurisdiction by rule over inherently local conveyances such as ditches, the agencies impermissibly intrude on local land use.

5. Ditches and conveyances should not be regulated as “waters of the United States.”

Millions of miles of ditches are encountered, built, and relied on every day by Coalition members, as part of the construction, operation, and maintenance of homes, natural gas transmission and distribution pipelines, electric generation facilities, electric transmission and distribution lines, transportation-related infrastructure (including roads and railways), agricultural irrigation, flood control, rural drains and roads, and mines located across the country. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Use of drainage ditches offers a way to remove excess water from agricultural fields, roads, and vital urban spaces, without the erosion rates and pollution transport that result from direct surface runoff. Modern drainage engineering criteria increasingly call for slowing drainage and runoff to reduce erosive force and potential collection in flood areas. As a result, there is a high likelihood that the “presence” of water in a ditch would render it jurisdictional.

The proposed rule does not need to call such conveyances “waters of the United States” to protect these features and connected waters against the discharge of pollutants. EPA has developed an extensive system of regulation of stormwater ensuring that such conveyances themselves do not impact waters of the United States. *See, e.g.*, 40 C.F.R. § 122.26 (industrial stormwater program, including construction NPDES permitting); § 122.34 (MS4 program).

By treating ditches as “waters of the United States” under the proposed rule, ditches that are necessary to support the nation’s infrastructure, agriculture, construction, transportation, energy, and mining activities (among others), and to prevent flooding, will now be subject to additional costly and onerous CWA requirements, as well as enforcement by third parties under the CWA section 505 citizen suit provision.¹⁴⁵ The CWA stormwater program *requires* the construction of ditches/stormwater retention ponds to manage stormwater.¹⁴⁶ If the ditches and

¹⁴⁵ With this expansion, the proposed rule directly conflicts with this Administration’s stated commitment to expediting expansion and modernization of infrastructure. *See* Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

¹⁴⁶ *See generally* Comments of the Coalition of Real Estate Associations on the proposed rule, “Definition of ‘Waters of the United States’ Under the Clean Water Act,” Docket ID No. EPA-HQ-OW-2011-0880 (August 8,

ponds created to comply with stormwater best management practices (“BMPs”) are treated as waters of the United States, this will result in a never-ending cycle of regulation. Just to imagine the vast majority of agricultural, roadside, and railroad right-of-way ditches that dot the U.S. landscape being required to meet water quality standards (“WQS”) and resultant total maximum daily loads (“TMDLs”) reveals how out of touch the proposed rule is with law or reality.

Similarly, Federal Emergency Management Agency (“FEMA”) flood control provisions require stormwater management and drainage and flood control. Federal safety requirements for roads and railways require stormwater management and drainage. *See, e.g.*, 40 C.F.R. Part 213. Municipal and county codes also require stormwater management and drainage, in many circumstances encouraged by EPA’s MS4 guidance. The Corps manages, administers, and promotes vast national flood control and drainage of stormwater, using ditches which would qualify as waters of the United States under the proposed rule, directly and in partnership with State and local governments.

Rather than labeling ditches as “waters of the United States,” the agencies should rely on existing 402 permit requirements for discharges to navigable waters and to or by stormwater management systems. Moreover, the agencies should clarify that point sources, such as MS4s, that are covered by NPDES permits are not waters of the United States. Indeed, the proposed rule’s “strong intent to provide as much certainty to the regulated public and the regulators” requires clarification on the jurisdictional status of MS4s. Moreover, while EPA’s recent “Ditch the Myth” campaign states that the proposed rule “cuts through the red tape” to offer greater certainty and consistency on “waters of the United States” determinations – with an emphasis on ditches – nowhere does EPA specifically address ditches that are components in permitted MS4s. Respectfully, this is a glaring omission in the agencies’ otherwise exhaustive proposed treatment of “waters of the United States” matters. The Coalition recommends that the agencies make clear that non-tidal ditches, including roadside, agricultural, industry-site, railroad right-of-way, and other stormwater, process water, and wastewater ditches, are not jurisdictional waters of the United States.

D. The Proposed Rule’s Treatment of “Adjacent Waters” Impermissibly Adds a New Category of Jurisdictional Waters and Is Riddled with Ambiguities.

With the proposed rule’s regulation of adjacent wetlands and non-wetland waters, the agencies extend jurisdiction to an entirely new category of waters. The broad terminology used to define “adjacent” allows for sweeping jurisdiction over every wet feature in a floodplain or riparian area, or that has a hydrologic connection to a jurisdictional water. This proposed category of “waters of the United States” goes too far and would result in regulation of non-wetland features with insubstantial connections to TNWs. The breadth of the category is compounded by numerous ambiguities in the proposed terminology that, in practice, will result in confusion and unpredictability.

2014) (addressing the impact of any revised definition of “waters of the United States” on MS4s and the component conveyances within these systems that channel and discharge stormwater runoff).

1. The proposed rule’s categorical regulation of adjacent waters is not supported by science or case law.

The proposed rule’s regulation of (a)(6) “adjacent waters” gives the agencies significant discretion to assert broad jurisdiction over waters and features that were previously considered to be “isolated” and outside the scope of CWA jurisdiction. The proposed rule asserts jurisdiction over “[a]ll waters, including wetlands, adjacent to” a TNW, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263. There is nothing in the proposed rule that limits or explains what can be considered “waters” that can be adjacent. In a footnote, the agencies state that the agencies use the term “waters” “in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems,” and the agencies also note that “waters” “do[es] not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.” *Id.* at 22,191 n.3. Again, this broad language indicates that the agencies intend to treat essentially every water feature as a “water” that could be jurisdictional by virtue of its adjacency. As discussed in the Appendix to these comments, the proposed rule’s inclusion of adjacent non-wetland waters is an impermissible expansion of agency jurisdiction that is not in line with case law or the agencies’ previous practices. Contrary to the agencies’ statements that they are not regulating any new categories of waters,¹⁴⁷ this is a clear change from the current regulations and even from the agencies’ 2008 *Rapanos* Guidance.

The proposed rule does not purport to change the definition of “adjacent,” which means “bordering, contiguous, or neighboring.” 79 Fed. Reg. at 22,263. However, with its new definition of “neighboring,” the proposed rule in fact vastly broadens the concept of adjacency. The proposed rule now expands jurisdiction to adjacent non-wetland “waters” without scientific, statutory, or judicial support. Under the proposed rule, “neighboring” waters include waters located within the floodplain or riparian area of a TNW, interstate water, territorial sea, or impoundment. *Id.* If an area is not within a floodplain or riparian area, it can still be a jurisdictional adjacent water if it has a “shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” *Id.* As EPA is aware due to work under other environmental statutes, subsurface hydrology is complex and can result in extensive areas being classified as influenced or connected. The proposed rule determines that all waters within the floodplain or riparian area of a jurisdictional water or that have a shallow subsurface hydrological connection to a jurisdictional water categorically have a significant nexus and will be jurisdictional by rule. *Id.* at 22,207. The science does not support such a categorical determination. As the GEI Report explains, “adjacent waters exist on a gradient of connectivity, and the science has not identified the point on that gradient (i.e., the strength of connectivity) where the significant nexus falls.”¹⁴⁸ Thus, the agencies fail to provide scientific analysis or references that support the proposed *per se* regulation of all adjacent waters.

¹⁴⁷ See, e.g., *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule*, Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure, Panel 1, 113th Cong. 19-20 (June 11, 2014) (statements of Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, and Deputy Administrator of the U.S. EPA, Bob Perciasepe).

¹⁴⁸ GEI Report, Exhibit 6 at 4.

Treating all “waters, including wetlands” as jurisdictional whenever they are located in a floodplain or riparian area will sweep in many additional features that have only remote and insubstantial connections with TNWs. Nearly every city and county in the U.S. has these areas, which may include ponds and lakes with liners installed to isolate them from groundwater, thus severing potential subsurface connection. Waters that used to be considered “isolated” and therefore beyond the scope of CWA jurisdiction will now be “adjacent” and thus categorically jurisdictional. The proposed rule does not provide limits for the floodplain and riparian areas, but leaves determination of the appropriate distance or floodplain interval to the agencies’ “best professional judgment.” *Id.* at 22,209. As noted by Dr. Emily Bernhardt of the SAB Panel, “There are considerable differences in the scope of protection depending upon whether regulators consider a 1 year or 500 year flood return interval to delineate a floodplain.”¹⁴⁹ There is no limiting principle to this theory of jurisdiction. The proposed rule gives the agencies broad discretion to use whatever flood interval they choose, including the most commonly defined and mapped floodplain, the 100-year floodplain.¹⁵⁰ As we have previously noted, this goes well beyond what is generally understood by the term “adjacent.”¹⁵¹ Under a 100-year floodplain standard, a water or wetland situated miles away from a TNW, which has a hydrologic connection with the river or stream once every 100 years, could be considered “adjacent.” Exhibit 10, for example, depicts the 100-year FEMA floodplain for Miami-Dade County. Any wet feature within this floodplain area could now be deemed jurisdictional as “adjacent” to the Atlantic Ocean, including those waters that are miles away.¹⁵² Such a water or wetland may have scarcely any nexus with the TNW, much less a “significant nexus.” Similar problems would occur with a 10-year, 25-year, or 50-year floodplain because in each instance, the area would be expected to be flooded by the subject stream very infrequently and would be far too remote in time to support a “significant nexus” determination or jurisdiction by rule.¹⁵³

If the agencies cannot assert jurisdiction based on the broad floodplain and riparian area concepts, they will assert jurisdiction if waters have a “shallow subsurface hydrologic connection or confined subsurface hydrologic connection” to a TNW, interstate water, territorial sea,

¹⁴⁹ SAB Panel Comments on Proposed Rule, Exhibit 7 at 19.

¹⁵⁰ The proposed rule states, “It should be noted that ‘floodplain’ as defined in today’s proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule.” 79 Fed. Reg. at 22,236.

¹⁵¹ WAC Comments on 2011 Draft Guidance, Exhibit 1 at 85.

¹⁵² Exhibit 10, FEMA 100-Year Flood Zone for Miami-Dade County, Florida. *See also* Exhibit 11, Pinellas County, Florida 100 Year Floodplain; Exhibit 12, Callaway County, Missouri FEMA Floodplain Map; Exhibit 13, Phoenix, Arizona Floodplain; Exhibit 14, Northern California Floodplain. All wet features within these expansive floodplain areas could now be categorically jurisdictional as “adjacent waters.”

¹⁵³ Moreover, making a jurisdictional determination on the basis of a more frequent flow event would result in additional costs for property owners since, unlike the 100-year floodplain, there are typically not publicly available maps of the 10-year through 50-year floods. Additionally, FEMA’s 100-year floodplain maps are often based on “approximate” studies, especially in rural/remote areas, and they are often in some state of revision due to ongoing land development projects in urban/suburban areas. Thus, the regulated community would likely incur additional costs spent verifying or updating FEMA’s maps should those become the jurisdictional basis used by one or more regulatory offices. These types of updates typically require the services of civil engineers and specific flow models.

impoundment, or tributary. 79 Fed. Reg. at 22,207. Again, the proposed rule does not provide any limit for these connections, but states that the agencies will use best professional judgment to determine if the waterbody at issue is within “reasonable proximity” of the jurisdictional water. *Id.* at 22,207-08. This will likely result in circumstances where landowners feel compelled to retain consulting geologists at significant cost to model potential groundwater flow paths as a tool in refuting an agency claim of jurisdiction based on a difference of opinion regarding shallow subsurface connections. A situation of dueling professional opinions would likely result, which runs contrary to the stated goal of simpler jurisdictional decisions. Categorically asserting jurisdiction over waters based on a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water is overbroad and amounts to the “any hydrological connection” standard rejected in *Rapanos*. Already, several groups have been drawing on this language in citizen suits to try to force the agencies to assert jurisdiction over isolated features with insubstantial connections to navigable waters based on these subsurface connections.¹⁵⁴ For example, a group recently argued that a sugar beet facility’s interior, on-site ponds are waters of the United States because the ponds “seep into the groundwater under the Facility,” and “[t]he groundwater underneath the Facility is hydrologically connected to the South Platte River,” a jurisdictional water of the United States.¹⁵⁵ This provision opens the door to essentially limitless jurisdiction under the guise of adjacency, even to constructed agricultural ponds.

Ponds within a floodplain or riparian area, or that have subsurface hydrological connections to jurisdictional waters, should not be *per se* jurisdictional. Neither the Connectivity Report nor Appendix A of the preamble provides scientific support for a finding that such features categorically have a “significant nexus” with navigable waters.¹⁵⁶ Allowing for such jurisdiction would have major impacts for countless industrial facilities that rely on internal industrial ponds for their operations. In addition, this provision could mean that recharge ponds that are part of water reclamation and reuse facilities are jurisdictional waters of the United States.¹⁵⁷ These isolated features fit squarely within the holdings of *SWANCC* and *Baykeeper*, and are beyond the scope of CWA regulation.

2. The proposed “adjacent waters” category and its associated definitions will create confusion and will not provide clarity.

The proposed expansive “adjacent waters” category and its vague definitions are sure to cause confusion and inconsistency. The following ambiguities are of particular concern:

¹⁵⁴ Bridget DiCosmo, *Citizen Suits Draw on EPA’s CWA Jurisdiction Rule to Boost Enforcement*, InsideEPA.com, June 6, 2014, <http://insideepa.com/daily-news/citizen-suits-draw-epas-cwa-jurisdiction-rule-boost-enforcement>.

¹⁵⁵ See *WildEarthGuardians v. Western Sugar Cooperative*, No. 14-cv-01503 (D. Co. filed May 29, 2014).

¹⁵⁶ Appendix A of the preamble purports to address connections between “adjacent” non-wetland waters and jurisdictional waters, but the science discussed and cited focuses solely on oxbow lakes. 79 Fed. Reg. at 22,237. There is no science cited here that discusses industrial ponds or any other non-wetland features that could now be jurisdictional on the basis of “adjacency.”

¹⁵⁷ See Exhibit 15.

- **Waters:** What is a “water”? The agencies’ vague footnote explanation of “waters” that can be “waters of the United States” based on adjacency is essentially limitless. *See* 79 Fed. Reg. at 22,191 n.3. It gives the agencies leeway to include any wet feature as a “water.” Why is this critical definition not part of the proposed regulation text?
- **Wetlands:** The proposed rule does not change the definition of “wetlands” from current regulations. In practice, the Corps relies on the 1987 Wetland Delineation Manual (and its regional supplements) for determining when an area is a wetland subject to regulation. Neither the 1987 Wetland Delineation Manual (and its regional supplements) nor the National Wetland Plant List, however, have ever been subject to notice and comment rulemaking. Indeed, the Corps recently announced that it is in the process of considering changes to the manual.¹⁵⁸ If the agencies are considering changes to the standard for “wetlands,” why are those changes not part of this rulemaking process?
- **Floodplain:** Even though it is common practice and scientifically sound to define the floodplain by a recurrence interval, the agencies have not done so, leaving it to be defined by the cop on the beat. This is contrary to common scientific and administrative practice and certainly will lead to confusion and unpredictability. How will the agencies identify floodplain? Will the agencies map the floodplains or rely on FEMA maps? Will it be the actual floodplain at the time of the permit application (requiring the agencies to map it for every jurisdictional determination), or will it be the floodplain as depicted in the latest flood map? What areas count as “within the floodplain”? Are areas behind levees still in the floodplain for purposes of “adjacency” determinations?
- **Riparian areas:** As with floodplains, the proposed rule leaves it to the agencies’ “best professional judgment” to determine the riparian area. 79 Fed. Reg. at 22,209. Again, this will lead to confusion and inconsistency across Corps Districts. What are the limits to the riparian zone? How is this determined or mapped?
- **Shallow subsurface hydrologic connection:** Under the proposed rule, waters can be “adjacent” and therefore jurisdictional if they have a “shallow subsurface hydrologic connection” to jurisdictional waters, but the agencies do not define that term. What is meant by “shallow”? Twelve inches? Five feet? Does “shallow subsurface hydrological connection” include manmade surface connections? Are there any limitations on the distance of the subsurface connection between the “adjacent” water and the non-navigable water? Where does the shallow subsurface connection end and groundwater begin? The SAB Panel explained that “the preamble of the proposed rule did not provide a clear understanding of what are considered to be ‘shallow’ subsurface connections.”¹⁵⁹ As one SAB Panel member noted, “Groundwater flowpaths can be in the shallow subsurface, where flow is limited in the soil, and where water flows from one water body

¹⁵⁸ Bridget DiCosmo, *Agencies’ Workgroup Eyes Changes to Key Delineation Guides* InsideEPA.com, Apr. 30, 2014, <http://insideepa.com/daily-news/agencies-workgroup-eyes-changes-key-wetlands-delineation-guides>.

¹⁵⁹ Rodewald Memo, Exhibit 7 at 7.

to another in hours to weeks.”¹⁶⁰ Does this not suggest that the proposed rule is actually regulating groundwater?

Virtually all alluvial groundwater could be determined to connect to streams and rivers. The distinction between shallow subsurface flow versus groundwater is very vague and difficult to implement on the ground. For example, one agency reviewer could find that groundwater from a tributary has a “shallow subsurface” connection because it occasionally reaches the 12 inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater, although it occasionally inundates that root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape, whereas the latter reviewer would not. The preamble states that the agencies will “assess the distance between the water body and tributary” to determine if they are in “reasonable proximity.” 79 Fed. Reg. at 22,207. How will the agencies determine if the water is within “reasonable proximity” of the jurisdictional water?

- **Confined surface connections:** The preamble states that, for purposes of this rule, confined surface connections “consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches.” 79 Fed. Reg. at 22,208. Such erosional features are categorically excluded under the rule, but the agencies treat them as connections that can establish adjacency. This use of non-jurisdictional connections to establish jurisdiction has no limiting principle. If these features are beyond the scope of CWA jurisdiction, why can they be used to establish jurisdiction?

The agencies’ approach of leaving crucial terms like “floodplain” and “shallow subsurface connection” vague and subject to the best professional judgment of the agencies will likely result in the agencies issuing guidance to the field to explain, for example, what flood interval is appropriate, or how deep a “shallow subsurface connection” can be. Clarifying these vague terms via later guidance outside of the rulemaking process allows the agencies to insulate key components of the proposed rule from challenge or judicial review. The agencies should not have to issue guidance to explain the meaning of their proposed rule. Definitions of key terms and concepts should be clear and subject to public comment as part of this rulemaking.

3. The proposed rule’s categorical assertion of jurisdiction over waters with “shallow subsurface hydrologic connections” is problematic.

The proposed rule’s assertion of jurisdiction over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters is problematic for several reasons. First, it is a radical departure from current methods of jurisdictional determination. Every other type of

¹⁶⁰ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 3 (comments of Dr. Allison Aldous). Other panel members raised similar questions regarding the distinction between shallow subsurface flow and groundwater. *See, e.g., id.* at 34 (comments of Dr. Michael Goosef) (“[I]f the surface water has left the channel by following hydraulic gradients that force it into the subsurface, is it still surface water? How long does it need to be in the subsurface to become groundwater?”); *id.* at 48 (comments of Dr. Michael Josselyn) (“The Final Science Report should more fully address differences between shallow groundwater connections and how they are defined.”).

jurisdictional determination can be performed primarily with visual observation (e.g., OHWM, wetlands vegetation, etc.). While there may be problems and lack of clarity and inconsistency in some of the specifics of these traditional indicators, there is simply no way to determine the flow direction, depth, and other characteristics of subsurface water without costly, time-consuming, and invasive subsurface investigation. The notion that “best professional judgment” can somehow see below the surface and interpret groundwater depth and flow from the surface defies logic.

Second, there is no scientific standard to separate what is “shallow subsurface” versus “groundwater.” As explained above, the proposed rule does not define or explain “shallow subsurface hydrologic connection.” According to the USGS, the definition of groundwater includes shallow subsurface flow, and this flow can be complex. Yet the proposed rule allows for shallow flow to be used to determine jurisdiction while categorically excluding other groundwater. If groundwater is categorically excluded but shallow subsurface connections can render a feature a jurisdictional “adjacent water,” what is the limit? The “best professional judgment” of agency personnel making judgments from surface observations would be expected to vary widely, given the vague definitions. While maps of regional groundwater conditions are available, these cannot begin to determine the level of connection between small marginal waters and nearby jurisdictional waters. The regulatory requirement of groundwater wells at sites of potential groundwater impairment (gas stations, etc.) attests to this fact. The agencies should clarify that groundwater connections cannot be used to establish jurisdiction. The agencies should likewise exclude use of “shallow subsurface” connections to establish jurisdiction or should clearly define what is meant by “shallow subsurface” flow that will be used to establish jurisdiction and how it is to be identified in the field.

Third, determining the extent of subsurface connections will be difficult and will likely lead to improper assumptions that there is always a connection. Determination of connection involving subsurface flow would be particularly problematic in areas where subsurface flow, direction, and other characteristics can vary greatly based on season, rainfall, and other factors. The proposed rule states “a determination of adjacency based on shallow subsurface . . . connection outside the riparian or floodplain area requires clear documentation.” 79 Fed. Reg. at 22,211. However, as discussed in section II.I., the proposed rule puts the burden on the applicant to prove that they are not jurisdictional. Here, the reality is that the regulated community would essentially have to prove lack of a subsurface connection, which is impossible without extensive and expensive subsurface investigation. Because many waters *could* be connected via shallow subsurface connections, at least during certain parts of the year and weather conditions, this could lead to the presumption that they *are* connected. Proving the negative would be prohibitively expensive in nearly all cases. If waters are assumed to be connected via shallow subsurface connection without investigation, this makes those waters subject to costly mitigation. And the agencies have offered no scientific evidence that such speculative connections could be considered significant.

The use of floodplains, riparian areas, and subsurface flow to establish jurisdiction will be problematic for industry. It will be particularly devastating, for example, for the extraction of aggregates resources. Nearly all sand and gravel deposits are located within floodplains and or/headwater areas that are not currently regulated to the extensive degree they would be under the proposed rule. In many areas of the U.S., excavating sand and gravel in an upland area leads

to groundwater. The proximity of sand and gravel deposits to rivers and streams generally indicates higher groundwater levels. If shallow groundwater connections establish adjacency, then how does the regulated community determine where shallow groundwater ends and deeper groundwater begins? Virtually all alluvial groundwater could be “judged” to connect to streams and rivers. In a real world example, an aggregates producer estimates about \$200,000 of wetlands mitigation would be required under the current regulations, based on the cost of current mitigation banks and extensive experience with permitting other similar sites. Because the site is located within a floodplain and includes “similarly situated waters” that would likely be jurisdictional based on subsurface connections under the proposed rule, they estimate that new cost for mitigation would jump to \$2.75 million dollars.

For all these reasons, the agencies must reconsider the proposed rule’s assertion of jurisdiction over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters and clearly distinguish between shallow subsurface flow and groundwater.

4. The agencies must return to regulating only wetlands by virtue of adjacency.

Given the major issues identified with the definitions associated with the “adjacent” category, the agencies should reassess this category of regulated waters. As we have noted in previous comments, the term “adjacent” has caused longstanding problems.¹⁶¹ And now the agencies have tried to extend the adjacency concept to more waters. The agencies should not try to force this already problematic concept of “adjacency” to cover other waters they want to protect. Instead, the agencies must return to regulating only adjacent wetlands. For these non-wetland waters the agencies seek to regulate, the agencies should revise the proposed rule to focus on characteristics within these non-wetland waters that should be protected and regulate based on those characteristics rather than geographic area.

E. The Agencies’ Proposed Treatment of “Other Waters” Is Confusing and Allows Jurisdiction over Isolated Features Without Basis in Science or Law.

If the agencies cannot assert jurisdiction under their broad “tributary” and “adjacent waters” categories, the proposed rule provides for jurisdiction over “other waters” that have a significant nexus with TNWs, interstate waters, or territorial seas. This proposed category of jurisdictional waters impermissibly allows for jurisdiction over isolated wetlands and non-wetland waters based on aggregation of all “other waters” in a watershed. As with the other proposed categories of jurisdiction, the “other waters” category is defined using ambiguous terms and concepts that will lead to unpredictable results. With the “other waters” category, the agencies provide no clarity – they simply provide a broad expansion in jurisdiction. The “other waters” category should be removed from the proposed rule. Waters and wetlands that do not fit within the agencies’ broad (a)(1) through (a)(6) categories should not be regulated under the CWA.

¹⁶¹ See WAC Comments on 2011 Draft Rule, Exhibit 1 at 84; FEED Comments on 2003 ANPRM, Exhibit 3 at 39.

1. The “other waters” category allows for jurisdiction over isolated features with little or no connection to TNWs.

The agencies’ proposed “other waters” category is designed to capture any wet feature that cannot be found jurisdictional under the “tributary” or “adjacent water” categories. Under the proposed rule, the agencies will assert jurisdiction over “other waters, including wetlands” that “alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus” to a TNW, interstate water, or territorial sea. 79 Fed. Reg. at 22,263. As with “adjacent waters,” the agencies do not explain which “waters” may be considered (a)(7) “other waters.” The preamble simply states that “other waters” “do not meet the criteria of any of the categories of waters in (a)(1) through (a)(6), and also are not one of the waters and features excluded . . . in section (b).” *Id.* at 22,211. As discussed in the Appendix to these comments, the proposed rule’s “other waters” category violates *SWANCC* by allowing for assertion of jurisdiction over isolated waters, such as prairie potholes or industrial ponds, that have little or no connection to TNWs. The science does not support the proposed assertion of jurisdiction over these “other waters.”

With the proposed aggregation of all “similarly situated” waters in a watershed, the proposed rule allows for regulation of waters that are not proximate to TNWs. Under the proposed rule, the agencies will find that “other waters” have a significant nexus, and are therefore jurisdictional, if they, “either alone or in combination with other *similarly situated* waters in the region (i.e., the *watershed* that drains to the nearest [TNW, interstate water, or territorial sea]), significantly affect[] the chemical, physical, or biological integrity” of a TNW, interstate water, or territorial sea. 79 Fed. Reg. at 22,263 (emphasis added). The agencies will find waters to be “similarly situated” when they “perform similar functions and are located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a *single landscape unit*” *Id.* (emphasis added). This concept introduces more ambiguity than clarity.

Looking at all “other waters” within a watershed is too broad and not supported by science. As Dr. Michael Josselyn of the SAB Panel noted, the watershed of the nearest navigable water “could be a very large area that may drain significant portions of a single State.”¹⁶² Even small Hydrologic Unit Code (“HUC”)-10 watersheds, which the preamble recommends for use in the arid West, are typically between 40,000 and 250,000 acres in size (i.e., approximately 60-390 square miles). *See* 79 Fed. Reg. at 22,212. As Dr. Josselyn noted, “It would be hard to argue that including all the [waters] within such a large area in one grouping would not have an effect on the downstream water.”¹⁶³ In addition, the agencies’ proposed aggregation of all “similarly situated” features within a watershed is not supported by the science. The GEI Report explains that “the Agencies’ aggregation approach is not based on a

¹⁶² SAB Panel Comments on the Proposed Rule, Exhibit 7 at 44. Confusingly, the agencies acknowledge that defining “in the region” as the watershed area is not appropriate in arid West where the single point of entry watershed is very large, and suggest a modified approach based on National Hydrology Dataset (NHD) mapping tools to demarcate catchments surrounding the water at issue. 79 Fed. Reg. at 22,212. But, as Dr. Josselyn notes, the large size of the watershed is also likely to be a problem outside of the arid West.

¹⁶³ Exhibit 7 at 44 (comments of Dr. Michael Josselyn).

scientific evaluation of whether aggregated effects result in a significant nexus.”¹⁶⁴ The studies cited by the agencies to support their aggregation principle support the notion that aggregation of small effects to downstream waters can result in a “measurable” effect, but “these studies do not provide support for the Agencies to reach a consistent determination of how much aggregation is sufficient to justify a jurisdictional determination.”¹⁶⁵ The proposed rule’s failure to provide a scientifically defensible standard method for determining when aggregated effects are significant “will likely lead to inconsistent case-by-case determinations in the field.”¹⁶⁶

Moreover, not all features within a “single landscape unit” are similarly situated. The preamble suggests that other waters could be similarly situated even if they are located in different landforms, have different elevation profiles, and have different soil and vegetation characteristics, so long as they “perform similar functions” and are located “sufficiently close” to a water of the United States to allow them to collectively function together. 79 Fed. Reg. at 22,213. This interpretation stretches the concept of “similarly situated” beyond reason and would allow the agencies to find that essentially every feature within a watershed is “similarly situated” and therefore can be aggregated to assess jurisdiction.

Furthermore, the proposed “other waters” standard is problematic because the case-by-case significant nexus analysis touted by the agencies for “other waters” is not really a case-by-case analysis. The agencies propose to evaluate similarly situated waters within a watershed, which as noted above could cover a geographic area of 60-390 square miles, “as a group.” 79 Fed. Reg. at 22,211. They will aggregate all similarly situated “other waters” within a watershed to determine if, when combined, all of those waters have a significant nexus with a TNW, interstate water, or territorial sea. *Id.* The agencies will not perform an individual analysis on the feature at issue unless they cannot make a finding that there are “similarly situated” features in the region. As noted above, if “other waters” that are located in different landforms, have different elevation profiles, and have different soil and vegetation characteristics can all be treated as “similarly situated,” it seems unlikely that the agencies would ever be in a situation where they could not find similarly situated features in the region. In addition, the agencies note that information relevant to finding that an “other water” has a significant nexus “need not always be specific to the water whose jurisdictional status is being evaluated,” but instead can be based on “regional and national studies of the same type of water,” or a “desktop” analysis. 79 Fed. Reg. at 22,214. Thus, the “other waters” analysis described in the preamble can hardly be characterized as a case-by-case analysis.

The end result of the proposed process for evaluating “other waters” will be the assertion of jurisdiction over many isolated features that, like the isolated, non-navigable ponds at issue in *SWANCC*, are a far cry from the “waters of the United States” to which the CWA extends.

¹⁶⁴ GEI Report, Exhibit 6 at 6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 6-7.

2. The proposed rule’s process for evaluating “other waters” is confusing, and as a result its application will be inconsistent and unpredictable.

In addition to allowing for regulation of features that are beyond the scope of the CWA, the proposed approach to “other waters” is complex, confusing, and likely to lead to unpredictable results. The following ambiguities are of particular concern:

- **Water:** Again, the agencies’ vague footnote explanation of “waters” that can be “waters of the United States” based on adjacency is essentially limitless. *See* 79 Fed. Reg. at 22,191 n.3. What is an “other water”? Any wet feature that the agencies could not assert jurisdiction over as a tributary or adjacent water?
- **In the region:** The rule proposes to interpret “in the region” to mean the watershed that drains to the nearest TNW, interstate water, or territorial sea. 79 Fed. Reg. at 22,212. But the preamble recognizes that use of the watershed may not be appropriate in the arid West where a single point of entry watershed is very large, and recommends a modified approach based on mapping catchments to be evaluated in combination. 79 Fed. Reg. at 22,212. If the watershed standard is not appropriate for a significant portion of the country, why use it? When is it appropriate to use the modified approach? Only in the arid West? Whenever single entry watersheds are very large? What do the agencies view as a “very large” watershed?
- **Similarly situated:** The proposed rule provides that waters are “similarly situated” when they “perform similar functions” and are located “sufficiently close together or sufficiently close to a water of the United States so they can be evaluated as a single landscape unit.” 79 Fed. Reg. at 22,263. This definition is anything but clear. What does it mean to “perform similar functions” or “function together”? If, for example, two features both provide habitat for birds, is that enough to determine they “perform similar functions”? How many functions must they have in common to meet those criteria? Must the features be “sufficiently close” to *any* water of the United States, or must they be “sufficiently close” to a TNW, interstate water, or territorial sea? How close is “sufficiently close”? What is a “single landscape unit”? These terms are undefined and ambiguous. And if all of these determinations are simply left to the judgment of the regulators, there will not be predictability or consistency in “other waters” jurisdictional determinations.
- **Aggregation:** The preamble states, “How these ‘other waters’ are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the ‘region’ or watershed.” 79 Fed. Reg. at 22,211. Is there any limit to this? Precisely which waters and wetlands will be aggregated is unclear. Will all wet features that are not jurisdictional under categories (a)(1) through (a)(6) be aggregated together? Will wetlands be aggregated with non-wetland features? Will a prairie pothole be aggregated only with other prairie potholes in the watershed? The preamble states that if a water is not “similarly situated” with other waters, it will not be aggregated, but will be assessed individually. 79 Fed. Reg. at 22,213. In what circumstances would waters

not be deemed similarly situated? In what circumstances would a water have to be assessed individually?

- **More than speculative or insubstantial:** The proposed rule states that “[f]or an effect to be significant, it must be more than speculative or insubstantial.” 79 Fed. Reg. at 22,263. The agencies list types of evidence that could support conclusion that there are chemical, physical *or* biological effects. *Id.* at 22,214. Is there a significant nexus if *any* of these indicators are present? If three indicators are present? Ten? What is required for a “more than speculative or insubstantial” showing? Or is this determination simply left to the agencies’ best professional judgment? Again, if that is the case, the “other waters” analysis will be inconsistent and unpredictable.

3. The alternatives presented in the preamble are unsupported by science.

For all of the reasons discussed above, the proposed “other waters” standard will lead to broad assertions of jurisdiction over isolated features that may have no meaningful connection with TNWs. Yet many of the alternative options presented by the agencies would have similarly overreaching results and are likewise unsupported by the science.¹⁶⁷ The agencies request public comment on four alternative approaches for “other waters”: (1) determine that “other waters” within particular “ecoregions” or “hydrologic-landscape regions” are similarly situated by rule and have a significant nexus; (2) determine by rule that certain additional subcategories of “other waters” (e.g., prairie potholes, western vernal pools) are jurisdictional; (3) determine that no “other waters” are similarly situated; and (4) determine that all other waters in a watershed are similarly situated. *See* 79 Fed. Reg. at 22,215-17.

The agencies state that they “might adopt any combination” of these “other waters” alternatives for the final rule. *Id.* at 22,215.¹⁶⁸ But alternatives (1), (2), and (4), which would each allow for categorical jurisdiction over “other waters” in some way, are just as, if not more, overreaching than the proposed rule’s approach. And, as the SAB Panel has recognized, these alternative approaches are not supported by the science.¹⁶⁹ The GEI Report concludes that “the Ecoregion and hydrologic landscape-unit approaches both suffer from being too broad, and are not placed within a consistent framework of determining significance.”¹⁷⁰ The ecoregion approach, for example, could render an entire watershed jurisdictional, thereby greatly increasing the need for Corps permits. The GEI Report estimates that “the extent of area proposed to be

¹⁶⁷ *See* GEI Report, Exhibit 6 at 7.

¹⁶⁸ As discussed in section V.D. below, the Administrative Procedure Act (“APA”) requires that the final rule does not deviate too sharply from the proposal. The agencies cannot adopt any of these proposed alternatives without fully developing these options and their underlying scientific support so that the public can meaningfully comment.

¹⁶⁹ *See, e.g.,* SAB Panel Comments on Proposed Rule, Exhibit 7 at 12 (comments of Dr. Genevieve Ali) (expressing concern about regulating subcategories of “other waters,” noting “I . . . do not think that the currently available scientific literature supports that approach.”); *id.* at 96 (comments of Dr. Mark Murphy) (“Stated briefly, a jurisdiction by rule of ‘other waters’ is intractable because science does not support such a distinction.”).

¹⁷⁰ GEI Report, Exhibit 6 at 7.

covered using the Ecoregion concept covers nearly a quarter of the country.”¹⁷¹ In addition, with the “ecoregions” or “hydrologic-landscape regions” approaches, the preamble provides that the agencies would consider all “other waters” within an ecoregion or hydrologic-landscape region as “similarly situated” and would determine by rule that they have a significant nexus. 79 Fed. Reg. at 22,215. As noted by the GEI Report, treatment of different categories of “other waters” features (e.g., prairie potholes, isolated wetlands) that do not perform similar functions as “similarly situated” is not supported by the science.¹⁷² Nor does the science support the establishment of *per se* jurisdiction over subcategories of other waters (e.g., prairie potholes, vernal pools).¹⁷³

For all these reasons, it would be arbitrary and capricious for the agencies to adopt a proposal that allows for categorical jurisdiction over “other waters,” even if it is limited to certain subcategories of “other waters.”

4. “Other waters” should not be regulated under the proposed rule.

Waters and wetlands that do not fit within the agencies’ broad (a)(1) through (a)(6) categories should not be regulated under the CWA. The agencies should eliminate proposed provision (a)(7), and, consistent with *SWANCC*, all “other waters” should be excluded from jurisdiction by rule.

F. The Proposed Exclusions from the Waters of the United States Definition Are Ambiguous and Wholly Inadequate.

Although we support the agencies’ listing of types of waters that are categorically *not* jurisdictional and the clarification that these excluded waters cannot be recaptured if they satisfy the rule’s other provisions, the exclusions contained in the proposed rule are unclear and wholly inadequate. We support the proposal to maintain the exclusions for waste treatment systems and prior converted croplands, but it is disappointing that the agencies have not taken this opportunity to provide some much needed clarity on the applicability of those exclusions. Of the new exclusions, some are so narrow as to be nearly impossible to satisfy. Others are not defined or are unclear. Moreover, the exclusion of these waters rings somewhat hollow when the preamble asserts that these excluded features can serve as links that can render connected features jurisdictional under the “adjacent waters” or “other waters” categories of the proposed “waters of the United States” definition. Notably, the suggestion that non-jurisdictional waters can provide the nexus from a pollutant discharge to a jurisdictional water is directly opposed to Justice Kennedy’s *Rapanos* concurrence. There, he provided the admonition that a seasonal drainage is *not* transformed into a “water of the United States” merely because it provides an intermittent or ephemeral hydrologic connection to TNWs. *See Rapanos*, 547 U.S. at 778-79 (Kennedy, J., concurring). Practically speaking, these exclusions provide little relief from the broad reach of the proposed rule’s (a)(1) through (7) categories.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

1. The exclusion for waste treatment systems fails to provide clarity.

The proposed rule excludes “waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.” 79 Fed. Reg. at 22,263. Instead of taking this rulemaking as an opportunity to clarify longstanding confusion on the waste treatment exclusion, the agencies have decided to avoid the issue all together. The agencies state that they do not propose any changes to the exclusion for waste treatment systems, *id.* at 22,217, but we have several concerns with the agencies’ handling of this exclusion.

First, the applicability of this exclusion has been anything but clear.¹⁷⁴ In the experience of Coalition members, there is not a uniform understanding of what the agencies consider to be a “waste treatment system,” and, as a result, the exclusion has been implemented inconsistently in the field. The same feature may be treated as an excluded “waste treatment system” in one instance, but treated as a jurisdictional “water of the United States” in another instance.

Second, the addition of a comma in the regulatory text changes the meaning of the waste treatment exclusion. Under the existing regulations, the phrase “designed to meet the requirements of the CWA” modifies the examples of “treatment ponds or lagoons.” 33 C.F.R. § 328.3(a). The proposed rule’s addition of a comma after “treatment ponds and lagoons” narrows the scope of the exclusion by requiring that all “waste treatment systems,” not just “treatment ponds or lagoons,” be “designed to meet the requirements of the CWA” to qualify for the exclusion. This could be interpreted to mean, for instance, that features that were constructed for waste treatment prior to the CWA’s enactment in 1972 do not qualify for the waste treatment exclusion. Although the agencies say that they only propose “ministerial” changes to the waste treatment exclusion, 79 Fed. Reg. at 22,217, the addition of this comma is a substantive change that would have significant implications for many existing waste treatment systems. The agencies should remove the new comma from the proposed regulatory text.

Third, the agencies improperly retain, in 40 C.F.R. § 122.2, both: (1) the sentence proclaiming that the waste treatment exclusion “applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States,” and (2) the accompanying footnote explaining that EPA suspended the sentence in question in 1980. *See* 79 Fed. Reg. at 22,268. The suspended sentence would have drastically limited the scope of the waste treatment exclusion. Although this language was suspended in 1980, courts have struggled with this issue, and in some instances have erroneously applied the suspended language.¹⁷⁵ Retaining this suspended language simply adds confusion to an already confusing exclusion. To provide clarity, the agencies should delete the suspended sentence and accompanying footnote from 40 C.F.R. § 122.2.

¹⁷⁴ Other groups, including the Utility Waters Act Group (“UWAG”), National Mining Association (“NMA”), and Edison Electric Institute (“EEI”), have submitted comments that more fully address the history of the waste treatment exclusion and the confusion surrounding its application. The Coalition urges the agencies to respond to the concerns raised in these groups’ comments on this issue.

¹⁷⁵ *See, e.g., West Virginia Coal Ass’n v. Reilly*, 728 F. Supp. 1276, 1290 (S.D. W. Va. 1989); *United States v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 2007 WL 2200686 (S.D. W. Va. June 13, 2007), *rev’d*, 556 F.3d 177 (4th Cir. 2009).

2. The exclusions for ditches are narrow and unhelpful.

As discussed in detail in section III.C.2., the two narrow exclusions for ditches are not clear, and in practice they are not likely to exclude many ditches from jurisdiction. The agencies should make clear that non-tidal ditches, including roadside, agricultural, industry site, railroad right-of-way, stormwater, process water, and wastewater ditches, are not jurisdictional waters of the United States.

3. There is confusion over what is an erosional feature that is excluded.

The agencies propose to exclude gullies, rills, and non-wetland swales, but do not propose definitions of those terms. The preamble states that the agencies specifically seek comment on “how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.” 79 Fed. Reg. at 22,219. Again, this raises many questions:

- How are regulators and regulated entities to identify gullies, rills, and non-wetland swales?
- What is the difference between erosional features and ephemeral drainages? The agencies do not provide any scientific basis for distinguishing between them.
- Indeed, if these features are so similar, why are erosional features categorically excluded and ephemeral drainages categorically jurisdictional? Neither should be jurisdictional.

The confusion over when these predominantly dry features are excluded erosional features will likely result in a substantial number of requests from the regulated community to verify that a particular feature is erosional. Given the subjective nature of erosion, to obtain regulatory certainty, it will likely be deemed too risky for the regulated public to decide on their own that only non-jurisdictional erosion exists at their site. Without further clarification of this issue, the Corps and EPA should expect a large number of future requests to verify the presence of an erosional feature versus a potentially regulated tributary.

Even more confusingly, the reasons given in the preamble for not listing “puddles” as “waters of the United States” seem similarly applicable for ephemeral drainages. The preamble states that puddles are not waters of the United States because a puddle “exists for only a brief period of time before the water in the puddle evaporates.” 79 Fed. Reg. at 22,218.¹⁷⁶ But the same is often true of ephemeral drainages, which are categorically jurisdictional under the proposed rule. Why are ephemeral drainages jurisdictional, and puddles are not? The agencies ask for comment on the distinction between these features and ephemeral and intermittent streams, but they do not provide much information on which to comment. The agencies should exclude ephemeral streams from jurisdiction, as well as erosional features like gullies, rills, and

¹⁷⁶ The fact that the preamble has to explain that puddles are not waters of the United States illustrates the broad and far reaching jurisdiction that could be asserted under the proposed rule’s definition of “waters of the United States.” Likewise, the fact that the agencies have to provide a specific exemption for swimming pools shows the expansive reach of the proposed rule.

non-wetland swales. This would eliminate substantial confusion over the distinction between erosional features and ephemeral drainages.

4. The agencies should not rely on excluded waters for purposes of establishing jurisdiction as “adjacent waters” or “other waters.”

The proposed rule impermissibly allows for the use of non-jurisdictional features (that are explicitly excluded from the waters of the United States definition) as connections for purposes of establishing jurisdiction over adjacent waters and other waters. The preamble states, “even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7).” 79 Fed. Reg. at 22,219. If gullies, rills, and swales can supply the requisite connection to render waters jurisdictional, what about classic instances of runoff as sheet flow?

The use of non-jurisdictional connections to establish adjacency or a significant nexus for “other waters” has no limits. The proposed rule essentially allows for all waters to be jurisdictional based on these connections. This amounts to the “any hydrological connection” theory rejected in *Rapanos* and hardly clarifies jurisdiction. The agencies should eliminate the use of excluded features and waters as a basis for jurisdiction.

5. The use of groundwater to establish CWA jurisdiction is particularly problematic.

In particular, the use of groundwater to establish connections is particularly problematic under the proposed rule. Groundwater is not regulated under the CWA.¹⁷⁷ And, rightfully, the proposed rule excludes “groundwater, including groundwater drained through subsurface drainage systems.” 79 Fed. Reg. at 22,263. But, as discussed in section III.D.2., there is significant confusion surrounding the distinction between groundwater and “shallow subsurface hydrological connections.” For instance, this provision appears to mean that water will be regulated when it is present on the surface, but the same water will not be regulated as it flows through the ground to some downstream water, where it will become regulated again. The SAB Panel pointed out the lack of clarity with respect to “what are considered to be ‘shallow’ subsurface connections” and “the role of regional groundwater systems.”¹⁷⁸ This confusion is contrary to the agencies’ claims that the rule provides clarity and predictability. Moreover, as noted above, the proposed rule allows for groundwater to serve as a connection to establish adjacency under paragraph (a)(6) or for purposes of a significant nexus analysis for “other waters” under paragraph (a)(7). Allowing for jurisdiction to be established via groundwater connections can create liability and permitting obligations not previously required.

¹⁷⁷ See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001) (“‘navigable waters’ do not include groundwater”).

¹⁷⁸ Rodewald Memo, Exhibit 7 at 7.

6. The agencies must revisit these exclusions to provide clarification.

In sum, although we support the listing of certain waters that are categorically excluded from the “waters of the United States” definition, the agencies must revisit these exclusions and provide more clarity on their applicability and fewer qualifiers on their application. Waters and features that are categorically excluded from jurisdiction should not be used to establish jurisdiction over connected waters as “adjacent waters” or “other waters.”

IV. The Proposed Rule Will Have Major Implications for All CWA Programs.

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

Despite that fact, the agencies have failed to consider the significant implications of this major change on all of the CWA’s programs. For example, nowhere does the preamble to the proposed rule discuss impacts to the section 303 WQS and TMDL programs, section 311 oil spill prevention program, section 401 certification, or section 402 permit program (covering, e.g., individual permits, industrial stormwater general permits, construction stormwater general permits, and pesticide general permits). Furthermore, as discussed in more detail in section V.C., the discussion of impacts of the proposed rule on the section 404 dredged or fill permit program is woefully inadequate.

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

This section explains the proposed rule’s implications for individual CWA programs.

A. Increased Section 404 Permitting Requirements

Section 404 requires a permit for the discharge of dredged or fill material into “waters of the U.S.” 33 U.S.C. § 1344. The proposed rule’s definition of “waters of the United States” will result in more activities triggering section 404 permitting requirements. Features such as ditches, waters in floodplains, and isolated waters, which were not previously considered jurisdictional, will now be covered by the proposed rule. *See* 79 Fed. Reg. at 22,193. Any discharge of dredged or fill material into these newly jurisdictional features will trigger CWA section 404 requirements.

The proposed rule will increase the need for individual permitting because fewer activities will qualify for general permits. NWPs are available under CWA section 404(e) for activities which are “similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.” The NWPs have maximum acreage thresholds. For example, NWP 12 allows for discharges of dredged or fill material for the construction, maintenance, repair, and removal of utility lines that will not result in the loss of greater than one-half-acre of waters of the United States for each single and complete project. 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012). With more features and areas considered “waters of the United States,” many activities will exceed the NWP threshold, and applicants will be forced to rely on individual permits. Individual permits are much more costly than general permits: the average cost to prepare an NWP application is \$35,954, but the average cost to prepare an individual permit application is \$337,577.¹⁷⁹ Increased individual permitting also means increased delays for permit applicants. While a NWP may take only ten months to obtain, it can take over two years to obtain an individual permit.¹⁸⁰ And a large increase in individual permit applications is likely to overwhelm EPA and Corps staff, increasing delays. These delays will result in lost opportunity costs for stakeholders. Overall, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines, that previously would have relied heavily on general permits.

Under the proposed rule, permittees will likely face increased mitigation requirements because unavoidable impacts to newly jurisdictional features and waters would require additional mitigation. Corps regulations require compensatory mitigation through mitigation banks, in-lieu fee mitigation, or permittee-responsible mitigation, to offset unavoidable impacts to waters of the United States authorized through section 404 permits. 33 C.F.R. § 332. Such mitigation is not only costly, but it is also difficult in many instances to obtain the requisite number of available mitigation credits. The increase in jurisdiction and associated mitigation requirements could cause a run on mitigation bank credits. As explained in Professor David L. Sunding’s review of the agencies’ economic analysis for the proposed rule, EPA’s estimate of the increased mitigation costs are far too low and lack proper documentation and explanation.¹⁸¹ In reality, the proposed rule’s expanded definition of “waters of the United States” will result in a significant increase in mitigation costs, placing a heavy burden on project proponents.

In addition, inherent uncertainty in the rule will increase costs and impose substantial burdens to compliance. The agencies acknowledge that jurisdictional uncertainty increases paperwork, costs, and time, while decreasing a business’ willingness to invest.¹⁸² As discussed

¹⁷⁹ See David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects).

¹⁸⁰ *Id.* at 76.

¹⁸¹ David Sunding, Ph.D., The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (May 15, 2014) (“Sunding Review”) (attached hereto as Exhibit 19) at 18-19.

¹⁸² EPA (primary author) and U.S. Army Corps of Engineers (contributing author), Economic Analysis of Proposed Revised Definition of Waters of the United States (Mar. 2014) at 10, *available at*

throughout these comments, the proposed rule suffers from a lack of clarity in many critical respects and will not reduce uncertainty or unpredictability in CWA implementation. Among other ambiguities, the proposed rule fails to provide a quantifiable method for determining “significant nexus;” fails to define “upland,” “perennial flow,” and other key terms; and leaves important determinations (e.g., floodplain interval, shallow subsurface flow) to the agencies’ “best professional judgment.” These and other inherent uncertainties are likely to produce confusion over whether a feature is a “water of the United States” and whether a facility must seek a section 404 permit for work that impacts the feature. Confusion over the definition will increase costs to comply with section 404, complicate project design and engineering efforts designed to avoid jurisdictional impacts, and increase the likelihood of discharges to unrecognized “waters of the United States” without a permit. In addition, as a result of the proposed rule’s uncertainties, section 404 permittees may be subject to additional enforcement actions and citizen suits.

Increased section 404 permitting requirements will subject project proponents to additional federal and State environmental compliance burdens. A Corps section 404 permit decision triggers the National Environmental Policy Act, Coastal Zone Management Act, National Historic Preservation Act, and Endangered Species Act (“ESA”). 33 C.F.R. § 325.2. Additional requirements and determinations, including environmental assessments or impact statements, certifications of consistency with the State’s Coastal Zone Management Plan, ESA section 7 consultation, and consultation with State historic preservation offices, would lengthen delays, increase opportunity costs, increase the burdens on federal and State agencies, and increase the overall cost of permits.

The proposed rule may also reach green infrastructure. EPA has pushed permittees to develop and implement green infrastructure in recent years.¹⁸³ Because green infrastructure is not exempt under the proposed rule, a section 404 permit, as well as other monitoring and regulatory requirements, could now be required for green infrastructure construction and maintenance where the green infrastructure is developed in areas considered to be “waters of the United States” under the proposed rule. The potential for additional regulation will discourage the development of green infrastructure.

B. Increased Section 401 Water Quality Certification Requirements

Under CWA section 401, any applicant for a federal license or permit to conduct any activity that will result in a discharge into “waters of the United States” (e.g., a section 404 permit) must obtain a State water quality certification. Because the proposed rule will result in increased section 404 permitting requirements, and more activities will affect the expanded universe of “waters of the United States,” more activities will trigger section 401 state water quality certification requirements. *See* 33 U.S.C. § 1341. Project proponents will increasingly have to go through the 401 certification process and comply with applicable WQS, effluent

http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf (“Economic Analysis”).

¹⁸³ *See, e.g.,* EPA, *Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow Control*, No. 832-R-14-001 (Mar. 2014), available at http://water.epa.gov/infrastructure/greeninfrastructure/upload/Greening_CSOP_lans.PDF.

limits, and other conditions imposed by the States. Furthermore, States may struggle to process certification requests as they work to manage the influx of new permit applications, thus increasing the burdens on States' already strained resources. There will also be more opportunities for States and interest groups to block or delay projects during the certification process.

C. Increased Section 402 NPDES Permitting Requirements

Under the proposed rule, any channelized features that contribute flow, including manmade features, are jurisdictional tributaries. *See* 79 Fed. Reg. at 22,263. This extends to new features, including a facility's internal conveyances that are not included in existing NPDES permits. An NPDES permit is required for the discharge of any pollutant from any point source into "waters of the United States." 33 U.S.C. §§ 1311, 1342. Thus, an NPDES permit would be required for the discharge of a pollutant from a point source into any system or feature covered by the proposed expanded "waters of the United States" definition, such as ditches and other manmade conveyances. Moreover, with the proposed rule's substitution of the new "waters of the United States" definition in 40 C.F.R. § 122.2, an NPDES permit will be required for stormwater discharges into newly covered features, including MS4 ditches and other stormwater conveyances. Ditches and conveyances, including those used for collecting and conveying stormwater, could be regulated as both point sources and as "waters of the United States." *See* 33 U.S.C. § 1362(14) (a point source is a discernible, confined and discrete conveyance – which includes ditches). In other words, point source flow into the feature or system would be regulated, as well as discharges from the system. This will result in the need for additional permits, duplicative regulation, and an increased risk of third party litigation.

As discussed in more detail below, as "waters of the United States," these features would be subject to section 303 WQS, including numeric effluent limitations. 33 U.S.C. § 1311(b)(1)(C); § 1313(e)(3)(A). For features that do not meet WQS, a TMDL must be established. 33 U.S.C. § 1313(d).

In addition, as "waters of the United States," even routine maintenance on ditches or stormwater conveyances or other actions taken to comply with NPDES permit requirements (e.g., changing pH, dredging out solids, or building a structure to take samples) could now require either a 402 or 404 permit. For example, the installation of baffles and weirs to facilitate removal of pollutants such as sediment in stormwater (as required by stormwater permits) would now require complex section 404 permitting procedures. As another example, the stormwater program *requires* the construction of ditches/stormwater retention ponds to manage stormwater. And if the ditches and ponds created pursuant to stormwater BMPs are treated as "waters of the United States," this will result in a never-ending cycle of regulation. Ultimately, these more burdensome permitting requirements will result in increased costs and delays.

The proposed rule covers tributaries that have been channelized or otherwise altered for use to create water delivery systems (or for water reuse systems) could now be subject to CWA regulation (including but not limited to the sections 303 and 404 requirements noted elsewhere in this section). And, adding the proposed rule's definition of "adjacent waters," which includes all waters in floodplain and riparian areas, it could mean that holding and recharge ponds that are part of such systems also would be jurisdictional. For example, regulators may have no choice

but to require an NPDES permit for storm flows that are diverted to basins for possible water supply, or a section 404 permit for maintenance activities.

Furthermore, the transfer of stormwater from one stormwater conveyance to another stormwater conveyance may trigger permitting requirements because each conveyance could be both a point source and “water of the United States” under the proposed rule. With the state of the Water Transfer Rule in flux, *see Catskill Mountains, et al. v. United States EPA*, Nos. 08-CV-5606 (KMK), 08-CV-8430 (KMK), 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014), this could lead to multiple permits required throughout a stormwater system. These increased permitting requirements may lead to lengthier permitting delays. For example, if the proposed rule is made final, and the EPA Water Transfers Rule is ultimately vacated, the Central Arizona Project (“CAP”)¹⁸⁴ would be regulated under the NPDES program and would need to obtain a permit to discharge into a traditional “water of the United States,” such as Lake Pleasant.¹⁸⁵ Additionally, CAP could be required to obtain separate permits each time it introduces water into the CAP system. *Id.* CAP anticipates that, “[i]n both instances, CAP could be required to treat water as it moves into and out of the CAP system based on differences in the chemical, biological, or physical characteristics of the source and receiving water.” *Id.* Because “treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive,” this outcome would be “disastrous” for CAP and other water delivery systems across the country and their customers. *See id.* The entire CAP likely would be considered a “water of the United States,” and a section 404 permit would be required for maintenance within the canal. Any State, tribal, federal, or regulated community costs related to regulating and/or permitting these areas has not been considered.

The cost of NPDES permitting requirements already has affected small businesses and cities, and in some instances the permits are cost prohibitive. For example, the court-ordered requirement for an NPDES permit for mosquito spraying is impacting public health, with jurisdictions having to decide whether to pay for the cost of the permit or not spray. Many have had to make the hard fiscal choice of not spraying because of the cost. In recent years, cities like Brewerton, Alabama; Orchard City, Colorado; and Cedaredge, Colorado could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western Slope and Delta County, Colorado have expressed concerns about citizen lawsuits, along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming struggled with increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon’s Department of Environmental Quality had to halt invasive species treatments for the same reason as Brewerton and other jurisdictions. We are concerned EPA and the Corps’ proposed rule will cause even more cities and small businesses applying pesticides to struggle with high permit costs.

¹⁸⁴ The Central Arizona Project is a water provision system that brings about 1.5 million acre-feet of Colorado River water per year to Pima, Pinal, and Maricopa Counties (the counties in which Arizona’s most populous cities, such as Phoenix and Tucson, are located). It has an approximately 336-mile long system of aqueducts, tunnels, pumping plants, and pipelines. *See* <http://www.cap-az.com/>.

¹⁸⁵ *See* Central Arizona Project, Action Brief: Discussion and Consideration of Action to Adopt Position on the Proposed Rule, ‘Definition of Waters of the United States Under the Clean Water Act’ (the ‘Proposed Rule’) (June 5, 2014), <http://www.cap-az.com/documents/meetings/06-05-2014/6.%20%20Clean%20Water%20Act%20060514.pdf>.

Even if the agencies do not intend to extend jurisdiction to features such as ditches within MS4s and other stormwater conveyances under the proposed rule, ambiguity in the rule would invite third party challenges. The CWA allows for citizen suits over discharges that EPA and the Corps have decided not to regulate. *See, e.g., San Francisco Baykeeper*, 481 F.3d at 706 (citizen suit alleging illegal discharge within an industrial facility into ponds that the agencies declined to assert jurisdiction over). Here, the agencies have left ambiguity in the proposed rule with respect to items such as where the discharge point is, when a point source is discharging to a “water of the United States,” the definition of “ditch,” the definition of “upland,” and the extent to which the rule would reach internal conveyances that are not included in existing NPDES permits. As in *Baykeeper*, the ambiguities in the proposed rule would leave the agencies and stakeholders vulnerable to citizen suits.

D. Additional Section 303, 304, and 305 State WQS

States must set WQS for “waters of the United States.” 40 C.F.R. § 131.3(i). States typically develop WQS for general categories of waters, which may or may not cover the features and waters that are newly jurisdictional under the proposed rule. As a result of the rule, each State will be required to determine whether features previously not considered “waters of the United States” are now in fact “waters of the United States,” and then they must make assessments as to what, if any, existing WQS are applicable. Performing these tasks is very expensive and time-consuming.¹⁸⁶

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

A complete analysis of the impact of the proposed rule on the WQS program is even more critical in light of EPA’s proposed rule entitled *Water Quality Standards Regulatory Clarifications*, 78 Fed. Reg. 54,518 (Sept. 4, 2013) (“WQS Rule”). The WQS Rule (if finalized as proposed) would, among other things, create a rebuttable presumption that the highest uses

¹⁸⁶ With respect to the section 303 WQS/TMDL program, after acknowledging that States and tribes incur costs developing, monitoring, and assessing WQS and TMDLs, the agencies state that it is their position that “an expanded assertion of jurisdiction would not have an effect on annual expenditures.” Economic Analysis at 6; *see also id.* at 25 (describing the impact to the section 303 program as “cost neutral”). To support that conclusion, the agencies assert that States typically only develop WQS for general categories of waters, which currently cover the types of waters that would be jurisdictional under the proposed rule and which would not change. The agencies go on to concede that what could “change is whether or not those standards apply.” *Id.* at 6. This concession undermines the agencies’ conclusion that the impact of the proposed rule would be cost neutral.

specified in section 101(a)(2) (i.e., fishable, swimmable) of the CWA are attainable uses for any “waters of the United States” by default, thereby forcing State and tribal regulators to prove otherwise should they believe it appropriate. To rebut the presumption, a State must perform a burdensome use attainability analysis for waters it does not believe can meet the “fishable, swimmable” goal. Such a showing would create significant additional costs for States and tribes, assuming they would be unwilling to capitulate to the rebuttable presumption.¹⁸⁷ Given that the proposed rule seeks to encompass ephemeral streams and all manner of ditches not subject to the limited exclusions (as discussed above), the proposed rule in concert with the WQS Rule dramatically will increase WQS/TMDL program costs for States and tribes. None of this is discussed or evaluated by the agencies.

By way of example, under Kansas state law, ephemeral streams are not “classified” waters because the State “finds it wholly unnecessary and wasteful of limited state program resources to set WQS, issue wastewater permits, assess impairment, and develop TMDLs for surface drainage features that may have flowing or standing water no more than a few days each year.”¹⁸⁸ EPA has approved Kansas’s WQS, which do not designate uses or assign water quality criteria for ephemeral streams.¹⁸⁹ If, as proposed, ephemeral drainages are now considered “waters of the United States,” Kansas estimates an increase from 30,620 stream miles to 134,338 stream miles for which the State must set WQS and comply with other CWA requirements.¹⁹⁰ As the maps in Exhibit 9 demonstrate, that increase is dramatic.¹⁹¹

CWA section 305(b) requires States to submit a water quality report biennially that includes a description of the water quality of all “waters of the United States” in the State and an analysis of the extent to which they meet water quality goals. And under section 303(d), States are required to develop lists of impaired waters (waters that are too degraded to meet the WQS set by the State). For impaired waters, States must develop TMDLs, which are calculations of the maximum amount of a pollutant that a waterbody can receive and still safely meet WQS. 40 C.F.R. § 130.7. Any increase in jurisdictional waters for which WQS are developed necessarily triggers greater costs for States and tribes to monitor and assess whether these newly jurisdictional waters are meeting WQS.¹⁹² Assuming they are not, the TMDL development progress is triggered at even greater costs.

¹⁸⁷ This is to say nothing of the additional costs the WQS Rule’s highest attainable use showing will compel.

¹⁸⁸ See Comments of the Honorable Sam Brownback, Governor of Kansas, on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0409 (July 14, 2011) (attached hereto as Exhibit 16).

¹⁸⁹ Letter from Leo J. Alderman, EPA, Director, Waters, Wetlands, and Pesticides Division, to Roderick L. Bremby, Secretary, Kansas Department of Health and Environment (Nov. 3, 2003).

¹⁹⁰ See Exhibit 9.

¹⁹¹ See *id.* at 11-12.

¹⁹² The agencies’ suggestion that the TMDL process is cost neutral because EPA allows States and tribes to prioritize TMDL development and to develop TMDLs over time is misplaced. See Economic Analysis at 6. Prioritization and delay do not neutralize or somehow lessen the impact of additional costs – they only shift those costs to the future, which generally would result in the necessary activities costing more. Similarly unsupportable is the agencies’ suggestion that in order to comply with the section 305 monitoring and report requirements, States and

As an example, the park ditch in Pinellas County, Florida, discussed and pictured in Exhibit 17, which provides no environmental or human benefits other than flood control, is not now considered to be a “water of the United States,” but would be under the proposed rule.¹⁹³ As noted above, EPA’s WQS Rule would establish a presumption that the attainable use for this ditch is “fishable, swimmable” unless the State conducts an expensive and time-consuming scientific analysis to demonstrate that attaining that use is infeasible. Assuming the State did not have the resources to rebut the presumption, it could be forced to develop a TMDL for this ditch. Using current TMDLs for nitrogen and phosphorous as a gauge, the Florida Stormwater Association estimates that the cost to attain hypothetical “fishable, swimmable” uses in the ditch would be \$31,351,460. While this example may seem extreme, it unfortunately falls comfortably with the scope of the proposed rule when viewed in light of other CWA program requirements.

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

In addition to increased costs to comply with WQS and TMDL requirements, States and regulated entities would also be more vulnerable to third party litigation under the proposed rule. For example, in 2007, pursuant to a settlement agreement, the State of Missouri and EPA agreed that Missouri was not required to set WQS for its ephemeral waters. Despite EPA’s approval, Missouri later had to defend its WQS against a third party. A group filed a citizen suit challenging Missouri’s WQS, arguing that the standards did not meet the requirements of the CWA because they failed to designate uses and set water quality criteria for *all* of Missouri’s waters.¹⁹⁴ The agencies and States face similar threats of litigation based on the additional WQS/TMDL obligations that the proposed rule will trigger.

E. Increased Section 311 Spill Protection Requirements

Under section 311, facilities with oil storage capacity that, due to their location, have a potential to discharge to “waters of the United States” must prepare and implement a Spill Prevention, Control, and Countermeasures (“SPCC”) Plan. 40 C.F.R. § 112. The proposed rule’s increased scope to cover ditches and manmade impoundments, as well as all features in

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

¹⁹³ See Florida Stormwater Association, Proposed Regulations on Waters of the United States: Preliminary Analysis, (attached hereto as Exhibit 17).

¹⁹⁴ *Missouri Coal. for the Env’t v. Jackson*, No. 10-04169 (W.D. Mo. Feb. 16, 2012) (suit was filed against EPA and the State of Missouri intervened to defend its WQS).

floodplain and riparian areas, many facilities, particularly in the arid West, would require SPCC Plans that were not required before. Facilities that already have SPCC Plans also would be affected because many have plans that rely on the use of on-site ditches or impoundments to collect spilled oil and prevent it from reaching “waters of the United States.” The proposed rule’s classification of those ditches and impoundments as “waters of the United States” would undermine current spill control plans and vastly expand planning, compliance, and cleanup costs. For example, in the western United States, one major petroleum company predicts that the proposed rule would require a 1,000-fold increase in SPCC plans.

The agencies concede that under the proposed rule there will be an increase in facilities subject to section 311. Economic Analysis at 29. Yet, to calculate the potential impacts of the proposed rule, they simply suppose that perhaps 1,000 facilities that previously questioned CWA jurisdiction would now require SPCC plans, and conclude that the cost of that compliance would be \$11.7 million. They further state that, despite costs, most facilities simply chose to comply without regard to whether they otherwise would be required to do so. The benefits of this compliance, the agencies state, outweigh any costs. *Id.* at 30. The agencies’ suggestion that the cost of the proposed rule on the section 311 program can be estimated based on a supposed number of facilities that previously may have questioned CWA jurisdiction is wrong. It is unreasonable to assume that there is any reliable correlation between the scope of CWA jurisdiction under the expanded definition of “waters of the United States” and operators that may have, in the past, determined, based on any number of business factors, to assert that they were not subject to the section 311 program. As with the other CWA programs, the agencies have not given adequate consideration to the proposed rule’s impacts on the section 311 spill protection program.

V. The Agencies Have Not Complied with APA and Other Procedural Requirements for this Rulemaking.

A. Review of Adequacy of the Science Supporting the Proposed Rule Is Ongoing.

The APA requires that an agency give notice of a proposed rule setting forth “either the terms or substance of the proposed rule or a description of the subjects and issues involved,” 5 U.S.C. § 553(b), and “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .,” *id.* § 553(c). Under APA notice and comment requirements, “[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency [relies in its rulemaking].” *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotations omitted). As courts have recognized, “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 376, 393 (D.C. Cir. 1973). Rather, the “most critical factual material” used by the agency must be subjected to informed comment to “ensure that agency regulations are tested through exposure to public comment . . .” *American Radio Relay League*, 524 F.3d at 236. By publishing and taking comment on the proposed rule before the Connectivity Report, which is touted as the underlying scientific support for the proposed rule, is final, the agencies have not complied with this critical APA requirement.

The agencies have assured the public that the final regulatory action related to CWA jurisdiction will be based on the final version of the Connectivity Report. *See* 79 Fed. Reg. at 22,190, 22,222. But throughout the comment period, the draft Connectivity Report was undergoing review by the SAB Panel. In late September 2014, the chartered SAB performed a quality review of the SAB Panel's draft conclusions on the draft Connectivity Report and submitted a letter with recommendations to the EPA Administrator.¹⁹⁵ On October 17, 2014, the SAB submitted final recommendations for revisions to the Connectivity Report, which incorporated the final report of the SAB Panel, to EPA Administrator Gina McCarthy. EPA now has the opportunity to make changes to the Connectivity Report based on the SAB's recommendations. Through its comments and report, the SAB Panel has recommended numerous substantive changes to the Connectivity Report.¹⁹⁶ This process will not be completed in time for the public to review and comment on the final Connectivity Report in their comments on the proposed waters of the United States rule. The agencies should have taken a coordinated and reasoned approach to develop a proposed rule following the SAB's peer review of the report and EPA's release of a final Connectivity Report.

Even the SAB Panel members are baffled by the agencies' decision to proceed with a rule before review of the underlying science is complete. Dr. Mark Murphy of the SAB Panel explained:

I must say I am puzzled as to why EPA has decided to release the Proposed Rule before receipt of our review of the Connectivity Report The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB -- just a few minor additions. . . . In point of fact, the SAB Review suggested that some *major* additions be made to the Connectivity Report.¹⁹⁷

Other members of the SAB Panel echoed this concern. Dr. Siobhan Fennessy, for example, noted,

I was surprised by the release date of the draft rule and to see that it does not reflect many of the suggestions made by the SAB panel to strengthen the EPA Connectivity Report. . . . [T]he timing of the release . . . possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based.¹⁹⁸

¹⁹⁵ Letter from David T. Allen, Chair SAB, to Gina McCarthy, Adm'r EPA (Sept. 30, 2014), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/\\$File/EPA-SAB-14-007+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf).

¹⁹⁶ *See* SAB Panel Review of Connectivity Report, Exhibit 5.

¹⁹⁷ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 89 (comments of Dr. Mark Murphy).

¹⁹⁸ *Id.* at 29 (comments of Dr. Siobhan Fennessy).

To allow informed and meaningful public comment on the proposed rule and report as required by the APA, and to fulfill its prior assurances, EPA should re-propose a rule that is informed by the final Connectivity Report and allow the public to comment on the final report.

B. The Connectivity Report and Underlying Science Do Not Support This Rule.

The APA requires that an agency make findings that support its decision, and “those findings must be supported by substantial evidence.”¹⁹⁹ The significant nexus analysis is the lynchpin concept of the agencies’ proposed rule, but the agencies’ significant nexus findings and determinations are not supported by the science. The Connectivity Report, the agencies’ purported scientific basis for the proposed rule, and the preamble’s Appendix A fail to address the “significance” of connections between waters. Instead, the agencies’ “scientific support” for the proposed rule focuses on the ability of science to simply identify the *presence* of connections.²⁰⁰ Both the Connectivity Report and the preamble’s Appendix A ignore the fundamental questions: What is a significant nexus? How do the agencies identify, based on science, circumstances in which there is a significant nexus?

Nor did EPA allow the expert SAB Panel reviewing the Connectivity Report to evaluate whether the report adequately addresses the significance or importance of connections it identifies. EPA’s technical charge questions to the SAB Panel were focused on verifying the technical accuracy of the report’s findings that streams and most wetlands are connected to downstream waters. EPA did not, however, ask the important questions about the scientific significance of these connections for the health or integrity of downstream waters. Recognizing that EPA failed to ask these critical questions, the U.S. House of Representatives Committee on Science, Space, and Technology, pursuant to its authority under the Environmental Research, Development and Demonstration Authorization Act (“ERDDAA”), provided the SAB Panel with additional charge questions that asked the SAB Panel to evaluate the scientific significance of the connections for downstream waters.²⁰¹ EPA dismissed Congress’s letter and additional charge questions, claiming that the questions “go beyond the scientific review that is the expert technical panel’s statutory focus.”²⁰² EPA directed the SAB Panel to ignore Congress’s charge questions and answer only those questions provided by EPA. Even more concerning, as SAB Panel members noted, “During the SAB Review, the panel was explicitly told not to discuss the definition of significance . . .”²⁰³ or “the Proposed Rule itself.”²⁰⁴ As a result, neither the Connectivity Report, nor the SAB Panel’s review of the report, addresses the significance of

¹⁹⁹ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); see also *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁰⁰ See GEI Report, Exhibit 6 at 2. This major issue was noted in WAC’s comments on the Connectivity Report. See WAC Comments on Connectivity Report, at 6-7.

²⁰¹ Letter from the Honorable Lamar A. Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to Dr. Amanda Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report (Nov. 6, 2013).

²⁰² Letter from Laura Vaught, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Lamar Smith (Dec. 16, 2013).

²⁰³ SAB Panel Member Comments on the Proposed Rule, Exhibit 7 at 91 (comments of Dr. Mark Murphy).

²⁰⁴ *Id.* at 48 (comments of Dr. Michael Josselyn).

connections for downstream waters – the central issue for the agencies’ proposed waters of the United States rule. Narrow charge questions are not the only way that EPA controlled the SAB review process. Through a Freedom of Information Act (“FOIA”) request, we obtained communications between EPA Office of Water officials and the SAB. Even the limited redacted documents we received show that this process was not independent and that EPA strong-armed the SAB scientists into validating the Connectivity Report and the proposed rule.²⁰⁵ Nor did the internal EPA or SAB review of the Connectivity Report comply with the requirements of the Information Quality Act.²⁰⁶

Moreover, on September 2, 2014, the SAB Panel released comments on the adequacy of the scientific and technical basis of the proposed rule.²⁰⁷ The SAB Panel members raised a number of serious concerns about the proposed rule’s definitions and categories of regulation. For example, “Panel members generally found that the term ‘significant nexus’ was poorly defined . . . and that the use of the term ‘significant’ was vague.”²⁰⁸ Panel members also questioned the adequacy of scientific support for several of the rule’s definitions and exclusions. For instance, “Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included.”²⁰⁹

In addition, the proposed rule draws conclusions for certain categories of waters, including “tributaries” and “adjacent waters,” based on a Connectivity Report that uses different terminology and definitions that do not necessarily align. As panel member Dr. Michael Josselyn noted, “definitions used in the proposed rule differ from those used in the Draft Science Report and could lead to differences in the interpretation of the science as it relates to the proposed legal definitions.”²¹⁰ For example, Dr. Josselyn points out that the Connectivity Report uses a definition of “tributaries” that relies on the presence of flowing water (or varying volume), whereas the proposed rule includes any feature that possesses a bed, bank, and OHWM. *Id.* These definitions are very different. Dr. Amanda Rodewald also notes this discrepancy and expresses concern that the proposed rule “expand[s] what is commonly thought of as a tributary to any type of water.”²¹¹ Conclusions drawn for “tributaries” in the Connectivity Report may not necessarily be true for all features (e.g., ditches and ephemeral drainages) that the proposed rule

²⁰⁵ See EPA Documents Produced in Response to Freedom of Information Act Request Regarding Science Advisory Board Review of Connectivity Report and Proposed Rule (disc attached hereto as Exhibit 18).

²⁰⁶ Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554) at § 515.

²⁰⁷ Rodewald Memo, Exhibit 7 at 6.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 7.

²¹⁰ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 42 (comments of Dr. Michael Josselyn).

²¹¹ *Id.* at 108 (comments of Dr. Amanda Rodewald) (“One concern that I have relates to what seems to be different definitions of tributary used in the scientific review and the rule. The scientific review focused on perennial, ephemeral, and intermittent streams, whereas the rule seems to include a wide range of waters, including lakes, ponds, ditches, and impoundments.”).

treats as “tributaries.”²¹² Similarly, the Connectivity Report uses the Cowardin definition of “wetland,” which allows for an area to be classified as a wetland if it has only one of three characteristics (hydrology, hydrophytes, or hydric soils), rather than the federal regulatory definition which requires an area to exhibit all three characteristics to be classified as a wetland.²¹³ The proposed rule does not change the federal regulatory definition of “wetland,” but the underlying Connectivity Report uses a different definition. This inconsistent terminology is yet another problem with publishing a proposed rule that was drafted before review of the Connectivity Report was complete.

And, as recently as September 26, 2014, a member of the chartered SAB questioned why neither the Connectivity Report nor the SAB review assessed the level of importance of connectivity. He stated, “EPA scientists should consider *where* along the connectivity gradient there is an impact of sufficient magnitude to impact downstream waters,” and noted that, although there is a continuum, scientists are depended upon to make determinations of significant or critical effects.²¹⁴ Substantial changes to the proposed rule and the Connectivity Report are needed to address these important concerns raised by the SAB Panel. And the public must be given the opportunity to review and comment on any such revisions.

Neither the Connectivity Report nor the preamble’s Appendix A assesses or quantifies the importance of connections between tributaries, adjacent waters, and other waters and effects on downstream waters. As discussed in section II.H. and explained in the GEI Report, “the Agencies have failed to consider that for any connection, there must be a scientifically defensible method to assess the strength of connection with respect to the integrity of the downstream water”²¹⁵ It is on that scientific assessment of strength of connection that the agencies should base determinations of jurisdiction.²¹⁶ But the agencies provide “no consideration for where on that continuum the threshold for strength of connectivity or significant nexus lies.”²¹⁷

Thus, the proposed rule’s underlying science does not provide support for:

- Making categorical significant nexus determinations for tributaries and adjacent waters;
- Asserting jurisdiction over all features that meet the proposed rule’s definition of tributaries (e.g., ephemeral drainages, features with manmade breaks, ditches, and other manmade conveyances) or the determination that all of these features are “similarly situated”;

²¹² See SAB Panel Member Comments, Exhibit 7 at 43 (comments of Dr. Michael Josselyn) (“The tributary definition in the Proposed Rule also includes other features such as flood control channels, some ditches, underground stormwater drainage works that are not part of, nor discussed in, the Draft Science Report.”)

²¹³ See Connectivity Report at 3-6; see also 33 C.F.R. § 328.3(b); 1987 Corps of Engineers Wetlands Delineation Manual at 9 (Jan. 1987), available at <http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf>.

²¹⁴ U.S. EPA Science Advisory Board Quality Review Teleconference (Sept. 26, 2014) (Statements of Dr. Michael Dourson).

²¹⁵ GEI Report, Exhibit 6 at 2.

²¹⁶ *Id.*

²¹⁷ *Id.* at 3.

- Asserting jurisdiction over all features that meet the proposed rule’s definition of “adjacent” based on connections to features that are not natural streams or major tributaries (e.g., ditches and other conveyances and connections via shallow subsurface flow), or the determination that all of these features are “similarly situated”;
- Asserting jurisdiction over “other waters” by aggregating all “other waters” in a watershed to determine if there is a significant nexus; or
- Adopting any of the other potential “other waters” options that allow for asserting categorical jurisdiction over subcategories of “other waters.”

None of these determinations or assertions of jurisdiction is supported by the proposed rule’s underlying science, which, as noted in the GEI Report, did not consider or quantify the significance of connections for downstream waters.²¹⁸ To correct this major shortcoming, the agencies should withdraw the rule, engage with stakeholders, and conduct additional scientific review.

C. The Economic Analysis Is Cursory and Grossly Underestimates the Impacts of the Proposed Rule.

The Economic Analysis for the proposed “waters of the United States” rule fails to provide a reasonable assessment of the proposed rule’s costs and benefits. Professor David L. Sunding, Ph.D., Thomas J. Graff Chair of Natural Resource Economics at the University of California, Berkeley, completed a review of the agencies’ Economic Analysis that provides an analysis of the calculations employed by the agencies and documents the analysis’s numerous flaws.²¹⁹ As Professor Sunding notes, “The errors, omissions, and lack of transparency in EPA’s study are so severe as to render it virtually meaningless.” *Id.* at 2.

The Economic Analysis fails to provide a reasonable assessment of the proposed rule’s increase in jurisdictional waters. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent. But the agencies arrive at this percentage using a flawed methodology. The agencies’ reliance on data from the Corps’ ORM2 database is problematic. As explained by Professor Sunding, the agencies cannot accurately quantify the proposed rule’s increase in jurisdiction by using the ORM2 database because the database only accounts for the section 404 program, and its data do not fit this exercise. *Id.* at 4-9.

Indeed, the Economic Analysis looks at Corps jurisdictional determinations (“JDs”) that concluded under current regulations there is no jurisdiction but that would change under the proposed rule. But this analysis fails to recognize that landowners and project proponents would not have sought JDs for most of the features that would now newly be considered “waters of the United States” under the proposed rule, such as ditches and ephemeral washes. *Id.* at 8.

²¹⁸ GEI Report, Exhibit 6 at 3.

²¹⁹Sunding Review, Exhibit 19.

In addition, the Economic Analysis relies on figures extrapolated from statistics from FY 2009-2010, a period of extremely low construction activity. *Id.* at 10-11. Moreover, the agencies' calculation of increased jurisdiction fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. *Id.* at 8. Relying on the 2.7 percent calculation throughout the Economic Analysis, the agencies systematically and drastically underestimates the impact of the proposed rule's new definition of "waters of the United States."

The agencies' calculations of incremental costs and benefits are also deficient. The cost analysis is focused on costs associated with the section 404 program. Yet the analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses of the permitting process. Sunding Review at 17. The Economic Analysis largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. *Id.* at 20. Costs to other programs, like the section 303 program (State WQS and implementation plans) and section 402 (NPDES and stormwater), are assumed to be "cost-neutral or minimal" without providing any analysis to support this conclusion. *Id.* Although the effects of the proposed rule's definitional change are likely to vary significantly from program to program, the agencies omit careful assessment of program-specific effects, and instead offer simplistic, generalized estimations.

Likewise, the Economic Analysis's benefit calculation overestimates benefits and is riddled with errors. Professor Sunding concludes that the benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics. *Id.* at 27. The agencies use third-party studies conducted 10-30 years ago to estimate an average willingness to pay for wetland mitigation. These studies are largely irrelevant and do not provide accurate estimates of benefits. *Id.* Moreover, the agencies' benefits calculation is based on an unstated and improbable assumption that all of the incremental wetlands affected by the proposed rule's definitional change would be filled (destroyed) if federal jurisdiction is not expanded to cover these areas. *Id.* at 28.

In addition to the methodological errors, the Economic Analysis suffers from a lack of transparency. Professor Sunding explains that "[e]xplanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided." *Id.* at 32.²²⁰ For all of these reasons, the Economic Analysis is inaccurate and incomplete. It does not even begin to cover the impacts of the proposed rule.²²¹ As recommended by Professor Sunding, the agencies should withdraw the analysis and perform a new, thorough review of the economic impacts of the proposed rule.

²²⁰ This is not surprising, given the GAO's recent conclusion that in its regulatory impacts analyses, EPA frequently fails to communicate information supporting regulatory decisions, including baselines, alternatives considered, and other information a reader might need to understand the analysis. U.S. Government Accountability Office, EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses, GAO-14-519 at 12 (July 2014) ("GAO-14-519").

²²¹ GAO 14-519 also noted that EPA often fails to monetize important costs and benefits, thus limiting the usefulness of its impact analyses. *See id.* at 16.

D. The Final Rule Must Be a Logical Outgrowth of the Proposed Rule.

A proposed rule must be sufficiently clear to allow meaningful public comment. The APA requires that the final rule must be a “logical outgrowth” of the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). “If a final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.” *Id.* at 547. There are several issues that cause concern with the agencies’ ability to comply with this APA requirement.

First, as discussed throughout these comments, there are numerous legal infirmities and substantive issues with the proposed rule’s categories and definitions. Addressing all of these issues will require significant revision to the proposed rule and its framework for defining “waters of the United States.” If the agencies take public comment into account and address these numerous concerns, as we recommend, they will need to re-propose the rule.

Second, because the outcome of the rulemaking will be based on the “final version” of the Connectivity Report, the agencies will likely need to revise the rule to reflect changes to the report. In particular, the SAB Panel made numerous substantive recommendation, including that the rule address connectivity on a gradient and provide metrics for determining significant nexus. To account for the SAB Panel’s recommendations and the final Connectivity Report, the agencies will likely need to significantly revise the rule and re-propose it for another round of public comment to comply with the APA’s logical outgrowth requirement.

Third, throughout the comment period, the agencies have continued to issue new materials explaining the proposed rule, creating a moving target for public comment.²²² Since the proposed rule was issued on April 21, 2014, the agencies have continued to issue new documents, blog posts, Q&As, and webinars throughout the comment period, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this ad hoc information is inconsistent with material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses. For example, as discussed above, the term “upland” is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded. Now, a recent Q&A document issued by the agencies on September 9, 2014, provides a new definition of “upland.”²²³ This new definition of “upland” is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? Is the public responsible for tracking the Agencies’ blog posts and ad hoc statements to piece together the meaning of key regulatory terms? Likewise, as discussed above, OHWM is the lynchpin concept of the proposed rule’s “tributary” definition, but the agencies are now in the process of

²²² See WAC Letter to Administrator McCarthy and Secretary McHugh (Sept. 29, 2014), Exhibit 20, and incorporated by reference herein.

²²³ Sept. Q&A document at 5 (“Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.”).

developing new guidance on OHWM, and the meaning of this key term is still in flux.²²⁴ This continual stream of new information from the agencies prevents the public from having adequate notice and opportunity to respond to key aspects of the proposal and results in a “critical defect in the decisionmaking process.” See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 376, 392 (D.C. Cir. 1973) (finding APA violations where a rule was promulgated based on data that “is only known to the agency.”). The agencies’ failure to disclose this information at the outset of the comment period has resulted in a lack of opportunity to comment on the proposed rule and its key concepts. See *id.* at 402.

Finally, the preamble’s treatment of “other waters” indicates that the agencies may adopt a brand new approach to regulating “other waters” that is a significant departure from the proposed rule. Although the agencies have proposed a case-by-case analysis, the preamble discusses several other options for regulating other waters, including determining that certain “other waters” are categorically jurisdictional based on ecoregions or other subcategories. See 79 Fed. Reg. at 22,215-17. The preamble states that the agencies “might adopt any combination of today’s ‘other waters’ proposal and the alternative options for the final rule, after considering public comment and the evolving scientific literature on connectivity of waters.” 79 Fed. Reg. at 22,215. But the preamble does not provide enough information on or scientific support for these alternate approaches that would allow the public to meaningfully comment. Publishing a final rule that adopts an “other waters” approach allowing for categorical jurisdiction over “other waters,” even if only in certain subcategories, would run afoul of APA requirements.

In sum, because the final rule must follow logically from the proposed rule, and the agencies must make *substantial* changes to bring the proposed rule in line with case law and available science, the agencies should withdraw the current proposed rule and start afresh, in dialogue with States and the regulated community.

E. The Proposed Rule Does Not Address Grandfathering Issues.

The proposed rule does not address grandfathering issues or how the rule’s changes would affect existing or pending JDs. We recommend that the agencies clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule.

A federal agency may not enact a regulation with a retroactive effect unless Congress conveys that authority in express terms. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Some courts have held that an administrative rule is retroactive if it “takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” *National Mining Ass’n v. U.S. Dep’t of Interior*, 177 F.3d 1 (D.C. Cir. 1999); *Ass’n of Accredited*

²²⁴ Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036027>; Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036026>.

Cosmetology Schs. v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992). The proposed rule would adopt new standards for defining jurisdiction. To avoid unlawful retroactive application, the agencies must clarify that previously issued JDs and CWA permits will not be reopened to reconsider jurisdiction under the new standards.

In addition, new requirements should not be applied retroactively to JD and permit applicants who have invested substantial efforts under the previous standards. In previous instances, the Corps and EPA have limited application of new regulations to new permit applications. With the 2008 Mitigation Rule, for example, the Corps and EPA provided that the final rule would apply only to permit applications received *after* the effective date of the rule and provided the district engineer discretion to make determinations under the previous standards where applying the new rules to a particular project would “result in substantial hardship to a permit applicant.” 73 Fed. Reg. 19,594, 19,608 (Apr. 10, 2008). The same standard should apply here.

In outreach meetings, the agencies have stated that existing JDs issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determinations.²²⁵ But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the agencies’ intent. In fact, in a June 30 Q&A document published by EPA with a blog post by Nancy Stoner, the agencies stated, “Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations.”²²⁶ Now, without any indication or notice that the June 30 Q&A document has been revised, the Stoner blog post links to a different Q&A document that no longer contains this statement. Have the agencies changed their position on revising previous determinations?

The agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. In addition, the agencies’ statements fail to address JDs and permit applications that are already pending (and may be close to being issued). It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule. Accordingly, the agencies should clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule.

F. The Agencies Have Not Complied with the Regulatory Flexibility Act.

The proposed rule has not been conducted in compliance with the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612. The Office of Advocacy of the U.S. Small Business Administration (“SBA”), which was established to represent the views of small entities before

²²⁵ For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed waters of the United States Rule, EPA stated, “The agencies haven’t figured out grandfathering, but they don’t intend to do anything retroactively to anyone who has been issued permits.” ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014).

²²⁶ Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014) <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/> (June 30, 2014) (attached hereto as Exhibit 21).

federal agencies and Congress, submitted comments that detail the agencies' failure to comply with their RFA obligations for the proposed rule.²²⁷ The RFA was developed in recognition of the economic importance of small businesses, and it attempts to ensure that regulations be promulgated with these entities in mind. Thus, the RFA requires agencies to analyze the impact a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative. *Id.* § 604(a). If the agency has performed an analysis and developed enough information to support a determination of no- or low-impact for small entities, the agency can certify that there would not be a "significant economic impact on a substantial number of small entities." *Id.* § 605(b). Importantly, if an agency does not have the factual data to support a certification, it cannot certify and must comply with detailed RFA impact analysis requirements, including the identification of alternatives that minimize the increase in cost for small businesses. *Id.* § 603. This assessment of less burdensome alternatives is at the heart of the protections afforded under the RFA.

For the proposed rule, the agencies did not publish an initial regulatory flexibility analysis as required by the RFA. Nor does it appear that the agencies considered any alternatives to the proposed rulemaking. Instead, the agencies certified that "this proposed rule will not have a significant impact on a substantial number of small entities." 79 Fed. Reg. at 22,220. The agencies failed to provide any factual basis for the certification as required by the RFA despite the evident consequences for hundreds of thousands of small entities. Rather, the agencies reasoned that certification was appropriate because "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations." *Id.* As explained throughout these comments, we disagree with that assessment, and interpret the rule to result in a substantial increase in jurisdiction. In its comments, the SBA similarly concludes that "the agencies have improperly certified this rule."²²⁸ The SBA points out the rule will have a significant, direct economic impact on small businesses.²²⁹ Coalition members estimate that the expanded regulatory definition would have widespread regulatory impacts on small businesses and small governmental jurisdictions. Many ordinary activities undertaken by small businesses and governments would immediately become subject to a wide variety of regulations and permitting requirements, all of which would impose direct costs, delays, and uncertainty in planning future activities and projects. These impacts are felt acutely by small business entities. As explained by the SBA, "Concerns raised by small businesses as well as the agencies' own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition."²³⁰ For all of these reasons, the agencies' certification is invalid. Accordingly, the agencies are required to conduct an initial regulatory flexibility analysis as required by the RFA, including exploration of regulatory alternatives for reducing significant economic impact on small entities.

In addition, when a rule will have a significant economic impact on a substantial number of small entities, the RFA, as amended by the Small Business Regulatory Enforcement Fairness

²²⁷ U.S. Small Business Administration, Office of Advocacy, Comments on Definition of "Waters of the United States" under the Clean Water Act (Oct. 1, 2014) ("SBA Comments").

²²⁸ SBA Comments at 4.

²²⁹ *Id.*

²³⁰ *Id.* at 9.

Act (“SBREFA”), requires EPA to convene a review panel. SBREFA panels are required for all EPA rules for which an initial regulatory flexibility analysis is required. 5 U.S.C. § 609. Panel outreach must take place *before* the publication of the proposed rule.²³¹ With a SBREFA panel, the agency solicits information and advice from representatives of small entities that are affected by the proposal, and issues a final panel report that is included in the rulemaking docket. 5 U.S.C. § 609.

But the agencies have not conducted a SBREFA panel for this proposed rule, and have not given the small business community or local governments a real, meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires. The agencies’ response to the concerns of small entities has been dismal. The agencies have disregarded calls from the SBA and the U.S. House of Representatives Committee on Small Business to hold SBREFA panels and to comply with other requirements of the RFA. In the docket for the proposed rule, EPA has provided a “Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of ‘Waters of the United States,’” which details an outreach meeting that the EPA held in 2011 to discuss the 2011 Draft Guidance. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule. The 2011 meeting was open to only a limited number of participants, and the topic of the meeting was not the proposed rule but a previous draft guidance. As evidenced by the content of the proposed rule, which is very similar to the 2011 Draft Guidance, the agencies have wholly ignored all of the feedback from small business entities, including those who were able to participate in the meeting on the 2011 Draft Guidance.

Similarly, after largely ignoring States and small entities throughout this rulemaking process, EPA invited select small entities to participate in a meeting held on October 15, 2014, less than a month before the extended comment deadline, to “provide input” on the proposed rule. This is too little too late. As in the past, invitations for this meeting were sent to a very limited list of small entity participants. The meeting was not open to the public. Ultimately, this meeting was a feeble attempt by the agencies to give the appearance of engaging with small entities – it is no more than window dressing. It in no way satisfies the agencies’ obligations to consider impacts to small businesses.

Moreover, the proposed rule does not comply with the President’s January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which reiterates the RFA’s provisions for providing regulatory flexibility and emphasizes the important role small businesses play in the American economy.²³² With this proposed rule, the agencies have not satisfied their obligations with respect to small businesses and governments. The agencies should withdraw the proposed rule, conduct an initial regulatory flexibility analysis, hold a SBREFA panel, and explore ways that the proposed rule could be modified to minimize impacts

²³¹ Small Business Administration, RFA Guide for Government Agencies, at 52 (May 2012), *available at* http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

²³² <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre>

to small entities. The SBA has also advised the agencies to withdraw the rule and conduct a panel prior to promulgating any further rule on this issue.²³³

G. The Proposed Rule Violates the Void for Vagueness Doctrine.

The Proposed Rule, with its expansive, vague, and unclear provisions, fails under the “void for vagueness” doctrine. There are specific constitutional due process prohibitions on adoption of an expansive, vague, and unclear standard that will determine potential liability in civil and criminal enforcement actions, as the proposed rule here would under the CWA. Additionally, such an expansive and vague definition will open the floodgates to “bounty hunter” citizen suits under the CWA, burdening the regulated community and the courts with wasteful and unnecessary litigation. This will also produce inconsistent results in lower courts until the jurisdictional limits are, once again, addressed by the Supreme Court.

As stated by the Supreme Court, “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). “This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment . . . [and i]t requires the invalidation of laws that are impermissibly vague.” *Id.*; see also *United States v. Williams*, 553 U.S. 285, 304 (2008). This doctrine is often referred to as the “void for vagueness” doctrine. The void for vagueness doctrine addresses two important due process concerns: “first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Id.*; see also *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Here, the proposed rule is a clear example of a statute that fails under the void for vagueness doctrine. The CWA provides for both civil and criminal enforcement for alleged violation of permits, unpermitted discharges, and other alleged violations of CWA requirements. See 33 U.S.C. § 1319. The definition and scope of “waters of the United States” is a critical element in the Act and a factor in determining the scope of regulated activity and potential liability. As such, the jurisdictional limits must be defined in such a way as to “give fair notice of conduct that is forbidden or required.” *F.C.C.*, 132 S. Ct. at 2317. Yet the proposed rule allows for sweeping jurisdiction based on tenuous connections, catch-all categories, and direct and indirect impacts, all of which leave a potentially liable person or entity in the dark as to what actions may or may not be subject to CWA enforcement. Such vague and ambiguous language fails to meet constitutional standards for enforcement actions.

²³³ SBA Comments at 9.

H. The Proposed Rule Does Not Comply with Other Mandatory Statutory and Regulatory Requirements.

1. The agencies have not complied with E.O. 13,563 (Improving Regulation and Regulatory Review).

The proposed rule fails to comply with Executive Order No. 13,563, titled “Improving Regulation and Regulatory Review” (E.O. 13,563). 76 Fed. Reg. 3,821 (Jan 21, 2011). That order provides: “Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” It adds that regulatory agencies must (1) base their requirements on the best available science, (2) promote predictability and reduce uncertainty, and (3) propose or adopt regulatory requirements only upon a reasoned determination that their benefits justify their costs. *See* E.O. 13,563 §§ 2, 5. Also, the President has commanded the agencies to tailor their regulations to impose the least burden on society, consistent with obtaining its regulatory objectives, taking into account the costs of cumulative regulations, and to identify and assess available alternatives to direct regulation. *See id.* § 1(b).

In drafting the proposed rule to define “waters of the United States,” it appears that the agencies chose to ignore or avoid their obligations under E.O. 13,563. Specifically, as noted in section V.B., the proposed rule is not supported by the science. And fundamentally, as noted throughout these comments, the proposed rule will *not* provide predictability or reduce uncertainty. Moreover, there is no evidence that the agencies made a reasoned determination that the proposed rule’s environmental benefits (if any) will justify its jobs, development, and consumer cost burdens. To the contrary, as explained in section V.C. above, the agencies’ Economic Analysis fails to provide a reasonable assessment of the proposed rule’s costs and benefits, and grossly underestimates the rule’s impacts. Moreover, it is clear that the agencies have not tailored the proposed rule to impose the least burden on society, taking into account the cost of cumulative regulations affecting stakeholders. Ultimately, the proposed rule is riddled with ambiguities and prospective implementation problems. The agencies have not crafted a revised definition of “waters of the United States” that “imposes the least burden on society” as required by E.O. 13,563.

2. The rulemaking does not comply with E.O. 12,866 (Regulatory Planning and Review).

The proposed rule fails to comply with Executive Order No. 12,866 of September 30, 1993, titled “Regulatory Planning and Review” (E.O. 12,866). 58 Fed. Reg. 51,735. Pursuant to E.O. 12,866, each agency “shall identify and assess available alternatives to direct regulation” and “alternative forms of regulation.” E.O. 12,866 at §§ 1(b)(3), 1(b)(8). An agency also has a duty to “assess both the costs and benefits of the intended regulation” and “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” *Id.* § 1(b)(6). Moreover, E.O. 12,866 requires an agency to base its regulatory decisions “on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation.” *Id.* § 1(b)(7). The EO requires an agency to tailor its regulations “to impose the least burden on society.” *Id.* § 1(b)(11). As discussed in section V.C., the Economic Analysis for the proposed rule is cursory

and grossly underestimates the impacts of the proposed rule.²³⁴ As Professor Sunding’s review demonstrates, the Economic Analysis is not based on the best reasonably obtainable economic information. The agencies have not provided a true, comprehensive analysis of the burdens that this proposed rule will impose on the regulated public. And, as explained in the GEI Report, the rule is not supported by the best reasonably obtainable scientific information.

Finally, E.O. 12,866 requires an agency to “draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.” *Id.* § 1(b)(12). As discussed throughout these comments, the language of the proposed regulation is anything but clear. To the contrary, it is vague and ambiguous, and invites litigation arising from such uncertainty. In sum, the agencies have not complied with E.O. 12,866 for this proposed rulemaking, and should withdraw and revise the rule to address these concerns.

3. The agencies have not complied with E.O. 13,132 (Federalism).

Executive Order 13,132 of August 4, 1999, titled “Federalism” (E.O. 13,132), establishes requirements for policies that have “federalism implications,” meaning “substantial direct effects on the States.” 64 Fed. Reg. 43,255 (Aug. 10, 1999). The purpose of E.O. 13,132 is to ensure that, in formulating and implementing policies with federalism implications, agencies are guided by certain fundamental principles. For example, E.O. 13,132 provides, “the national government should be deferential to the States when taking action that affects the policymaking discretion of the States.” *Id.* § 2(i). In addition, “[w]ith respect to federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible.” *Id.* § 3(c). E.O. 13,132 *requires* federal agencies to consult with State and local officials on policies that have federalism implications and “determine whether Federal objectives can be attained by other means.” *Id.* §§ 3(b), 6(a). Consultation must occur “early in the process of developing the proposed regulation.” *Id.* § 6(b)(2).

In the preamble, the agencies state that the proposed rule “will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” 79 Fed. Reg. at 22,220. This is patently false. The proposed rule defines where federal jurisdiction stops and where State jurisdiction begins. It involves the reach of a statute administered, in part, by the States. Yet the States were not adequately consulted on the proposed rule as E.O. 13,132 requires. Waiting until the public comment period to solicit State input does not allow for meaningful consideration of the States’ views, as well as alternate ways the States may have for meeting federal objectives under the CWA.²³⁵ Practically speaking, there was no reason for EPA and the Corps to avoid formal consultation with the States over the many years that the

²³⁴ Indeed, a recent GAO report noted that EPA’s economic analyses are often limited in their usefulness because the agency fails to monetize key benefits and costs, such as water quality effects. GAO 14-519, at 29 .

²³⁵ See *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule* , Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure (testimony of J.D. Strong, Oklahoma Water Resources Board), at 12 (June 11, 2014) , *available at* <http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf>.

agencies have been in this rulemaking process. The agencies should withdraw the proposed rule and conduct the necessary consultation with States and local governments.

I. The Agencies' Rulemaking Process Has Not Been Transparent or Open.

This Administration has committed itself to public participation and transparency.²³⁶ But EPA and the Corps did not solicit meaningful public participation in the development of the proposed rule. Some members of industry did meet with EPA to express their concerns about the potential impacts of the 2011 Draft Guidance and any proposed rule that would track that guidance, but the proposed rule does not address any of the concerns raised in this limited outreach. Only after the rule was developed, drafted, and proposed did the agencies seek more extensive outreach with industry groups, State and local organizations, and other members of the public. Instead of trying to understand the public's concerns with the potential breadth of the rule, the agencies have dug in their heels and repeated their mantra that this proposed rule will not change the scope of CWA jurisdiction. Moreover, the agencies have not been transparent during their outreach. For example, the agencies have held calls with numerous stakeholders, but those calls are initiated only by emails from the agencies to a select list of participants. There is no publicly available list of the meetings the agencies have conducted. Nor is there any advance notice of these meetings for the public. For example, in one of the few instances that the agencies did publicly announce a meeting with stakeholders, they did so after the fact – the notice of the meeting of the Local Government Advisory Committee in St. Paul on May 28 was published in the Federal Register on May 29. *See* 79 Fed. Reg. 30,787.

Given the critical importance of this issue, which has broad application and affects myriad stakeholders, the agencies should have made the rulemaking process more collaborative and more open. They should withdraw the proposed rule and conduct outreach the proper way, giving advance notice to the public of all meetings, and consulting with stakeholders *before* the rule is developed.

VI. Conclusion

In sum, the Coalition believes that the proposed rule misconstrues the relevant Supreme Court cases, is inconsistent with the limits Congress and the Supreme Court have placed on the scope of CWA jurisdiction, and impermissibly expands jurisdiction. Moreover, the proposed rule relies on vague concepts and ambiguous terminology and will not achieve the clarity and predictability that the agencies claim to seek. In many cases, the proposed rule's new concepts will require expensive consultants and legal interpretations, which will maintain or make worse the status quo for obtaining jurisdictional determinations. In addition, the proposed rule is unsupported by the science in the proffered Connectivity Report and the preamble's Appendix A. The agencies have failed to adequately analyze the proposed rule's implications for all CWA programs and have underestimated the enormous burdens the proposed rule will impose on EPA

²³⁶ *See, e.g.*, Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on Transparency and Open Government (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (encouraging public, State, and local participation in the creation of policy; and instructing agencies to take steps to ensure that the government is transparent, participatory, and collaborative).

and Corps staff, State permitting authorities, and the regulated community, while providing few if any corresponding benefits.

For all of these reasons, the agencies must withdraw the proposed rule. The agencies must work with stakeholders, including small businesses, States, and local governments, and regulated entities, to develop a revised rule that is more in line with congressional and legal intent and is supported by the science.

Appendix: Detailed Legal Analysis of Proposed Rule to Define “Waters of the United States”

I. The Proposed Rule’s Interpretation of Waters that Are Considered (a)(1) Through (a)(3) Waters Is Inconsistent with *Rapanos* and Prior Case Law.

Whether a water is a TNW, interstate water, or territorial sea ((a)(1) through (a)(3) water) is of fundamental importance because the proposed rule deems waters jurisdictional based on their relationships to these waters. The proposed rule’s broadening of the scope of waters that can be considered (a)(1) through (a)(3) waters has a domino effect, thereby broadening the scope of waters that are jurisdictional based on their relationship to (a)(1) through (a)(3) waters.

A. The Proposed Rule’s Definition of Traditional Navigable Waters Is Inconsistent with the Definition Relied on by the Justices in *Rapanos*.

The proposed rule’s (a)(1) provision covers “[a]ll 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.” 79 Fed. Reg. at 22,262. These (a)(1) waters are commonly referred to as TNWs. Although the proposed rule would not change the regulatory text for TNWs from the existing regulations, the agencies’ interpretation of the scope of waters that are considered TNWs broadly expands the concept of TNWs and is inconsistent with the definition relied on by the *Rapanos* plurality and Justice Kennedy’s concurrence. The agencies’ misinterpretation of TNWs was addressed in detail in our comments on the 2011 Draft Guidance.¹

In *Rapanos*, both the plurality and Justice Kennedy based their jurisdictional tests on what they referred to, respectively, as “traditional interstate navigable waters” and “navigable waters in the traditional sense.”² The waters to which the plurality and Justice Kennedy are referring are unmistakably clear from the cases they cite to describe them – *The Daniel Ball v. United States*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). These cases are cornerstones in a canon of well-established cases that define TNWs as waters that: (1) are navigable-in-fact (or capable of being rendered so) and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. See *The Daniel Ball*, 77 U.S. at 563.

The proposed rule acknowledges the origins of the well-understood TNW definition, but vastly expands the idea by providing that a water will be considered an (a)(1) water, *inter alia*, if “a Federal court has determined that the water body is ‘navigable-in-fact’ under Federal law for any purpose.” 79 Fed. Reg. at 22,255 (emphasis added).³ It also provides for a water to be

¹ See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 25-34.

² *Rapanos*, 547 U.S. at 742 (plurality) (establishing that a wetland is covered by the CWA requires a showing that “the adjacent channel contains a ‘wate[r] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters) . . .”); *id.* at 779 (Kennedy, J., concurring) (“the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”).

³ As examples, the agencies provide citations to several cases arising in non-CWA contexts, including *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) (stream met broad definition of “navigable

considered a TNW if it is “currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments).” 79 Fed. Reg. at 22,200. As the Supreme Court has explained, however, “any reliance upon judicial precedent” on the subject of navigability “must be predicated upon careful appraisal of the *purpose* for which the concept of ‘navigability’ was invoked in a particular case.” *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); *see also PPL Montana LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (noting that “the test for navigability is not applied in the same way in the[] distinct types of cases”).

That a water is deemed a “navigable water” by a federal court for purposes of title, admiralty, or the RHA does not mean that it meets the two-part standard of a traditional navigable water. Indeed, a water can be a “navigable water” for purposes of the RHA, for example, but not be a CWA jurisdictional water. *See United States v. Milner*, 583 F.3d 1174, 1196 (9th Cir. 2009) (finding jurisdiction under the RHA, but not the CWA, noting “the RHA’s concern with preventing obstructions, on the one hand, and the CWA’s focus on discharges into water, on the other. Since the two laws serve different purposes, their regulatory powers will diverge in some circumstances, as is the case here.”). Likewise, treating a waterbody as a TNW simply because a canoe or kayak can float on it is an impermissible expansion of the traditional navigable waters definition relied on by the *Rapanos* Court. Thus, the agencies’ interpretation of what can be considered a TNW to be regulated under paragraph (a)(1) of the proposed rule 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.

B. The Proposed Rule Inappropriately Allows for Waters To Be Jurisdictional Based on Their Relationships to Interstate Waters.

The proposed rule accords new status to interstate waters, equating them with TNWs and allowing for features to be jurisdictional based on a relationship to interstate waters. As discussed in more detail in section III.E., under the proposed rule, for example, “other waters” can now be jurisdictional if they have a significant nexus to a non-navigable interstate water. *See* 79 Fed. Reg. at 22,200. There is no support for this interpretation in *Riverside Bayview Homes*, *SWANCC*, or *Rapanos*, because those decisions did not concern interstate waters – they dealt solely with TNWs. The significant nexus principles that originated in *SWANCC* and *Rapanos* are tied to TNWs – not interstate waters. And interstate waters differ from TNWs because they are sometimes non-navigable and may not qualify as highways for commerce. *See infra* section II.J.1.

The proposed rule does not provide a definition of “interstate waters,” but a significant portion of the preamble’s Appendix B (Legal Analysis) is devoted to supporting the notion that interstate waters need not be navigable. *See generally* 79 Fed. Reg. 22,254-59. But the case law relied upon by the agencies does not provide support for asserting jurisdiction over waters based

waters” under Federal Power Act where canoe could be successfully navigated downstream); *Alaska v. Ahtna*, 891 F.3d 1401 (9th Cir. 1989) (river used for commercial fishing found to be navigable for purposes of “equal footing doctrine”). Although the waters at issue in these cases satisfied the navigability standard in their particular contexts, they would not necessarily satisfy *The Daniel Ball* and RHA standards and therefore may not be traditional navigable waters under the CWA.

on their relationship to non-navigable interstate waters.⁴ Indeed, minor, non-navigable waters that happen to cross state borders but are located far from TNWs should not be accorded the same treatment as TNWs. Therefore, it simply makes no sense, and there is no scientific or legal authority, to equate the two and allow for waters to be jurisdictional based on their relationship to interstate waters.

II. The Proposed Rule’s Definition of Tributary Is Inconsistent with the *Rapanos* Plurality and Justice Kennedy’s Opinion.

The proposed definition of tributaries is inconsistent with *Rapanos* and will sweep in waters and features well beyond the reach of the agencies’ CWA authority. Under the proposed rule, tributaries, impoundments of tributaries, and waters adjacent to tributaries are all *per se* jurisdictional. 79 Fed. Reg. 22,262-63. The proposed rule defines “tributary” as “a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water” to a TNW, interstate water, territorial sea, or impoundment. *Id.* at 22,263. Wetlands, lakes, and ponds can be treated as tributaries if they contribute flow to a TNW, interstate water, or territorial sea, even if they lack a bed, banks, and OHWM. *Id.* A water does not lose its status as a jurisdictional tributary due to manmade breaks (e.g., bridges, culverts, pipes, or dams) *of any length*, so long as a bed, banks, and OHWM can be identified upstream of the break. *Id.* A tributary “can be a natural, man-altered, or manmade water and includes water such as rivers, streams lakes, ponds, impoundments, canals, and ditches [unless otherwise excluded].” *Id.*

As we have previously noted in comments,⁵ both the *Rapanos* plurality and Justice Kennedy were concerned about far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow. The plurality chastised the Corps for extending jurisdiction to “ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert.” *Rapanos*, 547 U.S. at 734. Similarly, Justice Kennedy criticized the agencies’ “existing standard” for tributaries which “deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark” because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it.” *See id.* at 781.

⁴ In the proposed rule, the agencies cite to *Illinois v. Milwaukee*, 406 U.S. 91 (1972), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1984), and claim that in these cases, the Supreme Court “recognized the Federal interest in interstate water quality pollution” and “recognized that CWA jurisdiction extends to interstate waters without regard to navigability.” 79 Fed. Reg. at 22,256. The agencies’ argument is essentially that since the CWA replaced federal common law nuisance with regard to interstate water pollution, and since federal common law nuisance applied to both navigable and non-navigable waters, the CWA jurisdiction must extend to both navigable and non-navigable interstate waters. The Supreme Court, however, cautioned in *City of Milwaukee* that this sort of analysis is flawed: “The appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law.” *City of Milwaukee*, 451 U.S. at 316. The Court further explained, “it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law.” *Id.* at 317. Thus, to discern whether federal law governing interstate water pollution applies to non-navigable waters, one must look to Congress and the language of the CWA.

⁵ *See* WAC Comments on 2011 Draft Guidance, Exhibit 1 at 61; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 22.

Contrary to the limits of CWA jurisdiction recognized by the *Rapanos* plurality and Justice Kennedy’s concurrence, the proposed definition of tributary allows for *per se* jurisdiction over features with remote proximity and tenuous connections to TNWs, such as ephemeral drainages. The proposed definition does not require any consideration of frequency or duration of flow. Indeed, just like the agencies’ previous standard that the Supreme Court considered to be too far-reaching, the proposed rule’s tributary definition allows for regulation of drains, ditches, and streams with little or no relationship to traditional navigable waters. As such, the proposed rule’s definition of “tributary” goes well beyond the agencies’ previous assertions of jurisdiction that were criticized by the *Rapanos* Justices as exceeding the scope of their CWA authority.

Furthermore, the categorical determination that all channelized waters with an OHWM that contribute flow have a significant nexus and are therefore *per se* jurisdictional ignores Justice Kennedy’s concerns about the breadth of a standard based on OHWM. Justice Kennedy was skeptical of the use of OHWM to establish jurisdiction and noted that the Corps district offices apply the OHWM standard inconsistently. *Id.* (citing GAO Report 04-297).⁶ Justice Kennedy stated that in many cases the waters that would be jurisdictional under such a broad standard would be “little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” *See id.* at 781. Rather than limiting the scope of jurisdiction over tributaries in accordance with Justice Kennedy’s concurrence, the agencies announce a similarly broad standard in the proposed rule and ignore Justice Kennedy’s concern with the reliance on OHWM to determine jurisdiction. Again, the agencies’ assertion of jurisdiction over all tributaries essentially amounts to the “any hydrological connection” standard that was rejected by a majority of the Justices in *Rapanos*.

III. *Rapanos* Made Clear that Many Ditches Are Excluded from Jurisdiction, even Ditches that Connect Waters of the United States.

Contrary to *Rapanos*, which made clear that CWA jurisdiction does not extend to many ditches, even those ditches that connect to waters of the United States, the proposed rule would extend jurisdiction to a significant number of ditches. For the first time, the proposed rule expressly includes “ditches” in the definition of tributary, meaning that ditches with a bed, bank, and OHWM that contribute flow will categorically be jurisdictional unless they meet one of the narrow ditch exclusions. 79 Fed. Reg. at 22,263. The proposed rule excludes ditches in two very limited circumstances: (1) ditches excavated wholly in uplands *for their entire length*, draining only uplands, with less than perennial flow, and (2) ditches that do not contribute flow, directly or indirectly, to a traditional navigable water, interstate water, territorial sea, or impoundment. *Id.* at 22,203. As discussed in more detail in section III.C., most ditches will not satisfy the rigorous standards of these narrow exclusions, and therefore, under the proposed rule, many ditches will be regulated as tributaries regardless of their function, contribution to, or distance from traditional navigable waters.

⁶ Years later, the Corps OHWM standard is still being applied inconsistently across districts. *See* Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of a National OHWM Delineation Technical Guidance (Mar. 14, 2014).

Both the *Rapanos* plurality and Justice Kennedy’s concurrence made it clear that many ditches should not be subject to CWA jurisdiction. The plurality emphasized the plain language of the CWA in regulating “navigable” waters and rebuked the agencies for regulating ditches, drains, and desert washes far removed from navigable waters. *Rapanos*, 547 U.S. at 733-34. The plurality interpreted the phrase “waters of the United States” to include only “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams [,] . . . oceans, rivers, [and] lakes,’” and would exclude “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739. Likewise, Justice Kennedy noted, with disapproval, that the dissent “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters,” and concluded that “[t]he deference owed to the Corps’ interpretation does not extend so far.” *Id.* at 778-79. Justice Kennedy also expressed concern with the agencies’ existing tributary standard because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes.” *Id.* at 781.

The proposed rule ignores all of this language and sets up a structure where many ditches that are remote from any navigable-in-fact water and that carry only minor water volumes are categorically jurisdictional. Based on the limits acknowledged by the *Rapanos* Court, ditches should be excluded from jurisdiction.

IV. The Proposed Rule’s Concept of Adjacent Waters Is Inconsistent with the *Rapanos* Plurality and Justice Kennedy’s Opinion.

The proposed rule’s regulation of adjacent waters expands CWA jurisdiction in contravention of the *Rapanos* plurality and Justice Kennedy’s opinion. The *Riverside Bayview Homes* Court recognized that the agencies may assert jurisdiction over *wetlands* actually abutting on a navigable-in-fact waterway, 474 U.S. at 135,⁷ and the current regulations provide for jurisdiction over adjacent *wetlands*. But the proposed rule, for the first time, extends jurisdiction to adjacent non-wetland waters, and expands the concept of adjacency beyond reason.

The proposed rule extends jurisdiction to “[a]ll waters, including wetlands,” adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263. The proposed rule does not explain what is considered a “water” that could be adjacent under this provision, but the preamble states that the term “water” is used “in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems.” *Id.* at 22,191 n.3. The preamble further explains that the term “water” “do[es] not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.” *Id.* This explanation indicates that the agencies intend to treat essentially any feature that is wet as a “water” that could be jurisdictional by virtue of its adjacency.

⁷ The *Riverside Bayview Homes* Court explicitly did not address “wetlands that are not adjacent to bodies of open water.” 474 U.S. at 131 n.8.

The term “adjacent” means “bordering, contiguous, or neighboring.” *Id.* at 22,263. This definition has not changed from the current regulations, but the proposed rule vastly expands the concept of “neighboring.” Under the proposed rule, waters and wetlands are “neighboring” (and therefore regulable under (a)(6)) if they are “located within the riparian area or floodplain” of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have “a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” *Id.* The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies’ “best professional judgment” to determine the appropriate area or flood interval. *Id.* at 22,208. The proposal also leaves the application of the term “shallow subsurface hydrologic connection” to the best professional judgment of the agencies. *Id.* Building on this expansive concept of “neighboring,” the proposed rule determines, categorically, that all “adjacent waters” have a significant nexus, and allows for jurisdiction over all waters and wetlands in undefined floodplain and riparian areas or that have a subsurface connection to jurisdictional waters. This interpretation is a blatant departure from the plain meaning of “adjacent”⁸ and is a far cry from the actually abutting wetlands found to be adjacent in *Riverside Bayview Homes*.⁹

The proposed rule’s inclusion of non-wetlands in this “adjacent waters” category is an impermissible expansion of agency jurisdiction. Justice Kennedy’s *Rapanos* opinion applied only to wetlands. And in *Baykeeper*, the U.S. Court of Appeals for the Ninth Circuit held that adjacent non-wetlands are not subject to CWA regulation. 481 F.3d at 709. At issue in *Baykeeper* was whether the agencies had CWA jurisdiction over a non-navigable pond that Baykeeper argued was “adjacent” to the Mowry Slough, a navigable tributary of the San Francisco Bay. *Id.* at 706. The court rejected the agencies’ assertion of jurisdiction over the non-navigable pond, explaining that nothing in *SWANCC* or *Rapanos* supports the assertion of jurisdiction over non-wetlands based on adjacency to navigable waters. *Id.* at 707. With their proposed category of “adjacent waters,” the agencies again attempt to extend the concept of jurisdiction based on adjacency to non-wetlands. The agencies justify the assertion of jurisdiction over “adjacent” non-wetlands by claiming that, “Prior to *SWANCC*, adjacent non-wetland waters were often jurisdictional under the ‘other waters’” provision. 79 Fed. Reg. at 22,207. Although this may be true, the *SWANCC* Court rejected such a practice and held that regulation of these isolated waters was beyond the scope of the agencies’ authority under the Act. *SWANCC*, 531 U.S. at 168. The agencies may not use this rulemaking to recapture waters that the Supreme Court has ruled to be outside CWA jurisdiction.

In addition, the agencies’ adjacent waters standard is problematic because it allows for jurisdiction based on “adjacency” to drains, ditches, and streams remote from navigable waters and carrying only minor volumes of flow. Justice Kennedy’s opinion does not allow for jurisdiction based on “adjacency” to features that are not “major tributaries.” *Rapanos*, 547 U.S. at 780. Justice Kennedy explicitly rejected “the Corps’ theory of jurisdiction in these

⁸ See *Summit Petroleum Corp.*, 690 F.3d 733, 744 (6th Cir. 2010) (rejecting EPA’s position that “activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them” because that position “undermines the plain meaning of the text [‘adjacent’], which demands, by definition, that would-be aggregated facilities have physical proximity”).

⁹ See *Rapanos*, 547 U.S. at 748 (plurality) (“[A]djacent’ as used in *Riverside Bayview* is not ambiguous between ‘physically abutting’ and merely ‘nearby.’”).

consolidated cases – adjacency to tributaries, however remote and insubstantial . . .” *Id.* With respect to the non-navigable ditch at issue in *Carabell*, Justice Kennedy’s concurrence stated, “mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it.” *Id.* at 786. In such situations, he found that “a more specific inquiry” was necessary. *Id.* Under the proposed rule, wetlands (and non-wetlands) that are adjacent to such remote and insubstantial tributaries (including jurisdictional ditches) would be *per se* jurisdictional. Asserting *per se* jurisdiction over any water or wetland within the floodplain or riparian area of a water of the United States directly contradicts Justice Kennedy’s opinion.

Nor does the *Rapanos* plurality allow for such an expansive assertion of jurisdiction over “adjacent waters.” The plurality found that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.” *Rapanos*, 547 U.S. at 742 (emphasis in original). Thus, the plurality explained, “Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a ‘significant nexus’ in *SWANCC*.” *Id.* Moreover, the agencies do not state what floodplain interval is intended in their proposed standard, but a commonly defined floodplain mapped by FEMA is the 100-year floodplain. If that is what is intended, this goes far beyond the ruling in *Rapanos*. In criticizing the overbreadth of the Corps’ jurisdictional determinations, as an example, the *Rapanos* plurality specifically cited the practice of some Corps districts to assert jurisdiction over wetlands “if they lie within the ‘100-year floodplain’ of a body of water – that is, they are connected to the navigable water by flooding, on average, once every 100 years.” *Id.* at 728. Ignoring these limits imposed by the *Rapanos* plurality, the proposed rule would allow for jurisdiction over waters, including wetlands, based on location within the same floodplain or riparian area as non-navigable, remote features now classified as tributaries. This goes well beyond what the *Rapanos* plurality allowed and would codify practices specifically rejected by the *Rapanos* Justices.

With the proposed rule’s new definition of “neighboring” and extension of the adjacency concept to non-wetlands, the agencies are attempting to broaden their CWA jurisdiction in a manner that is wholly inconsistent with the *Rapanos* plurality’s and Justice Kennedy’s opinions, which squarely rejected the agencies’ “any hydrological connection” standard and the agencies’ attempts to regulate wetlands based on adjacency to non-navigable tributaries. Although the proposed regulation of “adjacent waters” may result in more certainty (because it automatically covers all waters in a floodplain or riparian area or with a shallow subsurface hydrologic connection to jurisdictional waters), the agencies cannot regulate in conflict with *Rapanos* and beyond the scope of their CWA authority in order to gain certainty.

V. The Proposed Rule’s Assertion of Jurisdiction over Isolated Waters Violates *SWANCC*.

The agencies’ regulation of “other waters” as proposed violates the Supreme Court’s decision in *SWANCC*. Under the proposed rule, CWA jurisdiction will extend to, “[o]n 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 traditional navigable waters, interstate waters, or territorial seas. 79 Fed. Reg. at 22,263. Contrary to the agencies’ assertions, this is an expansion of jurisdiction from the current regulations.¹⁰ As we have previously noted in comments, for all of the reasons articulated in *SWANCC*, it is unlawful for the agencies to assert jurisdiction over these “other waters.”¹¹

The *SWANCC* Court held that “nonnavigable, isolated, intrastate waters” – which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway – were not jurisdictional under the CWA. 531 U.S. at 168. As discussed in section II.B., the *SWANCC* Court found that assertion of jurisdiction over such features would raise “significant constitutional questions” and “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. The Court’s holding in *SWANCC*, including its rationale for rejecting jurisdiction in the case of non-navigable, isolated waters, was reaffirmed in Justice Kennedy’s *Rapanos* concurrence. *Rapanos*, 547 U.S. at 767. The agencies should eliminate proposed paragraph (a)(7) regulating “other waters,” and, consistent with *SWANCC*, all “other waters” should be excluded from jurisdiction by rule.

In *SWANCC*, there was no need to perform an elaborate analysis because the lack of proximity alone was sufficient to determine there was no meaningful connection to TNWs. Like the ponds at issue in *SWANCC*, “other waters” that do not fall within the broad scope of the agencies’ proposed “tributary” and “adjacent waters” categories are truly isolated waters that are not jurisdictional under the CWA.

¹⁰ The agencies state that the current regulations assert jurisdiction over “other waters” “more broadly than what is proposed today.” 79 Fed. Reg. at 22,212. But *SWANCC* invalidated the agencies’ broad use of the 33 C.F.R. § 328(a)(3) “other waters” provision to assert jurisdiction.

¹¹ WAC Comments on 2011 Draft Guidance, Exhibit 1 at 87.