November 12, 2014

VIA ELECTRONIC FILING AND ELECTRONIC MAIL

The Honorable Regina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Re: Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The undersigned groups, representing a broad range of businesses, industries, and commercial interests of every size, in every part of the country, write to express our strong opposition to the revised definition of "Waters of the United States" proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) (collectively "the Agencies.")[1] Along with many other affected interests, the undersigned groups believe they will be seriously adversely affected by the revised definition, for the reasons explained in detail below.

At the most fundamental level, the proposal as written represents an unjustified expansion of Clean Water Act jurisdiction far beyond the limits of federal regulation explicitly established by Congress and affirmed by the courts. The proposal would, for the first time, give federal agencies direct authority over land use decisions that Congress has intentionally preserved to the States. It would intrude so far into traditional State and local land use authority that it is difficult to imagine that any discretion would be left to State, county and municipal governments.

[1] 79 Fed. Reg. 22,188 (April 21, 2014).

Despite repeated assurances from the Agencies that the proposal is in reality merely a non-substantive definitional change, the Agencies' proposal would subject ordinary commercial and industrial activities to new layers of federal requirements under the Clean Water Act. This would happen solely because low-lying or wet areas on or near their properties would, for the first time, be defined as being jurisdictional. In addition, the unusually vague and confusing definitions the Agencies use in the proposal make it virtually impossible for businesses to even comprehend that they would have to meet federal—rather than State and local—requirements when they perform routine operations. Instead of creating more regulatory certainty for businesses, the introduction of terms like "significant nexus" and "tributary" guarantees that many years of additional litigation will be necessary to delineate the boundaries of federal jurisdiction.

We believe that the Agencies have not demonstrated that this proposal—as written—is either necessary or desirable, particularly because such a sweeping expansion of federal authority would not actually result in new environmental benefits or increased regulatory certainty. While this revised definition is ostensibly intended merely to clarify the scope of federal authority over *wetlands areas*, the proposal essentially rewrites the Clean Water Act to make EPA and the Corps a central authority that makes the key decisions on many kinds of land and water uses. Cooperative federalism, which has worked well in the water quality context for over 40 years, would be set aside as the Agencies commandeer State and local agencies to carry out federal directives.

The Agencies' proposed approach has been consistently rejected by Congress and the courts since 1972, and rightly so. The Agencies have neither the resources nor the on-the-ground capability to assume control of the nation's water infrastructure ***and*** associated land uses. If it were finalized, the Agencies' proposed rule would have profoundly negative economic impacts on business, States, local governments, and ultimately, on EPA and the Corps themselves. As the U.S. Supreme Court recently stated in another context:

> EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate.

All of the undersigned groups want clean water—and in many cases depend on it for their businesses to survive. They have supported efforts under the Clean Water Act to protect our water quality. The proposed rule is not really about addressing threats to clean water, however. The proposed rule is really about the Agencies' overreaching attempt to replace longstanding state and local control of land uses near water with centralized federal control.

In light of the overwhelming evidence that the proposed WOTUS rule would have a devastating impact on businesses, States, and local governments without any real benefit to water quality, the Agencies should immediately withdraw the waters of the U.S. proposal and begin again. The current proposed rule is simply too procedurally and legally flawed to repair. The Agencies are not issuing this rule under any legally- or statutorily-required timetable, so they have ample time to start over and write a rule that is legally defensible. Any revision of the WOTUS definition and its underlying terms must be written in a way that is clear and understandable. EPA also must explain why such a revision is necessary and what environmental benefits, if any, the revision would yield.

I. BACKGROUND

The Agencies published the "waters of the United States" (WOTUS) proposed definition rule in the *Federal Register* on April 21, 2014.[2] The Agencies' stated purpose for issuing the proposal is to "clarify the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*."[3] The Agencies assert that the proposed rule would "enhance protection of the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act."[4]

The Agencies cite the U.S. Supreme Court's 2001 *SWANCC*[5] and 2006 *Rapanos*[6] decisions, which, as described in detail below, sharply limited the scope of federal jurisdiction over some waters. As a result of the two decisions, the Agencies have been obliged to evaluate the jurisdiction of individual waters on a case-by-case basis. The proposed rule would allow the

[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] 531 U.S. 159 (2001).
[6] 547 U.S. 715(2006).

Agencies to avoid having to make these case-by case jurisdictional determinations so frequently.

The proposed rule is based upon EPA's Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. On the date the Agencies published the proposed rule, the Report had not been reviewed by EPA's Science Advisory Board. The Report is apparently intended to establish a scientific basis for the connectivity of isolated, rarely existing "waters" to traditional "navigable" waters under the CWA (rivers, bays, estuaries, etc.). The Agencies argue that the hydrologic "connectivity" of these remote waters, which ultimately reach navigable waters, establishes federal (rather than State or local) jurisdiction over these waters. These waters, currently regulated as "waters of the State," will become "waters of the U.S." under the proposed rule.

The proposal retains the existing CWA definitions for "wetlands" and "adjacent," but the Agencies would add the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." As discussed below, by itself or in combination with others, each of these terms has enormous regulatory significance. For example, in evaluating the impact of the proposal on its own operations, one manufacturer observed that:

> [A]dditional acreage will likely fall under one or more of the proposed definitions for tributary, adjacent, neighboring, riparian, floodplain or other waters . . . One major concern is the incremental, cumulative nature of these proposed definitions. If an area isn't a water body, it may be a tributary. If it is isolated and does not contribute direct flow, flow might nevertheless be indirect, the groundwater beneath it may be connected to a water body, or it might be in the floodplain, riparian area, or watershed and become significant when combined with other waters. It is the potentially unlimited nature of this definition, where very few limits exist, that causes concern.[7]

Despite industry's "major concerns," the Agencies contend that "the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations."[8] Based in part on this assertion, the Agencies

[7] Analysis of WOTUS proposal prepared by a manufacturing company (September 9, 2014).
[8] 79 Fed. Reg. at 22,189. EPA's comparison of current and potentially jurisdictional federal waters is based on the difference between the current WOTUS definition (last codified in 1986), and the proposed definition. However, the jurisdictional boundaries of the 1986 definition have been significantly limited by the U.S. Supreme Court in *SWANCC* and *Rapanos*. Therefore, any comparison of the jurisdictional scope of the proposed definition to the theoretical scope of the

certified or otherwise promised that (1) the proposed rule would not have a significant economic impact on a substantial number of small entities, (2) it would not impose new Federal mandates on State, local, or tribal governments, and (3) it would not have any substantial direct effects on the States.

II. UNDERSTANDING THE REAL-WORLD IMPACTS OF THE AGENCIES' PROPOSED "WATERS OF THE UNITED STATES" RULE

Despite the Agencies' written and oral assurances that the proposed rule would have no substantive regulatory impact,[9] and that it would actually reduce the amount of federally jurisdictional areas, all of the available evidence shows the opposite to be true.[10] As written, the proposed WOTUS rule gives businesses, institutions, and commercial interests grave concerns about the real-world impacts it would impose.

EPA's Own Maps Show Vastly Expanded Federal Jurisdiction Over Waters

Significantly, **EPA itself** has recently developed detailed maps that indicate vastly expanded areas of potential federal Clean Water Act jurisdiction under the proposed WOTUS rule. These detailed maps were released to the public by the House Science Committee on August 27, 2014.[11] The maps, developed by EPA and the U.S. Geological Survey, indicate more than **8.1 million miles** of rivers and streams across the 50 states under the

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original 1986 definition is both misleading and irrelevant in the wake of these key Supreme Court decisions.

[9] *See*, *e.g.*, Testimony of Robert Perciasepe, EPA Deputy Administrator, before the House Small Business Committee (July 30, 2014) ("it [the WOTUS rule] doesn't directly impact large businesses or small businesses in any direct way"); Statement of EPA Administrator Gina McCarthy made on farm tour in Missouri, as reported in FarmPolicy.com post (July 10, 2014) ("this [the WOTUS rule] has been characterized as the largest land grab ever in the United States. We're not regulating land. We're simply trying to protect drinking water, knowing that's important for agriculture."). These no-impact assertions appear to contradict the Agencies' 2003 Advance Notice of Proposed Rulemaking (ANPRM) soliciting comment on a revised WOTUS definition designed to restore federal jurisdiction over isolated waters in the wake of the *SWANCC* case. *See* 68 Fed. Reg. 1,991 (January 15, 2003). In the 2003 ANPRM, the Agencies listed potentially regulated entities as including "State/Tribal governments," "local governments," "Industrial, commercial, or agricultural entities," and "land developers and landowners." *Id*. at 1,992. The Agencies have not demonstrated that these same entities would not be regulated under the proposed rule.

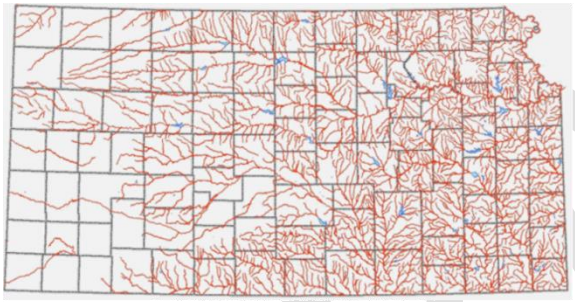
[10] Even if the Agencies' contrary interpretation of the scope and effect of the rule had some rationale, the textual definitions and language in the proposal will have to be applied and interpreted by businesses, State and local governments, lawyers, interest groups, and—ultimately—the courts.

[11] Press Release, House Committee on Science, Space & Technology, "Smith: Maps Show EPA Land Grab" (August 27, 2014) (the map hyperlink is embedded in the release).

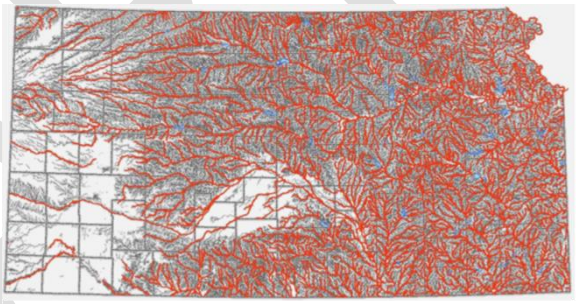
revised WOTUS definition.[12] This sharply contrasts with a January 2009 EPA report to Congress that estimated the U.S. had **3.5 million miles** of rivers and streams.[13]

Based on these new EPA maps, the proposed rule represents a potential expansion in federally jurisdictional "tributary" miles of at least**130%**. And this increase is over and above the expansion of federal jurisdiction related to waters that could be considered "adjacent" under the new "neighboring" definition.

Likewise, analyses by the States of their own waters reveals that the revised definition would increase the amount of stream miles under federal jurisdiction by orders of magnitude. For example, the state of Kansas has estimated that the inclusion of "ephemeral" streams as "waters of the U.S." would increase the amount of jurisdictional stream miles from 32,000 miles to 134,000 miles, as shown below, an increase of more than **400%**.[14]



Current WOTUS in Kansas



WOTUS in Kansas Under Proposed Rule

The expanded jurisdictional areas depicted in maps prepared by EPA and the States, respectively, are based primarily on the Agencies' proposal to define "ephemeral" streams—those that only flow after heavy rains, perhaps only once every few years—as waters of the U.S. Ephemeral streams are

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[12] EPA and the Corps consider these revised maps to be good indicators of the extent of federal jurisdiction. The agencies noted that "[w]hen considering whether the tributary being evaluated eventually flows to [a navigable] water, the tributary connection may be traced using direct observation or ***U.S. Geological Survey maps***, aerial photography or other reliable remote sensing information, or other appropriate information." 79 Fed. Reg. 22,202 (April 21, 2014) (emphasis added).

[13] EPA Office of Water, National Water Quality Inventory: Report to Congress, EPA 841-R-08-001 (January 2009).

[14] *See* Letter to Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency from Sam Brownback, Governor of Kansas (July 14, 2011) ("For Kansas, we can easily see where this [the WOTUS definition] would bring up to 100,000 miles of ephemeral drainages under the purview of the Clean Water Act and subject those drainages to its numerous mandatory requirements – requirements producing little if any demonstrable improvement in water quality.").

currently regulated in the majority of States as "waters of the State."[15] Regulating these waters—and the land areas "adjacent" to them—as WOTUS would be one of the largest regulatory expansions in history.

The Rule's New and Existing Definitions Will Have a Huge Impact on Ordinary Business Activities

Expanding federal jurisdiction through regulating ephemeral streams is the most conspicuous way the rule would expand federal jurisdiction. Less obviously, the proposed rule adds several new definitions that, although critical to understanding the true scope of the rule, are so vague as to allow virtually any interpretation of their limits. These definitions include "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." As noted above, these definitions work in conjunction with one another so that if an area isn't a water body, it may be a *tributary*. If it is isolated and does not contribute direct flow, flow might nevertheless be indirect, the shallow subsurface water beneath it may be connected to a water body, or it might be *in the floodplain*, *riparian area*, or *watershed* and become *significan*t when combined with other waters." Thus, it will often be impossible for landowners and businesses to escape federal jurisdiction under the revised WOTUS definition.

Thus, the Agencies' assertion that the change in the WOTUS definition has no substantive effect is clearly erroneous. The revised definition will have the immediate impact of greatly expanding federal jurisdiction over waters that are currently regulated by the States. In *National Association of Home Builders v. Army Corps of Engineers*,[16] the D.C. Circuit Court of Appeals found that a revised Clean Water Act definition had the effect of restricting developers' eligibility for general wetland permits, forcing them to apply for more burdensome and costly individual permits in many more situations. The court found that the developers had suffered a substantive injury from the definition change. The proposed WOTUS definition rule would have precisely the same kind of immediate adverse effect on a wide variety of business activities, as described below.

Moreover, although the proposed rule is ostensibly intended to simply clarify the scope of federal jurisdiction for activities that may trigger wetlands "dredge and fill" permits under section 404, the rule will federalize a much larger universe of clean water programs now run by States and localities:

[15] The Association of State Wetland Managers, "Report on State Definitions, Jurisdiction, and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States" (April 2014).
[16] 417 F.3d 1272 (D.C. Cir. 2005).

- Stormwater programs run by municipalities will be required to impose more stringent controls on facilities with parking lots, storage pads, or other large paved areas. These facilities would become subject to more stringent stormwater management requirements, potentially including the requirement to obtain National Pollutant Discharge Elimination System (NPDES) permits for the first time, and to treat their stormwater before it leaves the property. This will impact grocery stores, shopping centers, big box stores, stadiums, airports, schools, churches, hospitals, and many other kinds of commercial and institutional facilities;
- The revised WOTUS definition would require businesses to update and expand their Spill Prevention, Control, and Countermeasure (SPCC) Plans under section 311, and their stormwater discharge permits/plans under section 402;
- The expansion of jurisdictional waters of the U.S. is also likely to result in a greater number of "impaired" federal waters under section 303, with additional burdens on States to evaluate and list these waters, and a greater likelihood that facilities with runoff will fall under Total Maximum Daily Load "budgets" that may significantly impact facility operations; and,
- Substantially expanded federal jurisdiction over land areas and activities may trigger section 404 dredge and fill requirements for the first time. These requirements would apply to much more than just work that takes place in wetlands, impacting many other activities. In addition to the cost and delays involved with obtaining permits, firms will also face much higher mitigation costs to offset the impact of work done in newly-defined WOTUS areas.

Real-World Impacts on Specific Industries

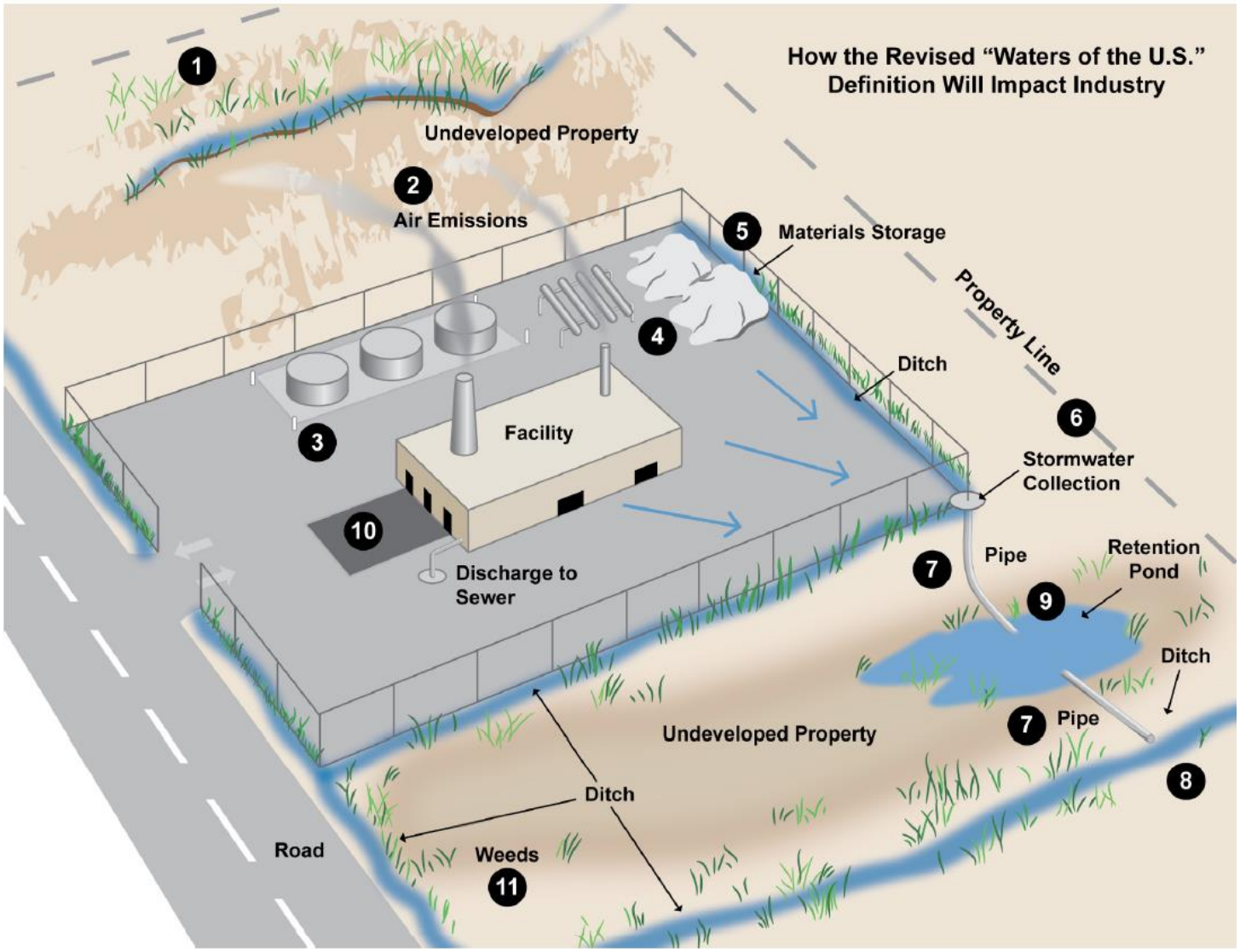
If the proposed rule were finalized, many businesses will be confronted by new federal permitting obligations. Virtually any business that owns or operates a facility or has property could be affected, particularly if it has industrial ditches, retention ponds for stormwater runoff, fire ponds, dust suppression ponds (since dust suppression is usually required under a facility's air permit), or other surface impoundments on site. Moreover, unlike some agricultural water features, industrial ditches and impoundments are not exempted from federal permitting requirements under section 404 or other sections of the CWA.

The real-world impacts of the Agencies' proposed rule can be illustrated using a diagram of a typical industrial/commercial facility. Each

number on the diagram corresponds to a potential new WOTUS impact under the proposed rule:

Diagram Illustrating WOTUS Impacts on Businesses/Facilities

Diagram © 2014 U.S. Chamber of Commerce



PERMITTING IMPACTS ON INDUSTRY FROM EXPANDED "WATERS OF THE UNITED STATES" DEFINITION

Many common situations/activities at industrial and commercial facilities will trigger Clean Water Act requirements because of the expanded "waters of the U.S." (WOTUS) definition:

❶ When it rains heavily, water ponds in the vacant areas next to the facility and may run off into ditches. While these areas are **uplands** under the current WOTUS definition (not subject to the Clean Water Act), the expanded definition can make them "adjacent" waters or "other" waters subject to the Clean Water Act. Water (or other liquids, dust, soil, ash, etc.) moving from the facility onto these areas can trigger the requirement to get a section 402 or 404 permit; water quality standards under section 303 could apply, as well as more stringent spill control requirements under section 311. Also, the facility owner would have to get a section 404 permit to develop these vacant areas.

❷ Advocacy groups contend that air emissions from facilities that leave deposits, such as on the vacant areas (or other waters) in this example, will require a section 402 or 404 permit.

❸ Oil storage tanks are currently subject to section 311 spill prevention requirements. More stringent requirements will be required under the revised WOTUS definition, because a spill can affect a far larger universe of jurisdictional "waters" near the facility (ponds, ditches, low lands).

❹ The on-site storage of materials that drip over time onto paved areas will result in more stringent and extensive stormwater management requirements under section 402.

❺ The on-site storage of materials that blow onto vacant areas (or are carried by rain in the facility's stormwater) can trigger new/more stringent section 402/404 permitting requirements.

❻ The stormwater collection point can, for the first time, itself be treated as a jurisdictional water and become subject to a section 402 permit for discharges from the facility.

❼ The stormwater conveyance pipe may classified as a "tributary" under the new WOTUS definition.

❽ The ditches at the facility are likely to be regulated as "tributaries," "adjacent waters," or "other waters." Maintaining these ditches, including clearing vegetation, removing silt, and stabilizing banks, will require a section 404 permit. Stormwater discharges into the ditches may require section 402 permitting or, in combination with other discharges, trigger area-wide TMDL requirements under section 303.

❾ The retention pond may also be regulated as a tributary, adjacent water, or other water. Clearing vegetation, removing sediment, stabilizing the pond banks, or draining the pond will trigger a section 404 permit, and discharges into the pond may require a section 402 permit.

❿ Toxic materials used inside the facility (e.g., metal dust) are tracked outside via the loading dock and mixed with stormwater, triggering more stringent section 402 requirements. Routine dust suppression programs and/or vehicle washing will make this problem worse.

⓫ Control of weeds growing near ditches and impoundments, whether through mechanical techniques or herbicide applicators, can trigger section 404 or 402 permitting requirements.

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Impacts from the WOTUS rule on specific industries[17] include:

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

  Any ditch that contributes flow to these waters—directly or indirectly—becomes a tributary, and its use and management is regulated, which can trigger section 404 permits. Besides the cost and time required for the permit itself, companies may be required to comply with costly and resource-intensive mitigation/restoration requirements. These facilities are also likely to face more stringent federal requirements under sections 402 and 311. Companies anticipate that their ditches next to service roads will be automatically regulated as tributaries. At these types of facilities the roadways function as corridors connecting the plant to other areas. Maintenance and operation of these kinds of vital roads will be made more difficult. Also, work that is necessary to improve these roads may be delayed or prevented by more stringent permitting.

- *Mining operations* – A longwall coal mining company in the Northeast reports that it has ditches and culverts that are connected to other ditches that eventually flow to streams. While the company has a robust stormwater management monitoring and management program, it has never had to obtain section 404 permits for its ditches, culverts and impoundments. Because the company stores coal, byproducts, and other materials that contribute sediment to the facility's stormwater, the company expects that it would have to obtain section 402 NPDES and section 404 permits if the WOTUS definition is finalized.

[17] These impacts have been estimated using the available information about how the proposed WOTUS rule would (or, based on pressure from advocacy groups, *could*) be interpreted by the Corps and EPA. While the proposal is complex and confusing, the broad scope of the written definitions would easily allow for the expansion of federal jurisdiction in the ways described in this comment letter.

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WOTUS Would Hit Building Products Manufacturers Hard

Building products manufacturers are located in every part of the country. Materials used in their products like sawdust, clay, and dust, can get into their stormwater and, ultimately, into their ditches. These ditches must periodically be cleaned out so they can flow properly. Currently, most of these ditches are regulated by the States through the section 402 stormwater program. Under the revised WOTUS definition, they would likely have to obtain section 404 permits to remove clay sediment from these ditches when maintaining them. Requiring building products companies to get section 404 permits for ditch maintenance would be a costly, time-consuming mandate that puts additional economic stress on the industry (as well as on the construction industry) while doing nothing to actually improve water quality.

Moreover, building products plants are likely to face much tougher stormwater management requirements under the WOTUS proposal. Facilities that have sediment in runoff would be more likely to have to get section 402 point source permits and treat their runoff. This has already happened at a plant in the Northeast, where the state agency's abrupt reinterpretation of its stormwater program resulted in a section 402 permit and treatment being required before rain water could be pumped out of an onsite clay pit. Despite the fact that the rain water was **already** the quality of drinking water, the company was required to treat it before allowing it to flow off-site. This struggling industry should not be required to waste precious resources to install treatment technologies that yield no environmental benefit.

- *Mineral processing* – A mineral processor in the West has a facility that processes bentonite. Although the State carefully regulates sediment in the plant's stormwater, the company has never had to obtain section 404 permits to remove sediment from its on-site ditches and impoundments. The revised WOTUS definition will subject the facility to federal permitting requirements. The federal regulation of ditches beside roads also makes road maintenance more complicated and subject to delays. Moreover, facility expansion projects will be much more likely to require federal permits, including a section 404

permit, which would also likely trigger extensive environmental project reviews by multiple federal agencies.

- *Asphalt plants* – Asphalt plants typically store process materials and recycled asphalt on site. A company in the Southeast reports that they have ditches and impoundments that are currently regulated under the stormwater program. As part of that program, the asphalt plant must treat their stormwater by running it through an oil-water separator. These plants will probably have to obtain NPDES permits under the revised WOTUS definition, as well as section 404 permits for the maintenance work that is routinely done in their ditches and impoundments. They are also likely to need to have more extensive SPCC programs for the bitumen that they use and store onsite.

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

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

WOTUS: Coming to a Store Near You!

Retailers, shopping centers, and other businesses with paved parking lots will be more likely to be required to treat their stormwater/snowmelt runoff before it leaves their property. For example, "big box" retail stores with garden centers or vehicle maintenance services are particularly likely to face more stringent Clean Water Act permitting required by EPA and the Corps. In some cases, these businesses would be required to obtain NPDES permits for the first time for discharges to WOTUS.

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- *Electric transmission* – Probably the most important impact to this industry from the proposed rule involves section 404 permitting relating to construction and maintenance of transmission lines. The actual location of poles (for distribution lines) and towers (for larger transmission lines) is driven by a number of right-of-way issues, such as the willingness of landowners to cooperate, potential National Environmental Policy Act (NEPA) review, and Endangered Species Act (ESA) concerns. Expanding the amount of federal jurisdictional areas under the revised WOTUS definition makes these siting problems both more common and more difficult to navigate. Nationwide Permit 12 (utility line activities) is frequently used where an activity does not result in the loss of greater than ½-acre of waters of the US for each single and complete project. Moreover, the infrastructure needed to construct and maintain transmission lines requires construction of access roads to bring equipment to the poles/towers. These access roads and related ditches are likely to trigger section 404 permitting, which in turn may trigger NEPA/ESA processes. In addition, utilities would also need section 402 NPDES permits to use herbicides to control vegetation within the line's right of way if there is a possibility for the herbicide to get into a WOTUS.

  Another concern expressed by electric cooperatives is how the phrase "single and complete project" will be interpreted in riparian areas or floodplains, which the WOTUS proposal would assume to be federal waters. Will the Corps continue to consider each crossing a "single and complete project," or will all the potential crossings be grouped together as a "common landscape unit." If the latter, the disturbance of the individual crossings could be combined, the combination would likely exceed the ½-acre limit in NWP-12, and the project would require a far more expensive and time-consuming individual section 404 permit. Again, the proposal would impose significant new burdens with little or no corresponding environmental benefit.

- *Energy development companies* - The proposed definition's emphasis upon the "significant nexus" of a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest jurisdictional water), means that more hydraulic fracturing operations will have to obtain section 404 permits. Hydraulic fracturing operations now often occur under Nationwide Permits 12 (utility line activities) and 39 (commercial and institutional developments), which authorize certain limited activities. NWP 12-authorized activities must not result in impacts greater than 1/2 acre of waters of the U.S. for each single and

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complete project. With a more expansive definition of WOTUS it is likely that previous general permit authorizations would now require an individual permit. NWP 39 authorized activities also must not result in greater than 1/2 acre of loss of non-tidal waters of the U.S. If an individual 404 permit is required, practicable alternatives to the dredging operation must be assessed. Under the expanded WOTUS definition, such alternatives will far be more difficult to identify.

Moreover, under the current regulations an operator does not need to obtain a permit from the Corps when building an access road that crosses a stream if the disturbance is less than one-tenth of an acre per crossing. Under the proposed WOTUS definition these crossings would likely require permits, significantly impacting oil and gas operations in these areas. Broadening the regulations to include "waters located within the riparian area" and "all adjacent waters in a watershed (with) significant nexus with their traditional navigable water" potentially expands WOTUS jurisdiction to include the drainage area of a tributary – from ridge top to ridge top on either side of a stream.

Trying to Make Sense of the WOTUS proposal

Energy companies have observed that it is very difficult to read the Agencies' proposal and understand the extent of a "floodplain" when the concept is so poorly defined. The result of these many definitional changes effectively means every stream crossing and many well pads will require a nationwide section 404 permit, and, possibly, an individual permit. The costs associated with these potential new permitting requirements will be significant. These would likely result in extended permitting timelines and could render many projects uneconomical, particularly for small energy companies.

The proposal's new emphasis upon adjacent waters and natural/ manmade ditches means that more operations will be required to maintain a SPCC plan for the first time. Un-diked areas are required to have drainage systems to flow into ponds, lagoons, or catchment basins to retain oil and return such runoff to the facility. Under the proposed rule, if such catchment basins are within areas subject to periodic

flooding, they would be adjacent to an "other water," and SPCC plans would be required to be implemented or renewed.

WOTUS and Energy Projects in the High Mountain West

Any energy company operating at mid- to high-elevations, where project sites are located "adjacent to" or "neighboring" an ephemeral or intermittent stream will likely find itself within this new expanded framework of WOTUS. Even in arid regions of the West in the vicinity of depressions that are dry a majority of the time, but which flow in heavy rains, projects will now be caught within the redefined WOTUS and subject to additional permit obligations.

Assessment of the effect on the chemical, physical, or biological integrity of such waters may be required to determine permitting obligations. While the agencies assert that the proposal will have no effect on permitting, if the landscape of jurisdictional waters is expanded, additional CWA permits will be needed that would delay and potentially halt energy projects.

- *Municipal Water Utility* – Municipal water utilities have to have section 404 and section 402 permits and in some instances the use of these permits can implicate the need for a section 401 water quality certification from the state. Western municipal utilities and water providers are interested in assisting EPA in pursuing "green infrastructure" options for stormwater control. Stormwater flows remain one of the largest impediments to meeting water quality standards. However, the installation of such infrastructure, including artificially constructed wetlands, natural detention basins, and pervious drainage ways or channels, could prove problematic if such infrastructure was found to then be located within, or if itself became, "waters of the U.S."

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Killing Green Projects?

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

Under the proposed revised WOTUS definition, the Aurora project would be unlikely to avoid jurisdictional "waters of the U.S.," triggering additional federal permits. Obtaining these permits would be much more costly and time-consuming, making it far less likely the project would have gone forward.

- *Sand, Stone, and Gravel Operations* - Aggregates, such as sand, stone, and gravel, are the chief ingredient in asphalt pavement and concrete. They are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Many aggregate deposits were created by water, so the deposits are often located near water. The availability of future sources of high quality aggregates is now a significant problem in many areas of the country, and permitting issues have made the problem more acute. This proposed rule will make matters worse. A change in what is considered jurisdictional can have a significant impact on aggregate reserves, which affects the life of facilities and delays the start-up of new sites. The concern is not only that these facilities will face more uncertainty and significant new

costs, but that other industries will also be affected. Without a supply of readily available aggregates, the construction of highways, public works, and residential and commercial building projects would be seriously impacted.

- *Road Construction/Maintenance* - Major linear transportation projects such as roads, highways, bridges, or transit systems, can take years, if not more than a decade, to complete. Although only certain entities are involved in the financing and construction of these projects, almost all other surrounding entities are positively impacted and benefit from these projects.[18] In order for these projects to move forward, planners need to know that permits received at the beginning of a multi-year construction process will be valid throughout the entire time the project is being built. Further, planners also need to know that the specific conditions and mandates in a particular permit are not going to change after the permit is issued. The prospect of validly-issued permits being rescinded because of reinterpretation in the scope of federal jurisdiction, or the inability to obtain permits in the first place, are of great concern to potential investors. The expansion of jurisdictional waters under the WOTUS proposal would greatly exacerbate this uncertainty problem.

- *Homebuilders/Realtors* - The uncertainty created by the WOTUS rule would also impact homebuilders and realtors. Homebuilders would face the problem of not knowing whether the property they intend to build on is actually WOTUS. The risk of building in a WOTUS without a section 404 permit is severe,[19] and developers would have much more difficulty finding non-WOTUS areas to build in. Many properties that are not now WOTUS would become effectively off-limits to homebuilders and other developers.

  Similarly, current real estate owners who wish to develop or sell their land would face new restrictions on the use or sale of their land if newly jurisdictional areas are created by virtue of the WOTUS rule. Even now, a new determination that a property contains jurisdictional waters will reduce the value of real estate. A recent example is instructive of a property seller in the West who had executed a sales

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

[19] *See*, *e.g.*, *Sackett v. EPA*, 566 U.S. __, 132 S.Ct. 994 (2012) (property owner who planned to build home and cleared land received Compliance Order from EPA asserting that the property was jurisdictional wetlands in which the owner had placed illegal fill material. The property owner was ordered to restore the site to its original condition and pay up to $75,000 per day for the illegal discharge of pollution.).

contract with a buyer when a Jurisdictional Determination letter from the Corps arrived. The buyer backed out of the sale and the owner was unable to sell his property. Such situations—created only because of a change in the WOTUS definition—could be repeated all across the country, destroying the value of thousands of properties by virtue of administrative fiat.

- *Railroads* - The revised WOTUS definition would have a profound impact on the nation's railroads. Rail plays a major role in the American economy, moving more freight (39.5%) than any other method. Freight rail companies must maintain a network of 140,000 miles of track,[20] along with associated rights-of-way, ditches, bridges, tunnels, switching equipment, poles, rail yards, and maintenance facilities. Railroad ditches and rights-of way may be WOTUS under the proposed rule even if they are dry nearly all of the year, or are not continuous. As one company has noted, "we have thousands of miles of ditches which could suddenly become subject to onerous regulation with absolutely no benefit to the environment.

  Routine track bed maintenance, ditch/culvert maintenance and clearing, or the repair of bridges or other crossings that may disturb more than ⅓ acre of land are much more likely to trigger "dredge and fill" permits under section 404 of the CWA. Railroad companies will have to incur the cost and project delays of many more of these permits—which EPA itself has estimated to have a median cost of $155,000.[21]

  The revised WOTUS definition could also subject railroads to additional litigation over coal dust that blows off of trains into jurisdictional waters. Advocacy groups are claiming that coal dust emissions from trains are point source discharges that require a section 402 NPDES permit. Lawsuits to stop these discharges are pending in federal court. In *Sierra Club v. BNSF Railway Co.*, 44 ELR 20005 (E.D.Wash.2014) the court denied the defendant's motion to dismiss the claim. A similar case involving coal dust emissions is also pending in the federal district court for the Western District of Washington.

- *Air emissions from industrial plants* - In recent years, EPA has argued that a point source discharge occurs under the Clean Water Act when

[20] U.S. Department of Transportation, Federal Railroad Administration, "Freight Rail Today" available at https://www.fra.dot.gov/Page/P0362.
[21] EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.

an industrial plant or other facility vents or emits dust or other materials to the ground outside, where they are carried by rainfall or snow runoff into jurisdictional waters. In EPA's view, the facility (which is itself the point source) makes a regulated discharge when it exhausts dust or other airborne materials from an enclosed facility to the ground where rainwater carries it to receiving waters.

In *Alt v. EPA*, 979 F.Supp.2d 701 (N.D.W.V.2013), for example, EPA asserted that a poultry house venting bits of feathers, dander, litter, and manure to the surrounding farmyard triggered a discharge permit under section 402 of the CWA. EPA determined that the farm "has discharged pollutants from man-made ditches via sheet flow to Mudlick Run during rain events generating runoff without having obtained an NPDES permit." The facility was threatened with a civil action and penalties of up to $37,500 per day of violation. The district court held that the CWA specifically exempts "agricultural stormwater discharges" from being regulated as a point source, and therefore that no section 402 permit is required. This exemption is not available to industrial or commercial facilities, however, so the WOTUS proposal would create more discharges subject to permitting.

Real-World Impacts on the States

Like businesses, States would face a very heavy burden under the WOTUS proposal:

- States will be immediately responsible for administering tens of thousands of new and revised NPDES point source permits to sources under section 402;
- States will also be required to revise their water quality standards under section 303, and certify that Federal actions meet those standards under section 401;
- The expansion of jurisdictional waters is also likely to result in a greater number of "impaired" federal waters under section 303, with additional burdens on States to evaluate and list these waters; and,
- States will face a greater likelihood that facilities with runoff will fall under Total Maximum Daily Load "budgets" that may significantly impact facility operations.

The States would be responsible for implementing all of these expanded duties within their existing budgets and staffing levels. Because businesses depend on being able to get State-issued permits within a reasonable

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timeframe, the additional workload the revised definition would place on the States would become a serious obstacle to commercial activity.

Real-World Impacts on Counties and Local Jurisdictions

The proposed rule would impose a particularly heavy regulatory burden on counties and local government jurisdictions. Much of this burden would come in the form of new permits and approvals being required to conduct routine infrastructure maintenance.

According to the National Association of Counties, the nation's counties are responsible for building and maintaining 45% of the roads in 43 states.[22] Because the proposed WOTUS definition would define "tributaries" to include ditches, flood channels, and other infrastructure, counties would immediately be required to obtain section 404 permits for work in those areas that may disturb soil or otherwise affect the "tributary." Individual section 404 permits currently may take more than a year to obtain, and have a median cost of $155,000.[23] County irrigation districts, flood control districts, road departments, weed control districts, pest control districts, etc., would be required to obtain these permits, regardless of the environmental benefit, if any, and their lack of resources to address this new federal requirement.[24] In fact, 1,542 of the 3,069 counties in the nation (50%) have populations of less than 25,000[25] and must operate with limited resources. Businesses such as the undersigned groups are located in these communities and rely on local jurisdictions to maintain local infrastructure.

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[22] Testimony of Warren "Dusty" Williams, General Manager, Riverside County Flood Control & Water Conservation District, submitted on behalf of the National Association of Counties, before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment (June 11, 2014) at page 2.

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

[24] The Lake County, Oregon, Road Department, for example, located in a county with 7,711 residents in 2012, must maintain the county's road network, including ditches, culverts, and bridges, with only a dozen or so employees. *See* www.lakecountyor.org/government/road.master.php. Brown County, North Dakota officials have also cited concerns about WOTUS permit delays "for something as simple as replacing a culvert." Gary Vetter, Assistant to the Brown County Commissioners, cited in "EPA's Proposed Definition Change Concerns County, Thune," Aberdeen News, Local News (posted August 16, 2014).

[25] Testimony of Warren "Dusty" Williams, General Manager, Riverside County Flood Control & Water Conservation District, submitted on behalf of the National Association of Counties, before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment (June 11, 2014) at page 2.

WOTUS Will Drive Up Local Water Costs

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

These counties and districts are responsible under the law to maintain the integrity of ditches to prevent flooding, even if they cannot obtain a section 404 permit in a timely manner to do the work. In *Arreola v. Monterey County*, 99 Cal. App.4th 722 (2002), a California appeals court held that a county is liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county had been forced to wait to obtain a section 404 permit to do the necessary work. Counties that perform essential maintenance work will have to hope that they can get a section 404 permit within a reasonable timeframe.

These section 404 impacts on county maintenance of roads, ditches, culverts, etc., are themselves more than sufficient to demonstrate that the proposed rule would have an enormous adverse impact. The thousands of projects undertaken in counties across the country that will be subject to federal dredge and fill permitting for the first time would cripple local efforts to deliver the basic services businesses and their surrounding communities depend on. This expanded permitting requirement would also delay or kill municipal projects to build or renovate schools, hospitals, community centers, local transit, parks, and other civic infrastructure.

For storm water discharges, counties and municipalities will feel the impact of the WOTUS proposal at two major levels. First, permits issued directly to municipal and industrial sources of storm water will have to address discharges to newly covered jurisdictional waters. Second, municipalities will then have to address a wide variety of land uses within

their borders through municipal ordinances and other mechanisms required by their storm water management systems. EPA and the States currently issue "municipal separate storm sewer system" (MS4) permits to municipalities requiring those municipalities to implement various land use controls. These controls range from post-construction retention requirements to measures aimed at meeting TMDLS. This type of coerced local regulation of commercial, governmental and residential activity will increase substantially with the Agencies' expansion of CWA jurisdiction.

III. THE AGENCIES' PROPOSED DEFINITIONS ARE SO VAGUE AND POTENTIALLY EXPANSIVE THAT THEY COMPLETELY RE-WRITE THE CLEAN WATER ACT

The Agencies' proposed definition of "waters of the U.S." contains several key new definitions. These new definitions, while important by themselves, would fundamentally change current Clean Water Act definitions. Besides being extremely difficult to fully understand, the interplay of these new and existing definitions has the potential to completely rewrite the CWA. The proposed WOTUS rule would fundamentally change the relationship between the federal government and the States—all in the absence of any new Congressional directive. The key definitions of concern include:

"Significant nexus"

The Agencies propose that any effect on jurisdictional waters not thought to be "speculative or insubstantial" will be considered "significant." The Agencies essentially propose that, if **any** effect exists, it is significant. This expansion of federal authority is totally unjustified and nonsensical. The concept of a "significant nexus" historically arose in the narrow context of wetlands areas that actually abutted—and were therefore "inseparably bound up with"—traditionally navigable waters. Now, the Agencies proposal would require an esoteric inquiry into whether an isolated water could theoretically have an impact on—or be impacted by—any other water within a region of indeterminate size. The meaning of "significant nexus" in the context of chemical, physical, and biological effects will likely occupy the federal courts for decades to come.

What is a "Significant Nexus?"

The Agencies' proposed definition of "significant nexus" unjustifiably ensures that virtually any impact on downstream waters will be deemed significant. Coupled with the "cumulative effects" approach and the

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likelihood that a single water will determine the jurisdictional fate of small waters spread over vast areas that are deemed to be "similarly situated," the agencies' proposal effectively leaves nothing out of the "other waters" category.

"Tributary"

The Agencies' proposed definition of "tributary" is extraordinarily vague and overbroad. The definition would cover just about anything that conveys water and is not otherwise ruled out by narrow exclusions. A "tributary":

- Can be anything that "contributes" even the tiniest amount of water;
- May only "contribute" water infrequently, e.g., during rare, extreme precipitation events;
- May only contribute water to major waters by an "indirect" route through another "water," which in turn also could convey only small, infrequent flows via indirect routes; and
- Can be a man-made feature, such as a **ditch**.

Since the Agencies have not defined "waters," the definition of "tributary" will cover virtually anything (not explicitly excluded) that is capable of "contributing" any amount of flow (including a trickle) to a downstream location that eventually connects to larger water bodies.

Is an industrial ditch a "tributary"?

In most cases, **yes**. The Agencies' proposal includes ditches within the definition of "tributary." Like many other aspects of the proposal, however, the jurisdictional coverage of ditches is unclear. The proposal provides, in part, that: "[a] tributary … includes water such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section." 79 Fed. Reg. 22,207. Most industrial ditches will not be excavated wholly in uplands, drain only uplands, and have less than perennial flow. Most industrial ditches will also eventually contribute some sort of flow to larger waters. This is precisely why a facility ***has*** a ditch in the first place—to carry water away from the site to drain elsewhere. Therefore, most industrial ditches would not be excluded or exempted from CWA permitting requirements.

"Adjacent Waters"

While the Agencies propose to retain the existing definition of "**adjacent**," they also propose new definitions of "**neighboring**," "**riparian area**," and "**floodplain**." These definitions not only expand the universe of jurisdictional waters far beyond the traditional concept of "adjacency" (and the Supreme Court's interpretation of that concept), they create profound uncertainty as to which waters and areas are likely to be jurisdictional. This problem is illustrated by the diagram below.

Significantly, the Agencies have not offered a defensible rationale to explain why the adjacency concept should be extended to non-wetland waters. There has long been a reasonable argument that wetlands that actually abut navigable waters without any clear boundary between the wetlands and waters should be jurisdictional WOTUS. This is based upon the fact that such adjacent (*actually abutting*) wetlands are probably inseparably bound up with jurisdictional waters and therefore have a significant nexus with them. But there is no rationale for extending this adjacency concept to non-wetland waters because non-wetland waters will always be non-abutting (and therefore have no significant nexus).

"Neighboring" - The Agencies define "neighboring" to include waters located within the riparian area or floodplain of a major navigable water or a tributary, or a water with a shallow subsurface hydrologic connection[26] to a jurisdictional water. These descriptions encompass potentially vast areas (e.g., the Mississippi River floodplain, the Missouri River floodplain) such that virtually all waters within that geographical area could be covered.

"Riparian Area" - The Agencies propose to define a "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Narrow strips of land directly abutting a waterway certainly "border" the waterway, but as one moves away from the waterway, the notion of "bordering" diminishes to the point of absurdity. The Agencies have provided no clarification as to how far a riparian area extends away from a water body. According to the proposal, the concept of "reasonable proximity," which itself is subjective and vague, applies only when adjacency is established through a hydrologic connection for a "water" that lies "outside of the floodplain and riparian area of a tributary." 79 Fed. Reg. 22,207-08

[26] While the Agencies assert that groundwater is not subject to regulation as WOTUS, the practical distinction between "shallow subsurface flow" and "groundwater" is unclear, particularly in areas where groundwater lies close to the surface (in Florida, for example).

(emphasis added). For "waters" within the riparian area, the proposal does not explain how far from a waterway the "bordering" area would extend.

Moreover, the "bordering" area is further explained as a location "where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area," but it is entirely unclear what the Agencies mean by the "area" where such influence exists. Because the Agencies are attempting to rely on a functional, rather than spatial, definition to describe "riparian area," the proposed rule is hopelessly vague and subject to varying, case-by-case interpretations and applications to regulated parties. This is precisely the type of analysis that the Agencies claim that the WOTUS rule was designed to avoid.

"Floodplain" - The definition of "floodplain" relies on the undefined term "waters" and the concept of "bordering." And while the definition employs a measurable concept – an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – the return period for such inundation is not specified at all. Is this the 10-year, 50-year, 100-year, or 200-year floodplain? The Agencies cannot simply say, as they have in the proposal, that they will use their "best professional judgment" to answer this question on a case-by-case basis. 79 Fed. Reg. 22,209.

"Other Waters"

The Agencies propose to define "other waters" as follows: "On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition." In support of the proposed definition of "other waters," the Agencies propose to define "significant nexus," in part, as follows: "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest [traditionally navigable] water), significantly affects the chemical, physical, or biological integrity of a [traditionally navigable] water."

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What Are "Waters"?

The Agencies would establish federal jurisdiction on the basis of "waters." but the key term is not defined. In the absence of a definition, virtually any area that occasionally experiences wetness would be deemed jurisdictional so long as it meets the definition of "adjacent." Such an area need not "contribute flow" to a navigable water, as would a "tributary," or even have a demonstrable "significant nexus" to a navigable water, as would an "other" water. 79 Fed. Reg. 22,207.

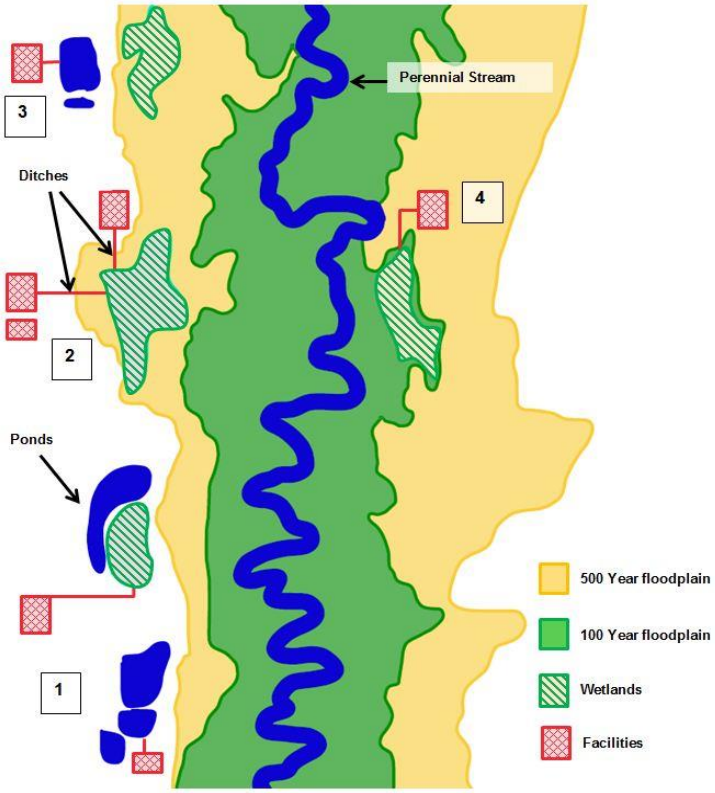
The concept of considering a water "in combination with other similarly situated waters … in the same region" is rife with uncertainties. In many instances, this would be a vast land area. The extraordinarily broad scope of the required evaluation immediately inhibits the ability of a land owner to make any reasonable judgment concerning the jurisdictional status of a single, local water.

Moreover, by considering the jurisdiction of a particular water "in combination with" other waters located in such a broad region, the Agencies would examine the cumulative impacts of multiple waters, ranging from large to very small, in order to determine the jurisdictional status of a particular water in question. If that cumulative impact is deemed to be "significant," then individual waters that might be thought to be contributing in some fashion to that cumulative impact would be considered jurisdictional.[27] Under this approach, **every** small pond or other water feature that retains stormwater, regulates the flow of floodwaters, traps sediments and other pollutants, and recharges groundwater "in combination with" other waters in a broad region, would be WOTUS if the cumulative effects are deemed not "speculative or insubstantial."

A larger water, or one nearer to a navigable-in-fact or interstate water, might represent the vast majority of the "cumulative" impact, and yet a smaller and/or more remote water would be pulled along into the web of federal jurisdiction. This not only expands CWA jurisdiction well beyond anything Congress could have intended to include in the term "navigable waters," but it leaves land users with virtually no way to assess the status of their local water, short of undertaking a complex and costly watershed study.

[27] This ignores the fact that much of the cumulative impact thought to be "significant" would, in most instances, be attributable to a handful of waters, or even a single water, that is deemed to be among a larger group of "similarly situated" waters.

The difficulties confronting businesses trying to determine whether the proposed WOTUS definition would impact them is illustrated by the diagram below. A facility may find itself in WOTUS for the first time because it is "adjacent" to a water, has one or more ditches that are a "tributary," is located in a "floodplain," a "watershed," or a "riparian area," or has a relationship to a navigable water as an "other" water:



1. Stormwater from two facilities is conveyed by ditches and shallow subsurface flow to a wetland adjacent to a pond and another pond, both of which are located outside the 500-year floodplain. Other ponds are nearby. Are the wetlands and ponds "adjacent waters"? Are they "other waters" when considered cumulatively? Are the ditches WOTUS? Are the two facilities in the stream's "watershed"?
2. Stormwater from three facilities is conveyed through ditches to a wetland located in the 500-year floodplain. Is the wetland an "adjacent water"? Are the ditches jurisdictional?
3. A business uses water from a pond for suppressing dust and for process water. The pond is located outside the 500-year floodplain in a depression that was created as a borrow put when the nearby highway was constructed. The pond is located very near to wetlands that are within the 500-year floodplain. Are the pond and/or the wetlands jurisdictional?
4. Stormwater from a facility is conveyed via a ditch and shallow subsurface flow running from the 500-year floodplain to a wetland located near a navigable water in the 100-year floodplain. Are the wetland and/or ditch "adjacent waters" or otherwise jurisdictional? Is the wetland in the riparian area?

IV. THE PROPOSED RULE'S EXCLUSIONS ARE FAR TOO LIMITED AND AMBIGUOUS.

The Agencies have proposed several exclusions from the definition of "waters of the United States." The proposed exclusions, however, are overly limited and ambiguous, and are of questionable value to industrial and commercial facilities.

"Waste Treatment Systems"

This proposed exclusion applies to "waste treatment systems," including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." What is unclear is whether the exclusion would include multiple-use impoundments. Industrial facility impoundments frequently are utilized for treatment (e.g., settling out any contaminants contained in storm water, neutralization, etc.), but also other beneficial purposes (e.g., water supply for dust suppression, firefighting, irrigation, etc.). Would this exclusion apply where the predominant uses are not treatment, such as where discharges of treated water rarely or never occur? Does it apply where a system was designed to meet CWA requirements but later converted to other uses when discharges were eliminated or handled through alternative means (e.g., by connection to a Publicly Owned Treatment Works)?

Likewise, does the treatment system have to be permitted under the NPDES program or otherwise clearly subject to CWA regulations in order to be considered as a system "designed to meet the requirements" of the Act? Treatment systems may have been designed to reduce down-slope erosion and resulting turbidity problems, or they may have been "designed" before the CWA even existed. Many treatment systems include both retention features (e.g., a pond) and conveyance features (e.g., ditches). It is unclear whether this system would be excluded.

"Ditches"

The proposed rule would exclude "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." Just as the Agencies have refused to define "waters," so too have they shed precious little light on the meaning of "uplands." In relatively flat terrain, the distinction between areas that fit these undefined terms and those that do not are extraordinarily difficult to discern. The Agencies' proposal does not give landowners the necessary (or promised) clarity concerning ditches to take

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timely action without retaining experts or engaging in painfully slow consultation with state or federal agencies.

The Agencies also propose to exclude "ditches that do not contribute flow, either directly or through another water," to navigable waters, interstate waters, the territorial seas or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify, such a ditch must contribute ***zero flow***, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country. For that reason, this exclusion is virtually useless.

"Artificial Lakes, Ponds, and Pools"

The Agencies further propose to exclude lakes, ponds and pools that have been created for specifically listed purposes: stock watering, irrigation, settling, rice growing, reflecting, swimming and ornamentation. To qualify for the exclusion, these features must have been created by excavating and/or diking dry land. These proposed exclusions are wholly inadequate, however. While the exclusions may benefit some agricultural uses, they do nothing for most industrial/commercial operations. Lakes, ponds and pools are used throughout the country for a wide variety of industrial uses, as well as for combinations of different uses. Examples include: storing storm water for use as a dust suppressant; storing storm water for use in industrial processes; storing storm water for use in fighting fires; creating conditions suitable for non-swimming recreation, such as fishing and duck hunting; and restricting the flow of storm water runoff to reduce peak flows so as to minimize down-slope erosion and turbidity.

"Water-Filled Depressions"

The Agencies propose to exclude "water-filled depressions created incidental to construction activity." The language of the proposed exclusion is ambiguous. The Agencies do not clarify what is meant by "incidental to" or "construction activity." Depressions are commonly created in the course of construction for various reasons, including borrow pits, retention basins, architectural landscaping, diversion of storm water run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created in the course of constructing something other than a structure or a facility? It is also unclear whether the exclusion survives beyond the period of the actual construction activity.

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V. THE PROPOSED RULE IS PROCEDURALLY FLAWED

The Agencies' proposed rule suffers from serious procedural defects. These defects are sufficient to require the Agencies to withdraw the current proposal and start the rulemaking process over from the beginning.

Administrative Procedure Act

Under the notice and comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553, in order to obtain "meaningful" participation from the public, courts have held that the Notice of Proposed Rulemaking (NPRM) must "fairly apprise interested persons" of the issues in the rulemaking.[28] The Agencies' proposal clearly fails to provide this adequate notice. Because of the vague and confusing nature of the new and existing definitions in the proposal, and the unknown ways these definitions will be applied in combination, even Clean Water Act experts are hard pressed to understand the full reach of this proposal. Major regulatory concepts are not explained. The Agencies provide no examples of how they would apply the new definitions, or real-world examples of how the exemptions would work. On the contrary, the Agencies simply assert that the proposal would have no regulatory effect. The NPRM is so vague and non-transparent that it does not 'fairly apprise interested persons' that they will be likely to face new federal regulatory requirements if the proposal were to be finalized. For this reason, the WOTUS rulemaking must be withdrawn.

Information Quality Act

The Agencies' WOTUS proposal neither complies with the Information Quality Act (IQA) as implemented under Office of Management and Budget (OMB) guidelines, nor EPA's own information quality guidelines.[29]

The Agencies issued the proposed rule based upon EPA's Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The Report purports to establish a

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[28] *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980); *see also American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977), *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995)(NPRM provides inadequate notice to interested parties when the only reference to a major new regulatory burden on an industry segment under proposal is mentioned only in a single footnote.).

[29] *See* Treasury & General Governmental Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515(a); 44 U.S.C. § 3516 (notes); EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-2008 (October 2002).

scientific basis for the connectivity of isolated, often evanescent "waters" to traditional "navigable" waters under the CWA. The Agencies argue that the hydrologic "connectivity" of these remote waters, which ultimately reach navigable waters, establishes federal (rather than State or local) jurisdiction over these waters. The information contained in the Agencies' Report clearly meets the OMB definition of "information." "'Information' means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic . . . ."[30]

The information at issue also meets the OMB definition of "influential" information. "Influential" means "that the agency can reasonably determine that the dissemination of the information will have or does have a clear and substantial impact on important public policies . . . ."[31] The Agencies have directly relied upon the Report in making findings regarding the extent of hydrologic connectivity sufficient to support an assertion of federal jurisdiction. OMB has stated that "influential information" should be held to a heightened standard of quality.[32] The Report clearly meets definition of "influential" information that needs to be of the highest quality.

On the date the Agencies published the proposed WOTUS rule, EPA's Science Advisory Board had not completed its review of the Report. In fact, the SAB did not complete its review of the Report until September 30, 2014. Given the complex and controversial nature of the conclusions made in the Report, until the public is given the opportunity to fully evaluate peer reviewers' comments on the Report—the quality of the information in the Report is of unknown quality and cannot be relied upon to make public policy.[33] This is particularly true of such a significant policy as the scope of federal jurisdiction over water and land uses. The Agencies must withdraw their proposal until they are able to fully comply with the Information Quality Act.

Regulatory Flexibility Act

Despite clear indications that their revised definition will impose widespread impacts on small entities, the Agencies certified under the

[30] OMB Guidelines § V.5.
[31] OMB Guidelines § V.9
[32] 67 Fed. Reg. 8,452 (February 22, 2002).
[33] Significantly, on September 2, 2014, SAB panel members released a memorandum raising serious concerns about the definitions in EPA;s Report, such as "significant nexus," and the extent to which hydrologically connected waters actually have any "significant nexus" to one another. Memorandum from Dr. Amanda Rodewald, Chair, Science Advisory Board 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" (Sept. 2, 2014).

Regulatory Flexibility Act (RFA)[34] that the rule would **not** result in a significant economic impact on a substantial number of small entities. In making this certification, the Agencies avoided their RFA responsibility to (1) investigate the impacts the revised definition would directly impose on small entities and (2) to consider less burdensome regulatory alternatives.

The RFA covers three distinct types of small entities: small businesses, small not-for-profit organizations, and small governmental jurisdictions.[35] Before formally proposing a new rule, an agency must identify small entities that are likely to be impacted by the rule and estimate the magnitude of the impact. If this screening analysis indicates limited impacts to small entities, the RFA allows the agency to certify that there will not be "a significant economic impact on a substantial number of small entities."[36] Significantly, if an agency lacks the factual data to support a certification, it may not certify the rule and must perform a detailed small entity impact analysis.[37]

The Agencies did not follow these requirements, however. There is no evidence that **any** screening analysis was conducted at all. Instead, the Agencies published an RFA certification that simply asserts, without supporting facts, that "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations . . . this action will not affect small entities to a greater degree than the existing regulation . . . [t]he proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden."[38] The Agencies cite several cases, including *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), and *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). The Agencies cite these cases to support their argument that because the revised WOTUS definition does not directly regulate small entities, they may properly certify the rule.

As discussed in detail above, however, the Agencies' certification statement is not factually accurate. The proposed WOTUS definition rule would in fact have a significant negative effect on a wide variety of small entities. Because the Agencies lack any factual basis to support their RFA

[34] 5 U.S.C. §§ 601-612.
[35] 5 U.S.C. §§ 601(3)-(5).
[36] 5 U.S.C. § 605(b).
[37] 5 U.S.C. § 603. Moreover, the EPA is specifically required by the RFA to take the additional step of conducting a Small Business Advocacy Review (SBAR) Panel, in order to more formally consider the views of affected small entities and evaluate alternative regulatory approaches that could lessen the rule's impact while still achieving the goal of the agency. 5 U.S.C. § 609(b).
[38] 79 Fed. Reg. 22,220 (April 21, 2014).

certification, the certification is invalid and the rulemaking is procedurally defective.[39]

Recently, the U.S. Small Business Administration's Office of Advocacy agreed with this conclusion, publicly advising the Agencies that they improperly certified the WOTUS proposal under the RFA.[40] Even if the Agencies originally believed in good faith that the proposed rule would not have a significant economic impact on a substantial number of small entities, they subsequently received more than ample evidence that small entities believe the rule will harm them:[41]

- Small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee on May 29, 2014, and expressed their concerns about specific impacts of the rule.
- Small businesses and small governments testified in front of the House Transportation and Infrastructure Committee on June 11, 2014, and echoed these concerns.
- The Office of Advocacy held a Roundtable on July 21, 2014, at which the Agencies heard firsthand the concerns of small businesses and their frustration that EPA would not withdraw the rule and fully comply with the RFA.

In light of the available evidence that the proposed WOTUS rule will in fact impose significant impacts on small entities, the Agencies need to withdraw the rule and start over.[42] The Agencies' public outreach efforts are **not** legally or functionally equivalent to the steps required of the Agencies under the RFA. To make matters worse, concerns about the proposal

[39] *Southern Offshore Fishing Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) ("Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.").
[40] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014) at 4.
[41] Courts have held that an agency must account for the public comments it receives that challenge the agency's initial determination that no significant economic impact on small entities is likely. *See Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998).
[42] Alternatively, the Agencies could suspend the rulemaking process and meet their RFA obligation by conducting an Initial Regulatory Flexibility Analysis (IRFA) and, in the case of EPA, to conduct a Small Business Advocacy Review (SBAR) Panel. While this is not optimal, it would at least give the Agencies and affected small entities additional opportunities to understand the true regulatory impacts of the rule before it is finalized.

expressed in good faith by small entities have either been ignored by the Agencies or dismissed as "silly" and "ludicrous."[43]

The Agencies have ample time to start again and write a rule that is clear, transparent, and narrowly tailored to accomplish its objective without causing collateral damage to small entities. Because the Agencies' certification is not valid, the Agencies remain obligated to comply with the RFA before the proposed WOTUS rule can be finalized.

Unfunded Mandates Reform Act

In the preamble to the proposal, the Agencies state that '[t]his proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA),[44] for state, local or tribal governments or the private sector. This proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA."[45] In light of the wide variety of impacts on state and local governments discussed above—which will be imposed directly on these governments by the Agencies themselves—the Agencies had no valid basis to avoid meeting their obligations under UMRA. For this reason, the proposed rule should be withdrawn so that the Agencies can comply with their UMRA responsibilities.

Executive Order 13,132: Federalism

Executive Order 13,132 requires federal agencies to develop accountable processes for "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." Because the Clean Water Act is a federal statute that is currently primarily administered and enforced by the States, imposing new responsibilities on the States necessarily implicates federalism. Even before the WOTUS rule was formally proposed, groups representing State and local interests voiced loud concerns that the States were not being adequately consulted or involved in the rule development process. The U.S. House of Representatives recently passed, by a bipartisan 262-152 vote, H.R. 5078, the "Waters of the U.S. Overreach Protection Act of 2014," which would require the Agencies to suspend the WOTUS proposal until they have done a better job of coordinating with the States. Because the Agencies have not consulted or coordinated adequately with the States, the Agencies must withdraw their

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[43] *See* Comments of Gina McCarthy, EPA Administrator, reported in *The Hill* online (July 8, 2014), available at: www.thehill.com/policy/energy-environment/211548-epa-promoting-water-rule-to-farmers-in-mo.

[44] 2 U.S.C. 1531-1538.

[45] 79 Fed. Reg. 22,220 (April 21, 2014).

proposal and not proceed to revise the WOTUS definition until they can fully comply with Executive Order 13,132.

VI. THE PROPOSED RULE IS LEGALLY FLAWED

The Agencies' rationale for their proposal rests upon a selective and biased reading of the principal Supreme Court precedents addressing jurisdiction under the CWA. It also ignores the clearly articulated Congressional design of the CWA and more than 40 years of its successful federal/State implementation. The proposal abandons key jurisdictional elements established in the *Riverside Bayview Homes* decision; ignores the clear restrictions imposed by the Court in *SWANCC*, including those articulated by Justice Kennedy; and distorts *Rapanos* by giving no weight to the plurality opinion while attributing to Justice Kennedy certain broad principles that are neither supported by his concurring opinion nor allowed within the jurisdictional bounds he helped clarify in *SWANCC*.

1. Clean Water Act historical context

From enactment of the landmark 1972 Clean Water Act, through its major amendments in 1977 and 1987, Congress clearly designed the Act to regulate the discharge of pollutants into waterways, ***not*** to regulate land uses. The CWA contains clear limitations on federal authority—and a corresponding preservation of traditional State and local authority—in the national effort to control water pollution while allowing beneficial land and water uses. CWA Section 101(b) provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use . . . of land and water resources…"[46] As a direct means of enforcing that policy, Congress also provided, in CWA Section 510, a rule for interpreting the Act when there is an issue as to the extent of federal authority within this sphere of State "rights and responsibilities": "Except as expressly provided in this chapter, nothing in this chapter shall… (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters…of such States."[47]

Because the Agencies' proposal to define the extent of federal authority under the CWA presents a question of federal regulatory jurisdiction versus traditional State authority, CWA Section 510 requires an inquiry as to whether the statute "expressly provide[s]" the authority that the Agencies claim. The U.S. Supreme Court has held repeatedly that this analytical

[46] 33 U.S.C. §1251(b).
[47] 33 U.S.C. §1370.

approach is central to the task of interpreting the CWA when the limits of federal jurisdiction are at issue.

2. ***Riverside Bayview Homes***.

In *U.S.* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court held that the CWA could be interpreted to cover some waters beyond traditionally navigable waters – specifically, wetlands that actually abut on navigable waterways.[48] While some of the Court's language may suggest that it was considering a broader question of CWA jurisdiction over wetlands adjacent to "streams" and "other hydrographic features," the Court was limited to the facts in the case, which pertained only to a wetland that "extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."[49]

Writing for a unanimous Court, Justice White explained that, "[i]n determining the limits of its power to regulate … under the Act" where the wetlands in question physically abut on a navigable waterway, "the Corps must necessarily choose some point at which water ends and land begins."[50] Recognizing the difficulty of that task, the Court found the Corps' determination that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality …" sufficient to support its decision to include such wetlands within the Act's jurisdiction.[51] The Court concluded that "[w]e cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with 'waters' of the United States … is unreasonable."[52]

3. ***SWANCC***.

Fifteen years later, the Court decided *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers*, 531 U.S. 159 (2201) (*SWANCC*). At issue in *SWANCC* were several ponds in a former gravel pit that had developed a "natural character" and were used as habitat by migratory birds. The ponds were physically isolated in the sense that they were not adjacent to open water, but they shared a biological connection with other waters given their well-established use by migratory water birds such as heron, geese, ducks and kingfishers. The Corps had concluded that the water areas were WOTUS because the migratory birds cross state lines, bird hunting is a

[48] *Id.* at 135.
[49] *Id.* at 131.
[50] *Id.* at 132.
[51] *Id.* at 133.
[52] *Id.* at 134.

significant economic activity, and the wetland, although isolated, functioned in interstate commerce and made it a water of the U.S., not a water of Illinois.

After the case reached the U.S. Supreme Court, the *SWANCC* majority held that the CWA embodied Congress' explicit purpose of recognizing and preserving the "primary responsibilities and rights" of States to deal with water pollution and land uses.[53] The Court noted that Congress does not "casually authorize" agencies to interpret their statutory jurisdiction in a manner that would "push the limit of congressional authority," especially where doing so "alters the federal-state framework by permitting federal encroachment upon a traditional state power."[54] In such circumstances, the Court "expect[s] a clear indication that Congress intended that result."[55]

The Court then reiterated its holding in *Riverside* that federal jurisdiction extends to wetlands that are actually abutting navigable waters because protection of these adjacent (actually abutting) wetlands was consistent with Congressional intent to regulate wetlands "inseparably bound up with 'waters of the United States.'"[56] The Court found that this "inseparability" is what produces a "significant nexus" between the wetlands and navigable waters.[57] Thus, nothing in *Riverside* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that actually abut waters that are jurisdictional in their own right. Justice Kennedy was a part of the majority making this key conclusion.

SWANCC held that the Corps' assertion of federal jurisdiction over "ponds that are not adjacent to open water" is not permitted under the plain language of the CWA.[58] Nothing in the legislative history of the Act persuaded the Court that Congress intended to cover more than navigable waters and their adjacent wetlands.[59] And the Court declined to give *Chevron*[60] deference to the Corps' interpretation of its own jurisdiction over isolated waters used by migratory birds because it found that the statute was unambiguous. In addition, deference was not justified because the Court found that the Corps' interpretation would infringe on States' authority to

[53] 531 U.S. 159, 166-67 (quoting 33 U.S.C. § 1251(b)).
[54] *Id.* at 172-73.
[55] *Id.* at 172.
[56] *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 134).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 170-71. While the Court noted it is possible to argue that the 1977 amendments adding Section 404(g) to the statute demonstrate a Congressional intent to cover "non-navigable tributaries and streams," the Court did not address that question. *Id.* at 171.
[60] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 531 U.S. at 172.

regulate land and water use without any clear indication that Congress intended that result.[61]

The Court's *SWANCC* and *Riverside* decisions continue to constrain the Agencies' discretion in interpreting the Act:

- The CWA cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters. In *SWANCC* the Court said: "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."[62] The Court did not merely disagree with the Corps' argument that use by migratory birds could justify extending CWA jurisdiction to isolated waters. It concluded that the statutory text cannot justify regulation of intrastate ponds that are not adjacent to open water ***under any rationale***;
- A water such as a pond is isolated (and therefore not jurisdictional) if it is not adjacent to open water. The Court understood adjacency as a limited concept, encompassing only those waters that actually abut on a navigable waterway.[63] The concept of adjacency must be so limited in order to give some import to Congress' use of the term "navigable" while at the same time recognizing that Congress intended to regulate "at least some waters" that are not navigable;[64] and,
- The *Riverside* decision must be understood to mean that wetlands adjacent to (i.e., actually abutting) navigable waters, which are thus "inseparably bound up with" navigable waters, provide the "significant nexus" on which the decision in *Riverside* rested.[65]

These were the jurisdictional boundaries drawn by the Court, including Justice Kennedy, prior to *Rapanos*. Neither the plurality opinion nor Justice Kennedy's opinion in *Rapanos* repudiates ***any aspect*** of the *SWANCC* decision, including the *SWANCC* majority's characterization of the rationale on which the outcome in *Riverside* rested.

[61] *Id.* at 172-74.
[62] *SWANCC* at 168.
[63] *SWANCC* at 167. Note that in neither *Riverside* nor *SWANCC* was the Court called upon to decide whether the Corps' regulatory definition of "adjacent" (i.e., "bordering, contiguous or neighboring") was a reasonable interpretation of the Act.
[64] *Id.*
[65] *Id.* Thus, conceptually there is little daylight between adjacency (meaning actually abutting) and the "significant nexus" that justifies extending CWA jurisdiction beyond navigable waters.

4. ***Rapanos***.

The case involved four wetlands areas lying near ditches and man-made drains that eventually drained into traditional navigable waters. Developers had filled these wetlands without obtaining section 404 permits, assuming that the areas were not jurisdictional because they were many miles from navigable waters. Both the federal District Court and the Sixth Circuit Court of Appeals found the wetlands areas to be jurisdictional waters of the U.S. The Supreme Court reversed. Five Justices found that federal jurisdiction did not exist or was not proven. Justice Kennedy concurred in the judgment but did not join the majority.

Instead, Justice Kennedy concluded that WOTUS jurisdiction could be established if there was a "significant nexus" between the four wetlands in question and the navigable water many miles away. In the case at hand, however, the elements necessary for the nexus had not been shown. The four wetlands did not "significantly affect the chemical, physical, or biological integrity" of the navigable water miles away. The effect of the four wetlands on the navigable water was only "speculative and insubstantial." The test suggested by Justice Kennedy, is whether a water has a "significant nexus" to a navigable water that is substantial and not speculative (i.e., can be proven).

The Agencies' proposed WOTUS rule relies extensively on language from the *Rapanos* opinions, particularly Justice Kennedy's. Unfortunately, the Agencies ignore limitations on principles expressed by the Justices. In particular, the Agencies' reliance on Justice Kennedy's concept of "significant nexus" in *Rapanos* seems to completely ignore the limits on the concept that he himself articulated. Rather than staying within the contours of Justice Kennedy's "significant nexus" concept that they rely so heavily upon, the Agencies' proposal expands the concept to a virtually infinite, zen-like construct where every drop of water is intimately connected to every other drop.

Jurisdictional Limitations Delineated By Justice Kennedy

Justice Kennedy noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality's coverage of "remote" wetlands with a surface connection to small streams would "permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach" (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters).[66] This, he said, was "inconsistent with the Act's

[66] *Rapanos* at 776-77.

text, structure, and purpose."[67] As for the dissent, Justice Kennedy said the Act "does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[68] Justice Kennedy's outright rejection of these jurisdictional theories–mere hydrologic connections to, and mere proximity to, navigable waters or features that drain into them—were not accounted for by the Agencies in their proposal.

Limitations on "Significant Nexus"

Justice Kennedy also acknowledged that the Court's concept of a "significant nexus" was tied to *Riverside*, in which wetlands actually abutting navigable waters were deemed to be within the Act's jurisdiction because they are "integral parts of the aquatic environment" that Congress expressly chose to regulate.[69] The *SWANCC* majority (including Justice Kennedy) had made the same point, and had concluded that ponds with no hydrologic connection, but with a very strong biological connection, to navigable waters were not subject to the Act's jurisdiction.[70] Justice Kennedy concluded with the general statement that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[71]

Justice Kennedy maintained that, for jurisdiction over wetlands, the requisite nexus must be significant effects on "the chemical, physical and biological integrity of the covered waters more readily understood as 'navigable'."[72] He posits this standard in a factual vacuum, ignoring that this standard, adopted by the Court in *Riverside*, pertained to wetlands actually abutting navigable waters such that a demarcation between waters and wetlands could not easily be discerned. Divorced from that significant fact, Justice Kennedy's standard is expansive. It could be applied to many isolated waters, including those held to be non-jurisdictional in *SWANCC*. It was the physical – i.e., hydrologic – connection that led the Court in *Riverside* to

[67] *Rapanos* at 776.
[68] *Rapanos* at 778-79.
[69] *Rapanos* at 779 (quoting *Riverside*, 474 U.S. at 135).
[70] *SWANCC* at 172.
[71] *Id*. at 779. Elsewhere in his *Rapanos* opinion, Justice Kennedy mischaracterized the Court's decision in *SWANCC*, saying the Court there had held that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' … ." *Id*. 759 (quoting *SWANCC*, 531 U.S. 159 at 167, 172). (emphasis added). The referenced passages in *SWANCC* refer to the prior holding in *Riverside* concerning wetlands inseparably bound up with navigable waters on which they abut. They mention nothing about a "water" (e.g., a pond or lake) having a "significant nexus" to navigable waters. The Agencies have mistakenly relied upon this incorrect assertion by Justice Kennedy to confer CWA jurisdiction over all manner of "waters" that are physically disconnected from navigable waters. 79 Fed. Reg. at 22259-60.
[72] *Id*. at 780.

conclude that wetlands were "inseparably bound up with" navigable waters, and thus had a significant nexus to them. And it was the lack of such a connection that led the Court in *SWANCC* (including Justice Kennedy) to conclude that physically isolated ponds had no such significant nexus. Nothing in the facts before the Court in *Rapanos* could justify this departure from the Court's precedent or legitimize Justice Kennedy's broad over-statement of the significant nexus principle.

Justice Kennedy also creates out of whole cloth the notion that a wetland can be found to have a significant nexus with "covered waters" if it has the requisite effects on the integrity of those waters "in combination with similarly situated lands in the region."[73] Nothing in the Court's jurisprudence or the statute suggests that Congress intended to enact a "cumulative impacts" standard for determining federal jurisdiction over a particular water body. Such a standard is unworkable in any event because the "in combination with" assessment allows certain wetlands – e.g., those directly abutting on navigable waters – to sweep into the Act's jurisdiction other wetlands in the region that contribute little to the "combined" impacts owing to the lack of any physical connection or proximity of those wetlands to navigable waters. Again, nothing in the facts of *Rapanos* even calls for consideration of this cumulative impacts principle.

Finally, Justice Kennedy offers his view of what is not a "significant nexus" – i.e. "wetlands' effects on water quality [that] are speculative or insubstantial."[74] Justice Kennedy appears to mean that "speculative or insubstantial" effects ***cannot be*** deemed "significant," a proposition few would dispute. Justice Kennedy likely did <u>not</u> mean that effects which are shown to be non-speculative and/or somewhat more tangible than insubstantial should automatically rise to the level of "significant," as he offers no support for such a proposition. It is also worth remembering that Justice Kennedy was keenly interested in the factors that would strengthen or weaken any nexus between waters. These factors would include distance, volume of flow, and duration of flow. The Kennedy-type inquiry about whether a significant relationship truly exists between a given water and another water is largely absent in the Agencies' proposal. Under the proposed rule, the nexus is presumed to be both present and significant.

The Agencies' application of Justice Kennedy's views must respect the following boundaries:

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[73] *Id.*
[74] *Id.*

- Justice Kennedy provided no guidance for distinguishing between "tributaries" and predominantly dry features that may occasionally convey rainwater. Instead, the plurality's views should control;
- Justice Kennedy provided no support for considering unconnected waters such as ponds to be tributaries;
- Justice Kennedy's participation in the *SWANCC* majority indicates he would not consider an intrastate water to be jurisdictional unless it is adjacent to open water in the same sense that the Court discussed adjacency in *Riverside* (i.e. actually abutting);
- Remote wetlands with merely a surface connection to small streams are not jurisdictional;
- Wetlands that merely lie alongside a drain or ditch are not jurisdictional.

For the reasons discussed above, the Agencies' reliance on the *Rapanos* case holding, and the "significant nexus" concept articulated by Justice Kennedy in particular, does not provide a valid legal justification for the overly expansive definition of WOTUS in the proposed rule. The Agencies' proposal tortures the logic of *Rapanos* beyond the breaking point, making **any** theoretical effect of a wet area on distant navigable waters "significant" and completely abandoning Justice Kennedy's determination that the relationship, if any, would only be "speculative or insubstantial." For this reason, the Agencies' proposed WOTUS rule is fatally legally flawed.

VII. CONCLUSION/RECOMMENDATIONS

In light of the overwhelming evidence that the proposed WOTUS rule would have a devastating impact on businesses of all sizes, States, and local governments without any real benefit to the environment, the Agencies should immediately withdraw the waters of the U.S. proposal and go back to the drawing board. The Agencies are not undertaking the WOTUS rulemaking under any court order or any court-issued deadline. They have sufficient time to start again and do a better job drafting the rule.Any revision of this definition and its underlying components—which are critical to determining the extent of federal, versus state and local, control of land uses—must be written in a way that is clear and understandable. EPA must explain why such a revision is necessary, and what environmental benefits, if any, the revision would yield. EPA must also conduct a formal SBAR Panel and consider alternative regulatory approaches. Had EPA conducted a Panel on the current proposal, it would have known early on that the public considers this revised definition to be confusing, not well thought out, and an unprecedented assertion by a federal agency of sweeping authority over land uses across the country.

DRAFT

American Frozen Food Institute
American Fuel & Petrochemical Manufacturers
U.S. Chamber of Commerce

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