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Clean Water Rule Comment Compendium
Topic 13 – Process Concerns and Administrative Requirements

The Response to Comments Document, together with the preamble to the final Clean Water Rule, presents the responses of the Environmental Protection Agency (EPA) and the Department of the Army (collectively "the agencies") to the more than one million public comments received on the proposed rule (79 FR 22188 (Apr. 21, 2014)). The agencies have addressed all significant issues raised in the public comments.

As a result of changes made to the preamble and final rule prior to signature, and due to the volume of comments received, some responses in the Response to Comments Document may not reflect the language in the preamble and final rule in every respect. Where the response is in conflict with the preamble or the final rule, the language in the final preamble and rule controls and should be used for purposes of understanding the scope, requirements, and basis of the final rule. In addition, due to the large number of comments that addressed similar issues, as well as the volume of the comments received, the Response to Comments Document does not always cross-reference each response to the commenter(s) who raised the particular issue involved. The responses presented in this document are intended to augment the responses to comments that appear in the preamble to the final rule or to address comments not discussed in that preamble. Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself remains the definitive statement of the rationale for the revisions adopted in the final rule. In many instances, particular responses presented in the Response to Comments Document include cross references to responses on related issues that are located either in the preamble to the Clean Water Rule, the Technical Support Document, or elsewhere in the Response to Comments Document. All issues on which the agencies are taking final action in the Clean Water Rule are addressed in the Clean Water Rule rulemaking record.

Accordingly, the Response to Comments Document, together with the preamble to the Clean Water Rule and the information contained in the Technical Support Document, the Science Report, and the rest of the administrative record should be considered collectively as the agencies' response to all of the significant comments submitted on the proposed rule. The Response to Comments Document incorporates directly or by reference the significant public comments addressed in the preamble to the Clean Water Rule as well as other significant public comments that were submitted on the proposed rule.

This compendium, as part of the Response to Comments Document, provides a compendium of the technical comments about process concerns and administrative requirements submitted by commenters. Comments have been copied into this document "as is" with no editing or summarizing. Footnotes in regular font are taken directly from the comments.

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Topic 13. Process Concerns and Administrative Requirements

Specific Comments

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

13.1 To finalize a rule without fully addressing these issues would be arbitrary, capricious, and an abuse of discretion. Reflecting upon the evidence obtained by the Committee on Science, Space, and Technology and all other relevant information the Agency is aware of or has relied on, please respond to the following unanswered questions and detail how such responses were considered in this rulemaking.

2. Why did EPA write the rule and formally propose it before waiting for the Science Advisory Board completes their review process?

Agency Response: As noted above, the EPA developed a draft scientific assessment that is based on more than 1,000 pieces of previously peer-reviewed and publicly available literature. This draft report underwent an independent peer review prior to proposal and reflects edits made in response to that peer review, and received generally positive peer review feedback from the Science Advisory Board, which EPA addressed. The final rule is consistent with the best science, including information in the final Connectivity Report.

13.2 7. When the SAB panel reviewing the science behind this Clean Water Act rulemaking meets publicly, EPA has refused to make a transcript of the proceedings available or an archived webcast for the public.

a. Why?

Agency Response: It has been a long-standing SAB practice that committee and panel meetings are not transcribed or recorded. Summary minutes of SAB committee and panel meetings are prepared and always made available to the public. Details regarding the conduct of SAB meetings are available on the SAB website at www.epa.gov/sab**. The science report (Connectivity of Streams and Wetlands to Downstream Waters: A review and synthesis of the scientific evidence) is available online:** http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414**.**

The report was thoroughly reviewed by the agency's independent Science Advisory board (SAB). The SAB has posted information on the background, process for the formation of the ad hoc review panel, advisory meetings and report development, and the final peer review report on their website: http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/7724357376745f48852579e60043e88c!OpenDocument&TableRow=2.3#2. Summary notes (minutes) for each meeting of the ad hoc panel and chartered SAB concerning the Connectivity Report has been posted on the SAB page under the tab "Advisory Meetings and Report Development." The agency's response to the SAB's final peer

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review report was posted on the same page as the Connectivity report under the tab "Related Links."

13.3 Will you commit to make either the transcripts public or archived webcasts available to the public? Summaries of meetings are not adequate.

Agency Response: **Live access by phone is available for most SAB committee and panel meetings. In addition, live streaming webcasts of SAB committee and panel meetings are provided if there is sufficient public interest in the proceedings. These webcasts are live events designed to share the real time public meeting with all interested parties who wish to watch or listen. The webcasts are not archived. The SAB Staff Office makes all meeting materials available to the public, including draft and final reports.**

13.4 9. Will you guarantee that all data supporting this rule is publically available?

Agency Response: **The rulemaking process proceeded in a legally appropriate and transparent process consistent with the Scientific Integrity Policy and the Administrative Procedure Act.**

13.5 10. Does the SAB need permission from EPA to answer questions from Congress or the public?

Agency Response: **The full policy on SAB interaction with Congress and the public is available at the SAB's website at** http://yosemite.epa.gov/sab/sabproduct.nsf/WebSABSO/PublicInvolvement?OpenDocument **With respect to certain congressional inquiries that implicate agency resources, discussions have been ongoing regarding the proper lines of communication between members of Congress and appointed members of the EPA's federal advisory committees, including the Science Advisory Board.**

13.6 11. Does the SAB or the SAB Chair need permission from EPA to testify before Congress?

Agency Response: **SAB members are free to testify before Congress. However, SAB members are encouraged to not discuss topics specific to ongoing reviews until deliberations are completed and the final findings report is finalized and approved by the Chartered SAB. The EPA encourages panel Chairs to be the primary spokesperson for the panel and to respond to Congressional requests to testify. The full policy on SAB interaction with Congress and the public is available at the SAB's website at** http://yosemite.epa.gov/sab/sabproduct.nsf/WebSABSO/Membership%20Information?OpenDocument**.**

13.7 12. If the scientists on the SAB panel have legal questions, who do they ask? Do they have lawyers who are independent from EPA?

Agency Response: **If scientists on an SAB panel have questions or require information from the EPA, they are instructed to contact the Designated Federal Officer (DFO) for the panel. The DFO then contacts the appropriate EPA office to obtain the information needed to respond to the questions. The agency's primary source of expertise on legal matters is the EPA's Office of General Counsel.**

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13.8 13. An early version of the "connectivity" report was reviewed in a process managed by a contractor, Eastern Research group. While your Agency has provided us with a list of individuals involved in that review, you have not released 1) the contractor-provided report, 2) the original EPA draft, or 3) the charge questions posed to these reviewers. Please provide those documents along with the contract agreement(s) and any related correspondence.

Agency Response: **The contractor-provided report was part of the publicly available docket as a supporting document for the proposed rule since the opening of the public comment period. In the docket, the document is listed as "Post-Meeting Comments for First Peer Review of EPA's Draft Report: Connectivity of Streams and Wetlands to Downstream Waters - A Review and Synthesis of the Scientific Evidence (independent external peer review report)" and is available at** http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0005**. This document is arranged by the charge questions the EPA provided to the peer reviewers.**

13.9 25. EPA says it "consulted" with states, but in your June 11, 2014, testimony before the House T&I Committee you could not name a single state that has come out in support of the rule. That was over a month ago, and you promised to survey the states.

a. Please provide that survey and its results.

b. Detail the methodology that you used in conducting this "survey."

Agency Response: **The contractor-provided report was part of the publicly available scope of Clean Water Act jurisdiction is an issue of broad importance to states and many states have asked the EPA to respond to Supreme Court decisions in *SWANCC* and *Rapanos* through rulemaking. The EPA worked closely with every state as a partner in the implementation of federal and state authorities and responsibilities. In this role, the EPA consulted early with states and state associations to develop the proposed rule.**

As part of the agencies' consultation process, the EPA held three in-person meetings and two phone calls in the fall and winter of 2011, to coordinate with state organization prior to beginning formal rulemaking. EPA also worked closely with states and municipalities after the rule was proposed. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States (ECOS). In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation, 12 counties, eight associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments.

In addition, the EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state

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and local agencies and associations, including the Western Governors' Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings. The agencies' engagement with states continued through a series of conference calls organized by both the ACWA and the ECOS. The agencies included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule.

13.10 27. You say that you have held a number of outreach sessions and listening sessions.

a. Summarize the over-all response from the manufacturing, mining, and construction groups.

b. What have been their greatest concerns?

c. Detail the actions you have taken to address those concerns.

Agency Response: **The agencies have received and processed over one million public comments submitted on the proposed rule. The agencies carefully considered comments submitted by industry groups as well as other stakeholders as they work to develop a final rule.**

The agencies included a detailed narrative of concerns raised by small entities during the course of the rule's development and a description of the agencies' efforts to address them with the final rule.

13.11 28. EPA keeps telling opponents of this rule to comment.

a. Do you have any legal obligation to make any changes based on the comments you receive?

Agency Response: **Under the Administrative Procedure Act, the EPA and the Corps are required to solicit public comments on their proposed rule and to review the comments they received while developing a final rule. To the extent relevant issues are raised during the public comment period, the agencies have an obligation to consider them, and we expect to make improvements to the final rule in response to public comments. The agencies prepared a response to all comments received to accompany the final rule which will address the comments and outline how they were considered.**

13.12 b. EPA frequently mentions meetings and consultations with governments and businesses. What specifically did the Agencies change as a result of these meetings? (p. 6 – 10)

Agency Response: **The EPA and the Corps published a proposed rule, on which the agencies solicited public comments until November 14, 2014. As early as 2011, EPA conducted outreach to states, tribes and small businesses to help identify what the agencies should include in a proposed rule. For example, the EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule to define "waters of the United States." Similarly, the EPA determined to seek early and wide input from**

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representatives of small entities, enabling the agencies to hear directly from these representatives prior to publishing a proposed rule.

During the public comment period, the agencies met with stakeholders across the country to facilitate their input on the proposed rule. We talked with a broad range of interested groups including farmers, businesses, states and local governments, water users, energy companies, coal and mineral mining groups, and conservation interests. In October 2014, the EPA conducted a second small business roundtable to facilitate input from the small business community, which featured more than 20 participants that included small government jurisdictions as well as construction and development, agricultural, and mining interests. Since releasing the proposal in March, the EPA and the Corps conducted unprecedented outreach to a wide range of stakeholders, holding nearly 400 meetings all across the country to offer information, listen to concerns, and answer questions. The agencies recently completed a review by the Science Advisory Board on the scientific basis of the proposed rule and will ensure the final rule effectively reflects its technical recommendations. These actions represent the agencies' commitment to provide a transparent and effective opportunity for all interested Americans to participate in the rulemaking process.

The agencies prepared a report summarizing their small entity outreach, the results of this outreach, and how these results informed the development of this rule.1 By holding these meetings early in the rulemaking process, the agencies were able to hear from these entities at a time when their input could be subsequently reflected in specific regulatory text. For example, many stakeholders indicated that the proposed rule should specifically identify those ditches that are excluded from Clean Water Act jurisdiction, and the proposed rule does so. Similarly, several stakeholders asked that the proposed rule clarify the jurisdictional relevance of breaks in the "ordinary high water mark," whether they be natural or man-made, and the proposal does so. During the public comment period, the agencies received more specific input on their proposed regulatory text, and the agencies carefully considered in developing the final rule. The agencies prepared a response to comments document to accompany the final rule. A summary of these comments can be found in section 13.2.5 of this document and section 11.1 of Compendium 11.

Additional details on the comments received and agency responses can be found in the docket for this rule.

Utility Water Act Group (Doc. #0852)

13.13 Furthermore, several weeks into the comment period, certain documents referenced in the preamble to the proposed rule are not yet available on the agencies' websites or regulations.gov. For example, the preamble states that the agencies "prepared a report summarizing their small entity outreach to date" and that the report is "available in the docket," but there is no such document yet posted in the docket. 79 Fed. Reg. at 22,220. (p. 2)

[1] This report is available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-1927.

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Agency Response: **All documents were posted and available in the docket on April 21, 2014. The small entities report could be found in the docket under Id. No. EPA-HQ-OW-2011-0880-1927. A revised copy can be found in the docket under Id No. EPA-HQ-OW-2011-0880.**

13.1. CONCERNS ABOUT TIMING/OVERLAP OF SCIENCE DOCUMENT AND REVIEW PROCESS

Agency Summary Response

This Summary Response addresses all comments in section 13.1.

Summary of Concerns About Timing/Overlap of the Science Report and Review Process

The majority of comments in this section expressed concern with the timing and sequencing of the science report and the proposed rule. Commenters suggested the agencies should have waited to publish the proposed rule until findings of the final science report could be included. Several commenters recommended the proposed rulemaking should have been stayed until the science report was finalized and the economic analysis was revised. Others requested an extension for proper consideration of the science report.

Many commenters also suggested the sequencing of these documents did not provide adequate time to review and provide comment on the science report while it was undergoing review by EPA's Science Advisory Board (SAB). Others suggested that this approach prevented the public from meaningful review of the science report prior to the submission of the proposed rule to the Office of Management and Budget (OMB).

The sequencing of the report and proposed rule caused many commenters to question the utility of a proposed rule based on a draft science report, the agencies' use of the best available science to develop the proposed rule, correlation of the science to legislative language or the Supreme Court rulings, and the agencies' adherence with agency standards for the peer-review process. These concerns led many to interpret the rule as an expansion of federal jurisdiction with the agencies' interpretation of the Clean Water Act (CWA).

Other commenters contended that it violated the APA to use a draft version of the Science Report as a basis for a rulemaking of this significance. Several commenters recommended that the Proposed Rule be withdrawn until the Science Report is finalized.

Agencies' Summary Response Concerns About Timing/Overlap of the Science Report and Review Process Comments

The comments related to the adequacy of the opportunity for public comment on the Science Report and the results of review by the SAB are addressed in Compendium 9 - Comments on Scientific Evidence Supporting Rule**,** summary responses 9(a) and 9(b).
There is no basis for the commenters' assertion that relying on a "draft" report for the proposed rule somehow violated the APA. The APA requires, in short, that the public have a meaningful opportunity to comment and that the final action be reasonably supported by the administrative record. Both requirements were met here.

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Nothing in the APA precludes an agency from relying on a draft report for a proposed rule. The label "draft" merely reflected that the analysis was subject to revision based on input by the SAB in its review and the public during the comment period. It turns the APA on its head to contend that the agencies were precluded from proposing a regulation until it has made definitive and final scientific conclusions prior to full airing of the issues during the rulemaking's public process.

Moreoever, as explained in Compendium 9 - Comments on Scientific Evidence Supporting Rule, summary response 9(e) the draft Report reflected a full and robust analysis of the available scientific information and was subject to peer review prior to submittal to the SAB and proposal of the rule.

Specific Comments

Michigan Department of Environmental Quality (Doc. #5462.1)

13.14 Although Michigan agrees the United States Environmental Protection Agency (USEPA) should clarify the definition of Waters of the United States under the CWA, the State of Michigan would like to begin its comments by encouraging the USEPA to wait until the Science Advisory Board Draft Report "*Connectivity of Streams and Wetlands to Downstream Waters*" is complete and final before moving forward with a rule. As the purpose of this report is to summarize the current scientific understanding of the connections between streams and wetlands, and downstream waters, including physical, chemical, and biological connections that affect the condition or function of downstream waters, any final action to clarify jurisdictional waters under the CWA should be based on the final findings of this report, after consideration of public comments and independent peer review. In short, we believe a determination of this sort should be based on science. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Rural County Representatives of California (Doc. #5537)

13.15 At that time, the proposed Guidance was highly controversial, with many stakeholders, including RCRC, believed it to be a drastic de facto jurisdictional expansion by your agencies. We are disappointed that you have decided to essentially repackage the Guidance into a proposed rule before issuing the draft science report without extensive nationwide outreach to counties, farmers, landowners, and the other myriad stakeholders that this rule will impact should it be adopted. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

13.16 The rulemaking should not have been initiated before the issuance of the draft science report.

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Your agencies have stated that the draft science report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" is informing the proposed rule. However, you are moving forward with the rulemaking before the report has been finalized and released, making it impossible to truly use the conclusions from the report to inform this proposal. Moving forward with the proposed rule before the science report is finalized is bad public policy and premature at best, particularly when the proposal has the far-reaching impact that this one does. RCRC recommends that your agencies withdraw the rule so that a thorough review of the draft science report can be conducted before finalizing such a far-reaching regulatory proposal. (p. 4)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Office of the Governor, State of Wyoming (Doc. #7181.1)

13.17 There is also a question on the validity of the upcoming "science report" - a still pending report that the EPA has said it is comfortable supports their proposal. The implication - pre-knowledge of the conclusions of the science report not yet issued - raises concern. A report should not be developed to justify a pre-determined agency position as it appears may be the case here. Rather, science should be the neutral foundation to begin discussions with the states (where, for the most part, regulatory responsibility rests) and other interested partners. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Area II Minnesota River Basin Projects, Inc. (Doc. #7185.1)

13.18 It appears that the EPA and Corps of Engineers are expanding their jurisdiction with their interpretation of the Clean Water Act, and not with the actual intent of the Clean Water Act. The proposed rule relies on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, a draft report released by EPA's Science Advisory Board in September 2013. Policy decisions should be made on final and approved scientific bases, not ones in draft form. This report's conclusions, if enacted into law by the proposed rule, could establish categorical federal jurisdiction over tributaries, riparian areas, and floodplains without agencies conducting case-by-case analysis. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.19 PADEP appreciates the opportunity to submit these comments to EPA and reserves the right to submit additional comments after review of the final Scientific Advisory Board

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report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. (p. 1)

Agency Response: **Thank you for your comment.**

Commonwealth of Pennsylvania Department of Agriculture (Doc. #14465)

13.20 The proposed rule was premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB). On the same day the draft Connectivity report was released to the public, the proposed rule was sent to the Office of Management and Budget (OMB) for interagency review. This is inappropriate and prevented the public from being able to provide meaningful comments on the proposed rule. The Connectivity report is the scientific basis the agencies rely on to support their proposed rule. The science should have been final prior to the proposed rule being developed.

Recently the agencies extended the public comment period, and weeks later the final Connectivity report was released. This extension fails to rectify the procedural failures of the agencies for not providing a final report in the proposed rule for comment when the rule was first released. The process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Virginia Department of Environmental Quality (Doc. #18760)

13.21 DEQ also believes that waiting to implement the rule making until after the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report and EPA's Science Advisory Board (SAB) panel review were concluded would have better served the rule makers and states in understanding the Proposed Rule, and thus, may have reduced confusion and concern among state regulators. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.22 Apart from the content of the report, we note that the peer review and agency reliance on the report are fundamentally undermined by EPA's failure to comply with peer review principles recognized by EPA and the Office of Management and Budget (OMB). OMB observes that "when an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened."[2] Likewise, EPA

[2] OMB Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2668 (Jan. 14, 2005) (emphases added).

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holds that peer review "is a process for enhancing scientific or technical work product so that the decision or position taken by the Agency, based on that product, has a sound, credible basis."[3] Because the proposed rule prematurely relied on a draft, incomplete, non-peer reviewed report, EPA and the Corps are already invested in an approach that may not be supported by the peer review process. Further, EPA's release of a proposed rule before the peer review was completed may have caused bias in the peer review towards not only the conclusions reached in the Connectivity Report, but also the approach adopted by EPA and the Corps in the prematurely released proposed rule. Thus, the muddled process EPA took in promulgating a proposed rule before any scientific review was completed puts the proverbial cart before the horse, with a strong potential to create bias in both written products. (p. 14 – 15)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

California Department of Transportation, Division of Environmental Analysis (Doc. #19538)

13.23 11) The proposed change to the definition of WOUS relies on the scientific study recently conducted by the EPA titled Connectivity of Streams and Wetlands to Downstream Waters. This study is currently in the peer review process. While we recognize the intent of the proposed changes to this definition, and support the effort to clarify the extent of jurisdictional waters under the Clean Water Act, we recommend that you wait to finalize the proposed language until the peer review on the scientific study complete and the document is published. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Skamania County Board of Commissioners (Doc. #2469.1)

13.24 Proposed rule should follow, not precede, draft science report In addition to the aforementioned issues, we are also concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

[3] EPA, Science Policy Council, U.S. Environmental Protection Agency Peer Review Handbook, available at http://www.epa.gov/peerreview/pdfs/peer_review_handbook_2006.pdf .

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13.2. CONCERNS ABOUT TIMING AND PROCESS OF SCIENCE DOCUMENT

Specific Comments

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

13.25 The Connectivity Report should be finalized prior to presenting the proposed rule for public review and comment.

If the EPA's draft connectivity report is to be utilized as the culmination of scientific study related to defining connectivity for determining Waters of the United States, then it should be finalized before related rule changes are presented for public review and comment. Input by stakeholders regarding the draft connectivity report should be reviewed, and any resulting modifications to the draft Clean Water Act rule should be completed, prior initiation of a public comment period for the rule making. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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

13.26 The draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, is currently under peer review, and it is our understanding that the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized is premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would be useful in development of the proposed rule. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

The Carroll County Department of Land Use, Planning and Development (Doc. #6266.1)

13.27 In addition, the scientific report, Connectivity of Streams and *Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, **should be finalized before a rule is proposed** and public comment sought. Clearly, issuance of any proposed rules' modifications is premature. (p. 1 – 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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

13.28 We recognize that science-based research needs to lead the process, and to that end we propose EPA wait for the final version of "*Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*" (connectivity

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report) plus the use of other relevant scientific data before making final rule definitions. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.29 We recognize the EPA extended the comment period 25 additional days due to the anticipated Science Advisory Board (SAB) peer review report release to the public. We appreciate the extension of time, but an extension of 30 days or less is inadequate time for the County to review and provide meaningful comments on this SAB peer review report. In the future, we request that the EPA increase their extension of time to 60 days following the publication of new information during an official public comment period. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Del Norte County, California (Doc. #8376)

13.30 • Proposed rule should follow, not precede, draft science report

We are also concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Aurora Water (Doc. #8409)

13.31 The draft Connectivity Report fails to correlate science with legislative language and previous Supreme Court rulings; and will not be available for review during this existing comment period. The "Connectivity Report" currently in draft and under review by the Scientific Advisory Board is supposed to summarize and synthesize the existing scientific literature with respect to the "connectivity" factors that include hydrology, chemical or biological connections. The available draft seems to consider connectivity as a zero sum activity - as either present or absent. This approach fails to recognize that connectivity can occur over a wide range of conditions from minor with little or no impacts, to direct, with major consequences. Also, the draft report states ... "over sufficiently long time scales all aquatic habitats are connected to downstream waters through the transfer of water chemicals and biota ..."; while broadly true, this statement is not the basis to regulate or determine what are presently WOTUS.

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Recommendation: The comment period on the proposed rule should be extended for an additional 60 days past the issuance of the final Connectivity Report so that comments regarding the proposed rule can be modified to incorporate the report's findings. (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Carroll County Board of Commissioners, Maryland (Doc. #8667)

13.32 (…) We also note that the scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, has not yet been finalized. This important analysis should be completed and its assessments reviewed prior to any further action on the proposed rules. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

City of Copperas Cove, Texas (Doc. #14118)

13.33 EPAs decision to publish the proposed rules based on the Connectivity Report that has yet to be finalized is of great concern. The proposed rules will possibly inadequately address a scientific report that has yet to receive full public comment and clarity based on those concerns. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Lassen County Board of Supervisors (Doc. #17461)

13.34 *The rulemaking should not have been initiated before the issuance of the draft science report*

Your agencies have stated that the draft science report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" is informing the proposed rule. However, you are moving forward with the rulemaking before the report has been finalized and released, making it impossible to truly use the conclusions from the report to inform this proposal. Moving forward with the proposed rule before the science report is finalized is bad public policy and premature at best, particularly when the proposal has the far-reaching impact that this one does. RCRC recommends that your agencies withdraw the rule so that a thorough review of the draft science report can be conducted before finalizing such a far-reaching regulatory proposal. (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Department of Public Works, County of San Diego, California (Doc. #17920)

13.35 13. Scientific basis of connectivity report

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The new rule should be proposed only after the scientific basis has been fully vetted. The sequence and timing of the draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report), and how it was utilized during the "Waters of the U.S." rulemaking process, is cause for concern. The agencies released the Connectivity Report in draft form at the same time as the proposed rule, rather than allowing review prior to developing the proposed rule. This sequence did not allow time for the public to comment on the draft Connectivity Report prior to rulemaking, nor did it provide the agencies time to review, address comments and concerns, and update the proposed rule accordingly. Comments and concerns on the Connectivity Report could provide valuable feedback that should be incorporated into the proposed rule. The County requests that the agencies consider all comments and feedback on the connectivity report (including those released on from the Science Advisory Board on October 24, 2014), revise accordingly, and re-release the report and the proposed draft rule in an appropriate sequence to allow for meaningful review and comment on each.

EXAMPLE: Typically, the sequence outlined for background reports to influence the design of rules and regulations includes a comment period, along with additions, input and revisions prior to release of a final report. After the final report is completed, proposed rules are then developed utilizing the final report as a basis. This process was not followed for the proposed Waters of the U.S. rule. (p. 9 – 10)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

City of St. Petersburg (Doc. #18897)

13.36 (…) 11. The proposed rule should not be settled until the EPA Draft Science Report is finalized. Much of the science cited too in the rule comes from the draft report and is used to justify new definitions for "tributary," "significant nexus," and "adjacent waters." Until this draft report is finalized, the validity of the science behind the new definitions is speculative at best. (p. 4)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Hidalgo Soil and Water Conservation District, Lordsburg, New Mexico (Doc. #19450)

13.37 Document Availability: EPA's Office of Research and Development's report, "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence," the document, upon which all of these definitional changes are based, was not complete at the time of publication of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Mississippi Valley Flood Control Association (Doc. #19488)

13.38 The Proposed Rule Reflects an Improper Disregard of Science As noted above, EPA's draft scientific report on connectivity, which the agencies purport to rely on as the foundation of the Proposed Rule, has not yet been peer-reviewed or finalized. The draft report was sent to the SAB to begin undergoing review on the same day the Proposed Rule was sent to OMB to undergo interagency review. So, the public will be denied the opportunity to comment on the final report that the agencies will use as the basis for their final rule. The agencies' rulemaking process is entirely disordered; the scientific analysis supporting a rulemaking should always be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts are exceptionally intertwined. The agencies should extend the Proposed Rule's public comment period to a date at least 90 days after the final report is issued to allow for adequate review of this fundamental document. (p. 10 – 11)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Maui County (Doc. #19543)

13.39 The County of Maul further requests that the EPA and Corps stay the current rulernaklng process until the scientific assessment is final and the credibility of the EPA's "A Review and Synthesis of Scientific Evidence" ("Connectivity Report") is established and the agencies have sufficient scientific and technical foundation for the proposed rule, and further stay the rule until the EPA conducts a complete cost-benefit study, as required by Executive Order 13563. The County of Maui requests that the agencies analyze the specific impacts of the proposed rule on each region of the U.S.,with Hawaii being considered as a separate region. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Navajo County Board of Supervisors, Arizona (Doc. #19569)

13.40 The proposed rule should follow, not precede, the science report

In addition to the aforementioned issues, Navajo County is concerned with the sequence and timing of the science report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, and how it fits in the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Mesa County, Colorado Board of County Commissioners (Doc. #12713)

13.41 Mesa County respectfully requests that the United States Environmental Protection Agency (EPA) and USACE:

1. Stay the current rulemaking process until the scientific assessment is final and the credibility of the Connectivity Report is established and the Agencies have the necessary scientific and technical foundation for the Proposed Rule;

2. Stay the rulemaking process until the EPA's Economic Analysis is revised and the EPA is able to conduct a complete cost-benefit study;

3. Revise the Proposed Rule based upon the findings and recommendations of the Connectivity Report and Economic Analysis and the comments submitted by stakeholders; and

4. Conduct a negotiated rulemaking process. (p. 1 – 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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

13.42 As explained in greater detail herein, our concerns with the Proposed Rule include:

(…) Circulation of the Proposed Rule and solicitation of comments thereon prior to completion of the scientific analysis and review purportedly underpinning the entire Proposed Rule; (…) (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Unites States Steel Corporation (Doc. #15450)

13.43 The proposed rule was developed via a flawed process, where the rule was developed before review of the underlying science is complete. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Contra Costa County Public Works Department (Doc. #15634)

13.44 4. The rule-making process should be suspended until the EPA Scientific Advisory Board's peer review of the Connectivity Report is complete. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Beaverhead County Commissioners (Doc. #16892)

13.45 We are also concerned with the sequence and timing of the draft science report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis*

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of the Scientific Evidence," and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Rulemaking should follow science, not the inverse. It seems only prudent to wait until the Connectivity Report is finalized so comments or concerns from the Final Report can be addressed in the development of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Water Advocacy Coalition (Doc. #17921.1)

13.46 (…) The proposed rule was developed via a flawed process before review of the underlying science was complete. (p. 14)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

American Concrete Pressure Pipe Association (Doc. #3306)

13.47 Furthermore, the NPRM was released before an agency study on the connection between intermittent waters and wetlands to larger bodies of water was finalized and placed in the docket. Before proceeding, the EPA must comply with basic rulemaking requirements. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

County of San Diego (Doc. #14782)

13.48 13: Scientific basis of connectivity report

The new rule should be proposed only after the scientific basis has been fully vetted. The sequence and timing of the draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report), and how it was utilized during the "Waters of the U.S." rulemaking process, is cause for concern. The agencies released the Connectivity Report in draft form at the same time as the proposed rule, rather than allowing review prior to developing the proposed rule. This sequence did not allow time for the public to comment on the draft Connectivity Report prior to rulemaking, nor did it provide the agencies time to review, address comments and concerns, and update the proposed rule accordingly. Comments and concerns on the Connectivity Report could provide valuable feedback that should be incorporated into the proposed rule. The County requests that the agencies consider all comments and feedback on the connectivity report (including those released on from the Science Advisory Board on October 24, 2014), revise accordingly, and re-release the report and the proposed draft rule in an appropriate sequence to allow for meaningful review and comment on each.

EXAMPLE: Typically, the sequence outlined for background reports to influence the design of rules and regulations includes a comment period, along with additions, input

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and revisions prior to release of a final report. After the final report is completed, proposed rules are then developed utilizing the final report as a basis. This process was not followed for the proposed Waters of the U.S. rule. (p. 9 – 10)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Mississippi Farm Bureau Federation (Doc. #14464)

13.49 We are concerned that EPA chose to publish the WOTUS proposed rule before the Scientific Advisory Board (SAB) has had an opportunity to review and provide comment on the "*Connectivity of Streams and Wetland~ to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (Connectivity Study). (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Riverport Levee District (Doc. #15655)

13.50 d. Jurisdiction is improperly expanded as the science supporting the sought after connectivity has not been supplied.

The Agencies published the proposed rule prior to the science upon which it is supposedly based having been finalized; something that should have occurred prior to the proposed rule having ever been formulated. EPA's Connectivity Report is still not finalized and has only recently been peer-reviewed. While the Report documents the presence of connections between waterbodies, it appears to fail in supplying the scientific basis needed to determine when such connections may or may not significantly affect downstream waters. The voluminous amount of data released after publication of the proposed rule is too complex to have reviewed in the limited time allowed, and specific scientific comments cannot be provided. Instead, we offer that when policy is crafted and an implementing rule drafted all in advance of peer-reviewed sound science being published, transparency is lost and data driven decision-making has not occurred. Going forward the Agencies intend that all adjacent waters be categorized as jurisdictional, claiming a significant nexus to jurisdictional waters. Under the proposed rule, all tributaries (including ephemeral streams and manmade ditches which may be dry most of the year), all adjacent waters and all adjacent wetland would be subject to federal jurisdiction. Drainage ditches would be considered jurisdictional unless they fall under one of the two categorical exclusions: 1) those ditches located in uplands with less than perennial flow (another undefined term used in the proposed rule for which there are varying working definitions), and 2) those ditches that do not contribute flow either directly or indirectly to jurisdictional waters. The basis for this expanded jurisdiction is deeply flawed in that it relies on a faulty construction of the significant nexus text and is not shown to be supported by sound science. This ill-founded and improper action, considering the predictable outcome of expanded jurisdiction and regulatory authority, is arbitrary and capricious. (p. 4)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Mendocino County Farm Bureau (Doc. #16648)

13.51 The Draft Science Report

It is stated that the draft science report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" is informing the proposed rule. However, this Rule development process was started prior to the issuance of the draft science report which impacted the ability for those that have submitted comment on the Rule to fully review the scientific merit, or lack thereof, as related to the Rule. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Montana Stockgrowers Association (Doc. #16937)

13.52 Use of Draft Report Is a Procedural Flaw. One of our first concerns is the use of the Draft Report: Connectivity of Streams and Wetlands to Downstream Waters, as a basis for the foundation for the development of the proposed rule. Even though the Report is under review by EPA's Science Advisory Board, and will not be finalized until that review and the final Report are complete, this clearly presents a procedural flaw. We believe it is premature to develop a rule based on a Draft Report and not provide an adequate opportunity for the public to comment on the "Final" Report prior to its utilization in the development of this rule. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

San Joaquin River Exchange Contractors Water Authority (Doc. #1351)

13.53 I am respectfully requesting an extension of the public comment period for an additional 90 days from the current due date of July 21, 2014, or for 90 days from the release of the final connectivity report by the EPA (whichever is later) on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule Defining "Waters of the United States" Under the Clean Water Act. 76 Fed. Reg. 22,188 (Apr. 21, 2014). (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

National Waterways Conference, Inc. (Doc. #12979)

13.54 The agencies' rulemaking process is entirely disordered. The scientific analysis supporting a rulemaking should be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts are intertwined. In this instance, the troubling conclusion is that the agencies set the policy goal of greater control of land use decisions first and only afterwards sought for a rationale. (p. 12)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Senators Jeff Flake and John McCain (Doc. #1377)

13.55 (…) In addition, we find it troubling that EPA is using a draft report, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, as support for this proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

United States House of Representatives (Doc. #17457)

13.56 I also find it troubling that an agency such as yours, which normally roots its rulemaking processes in sound science, sent its draft rule to the Office of Management and Budget on September 17, 2013 — the same day the EPA submitted its scientific study justifying the redefinition to its own, non-peer reviewed Scientific Advisory Board. Not only is that headlong sprint towards finalization a violation of the White House's own internal regulatory guidelines, it underscores that this rulemaking is a product of the EPA's political agenda, rather than the result of new scientific findings. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

United States House of Representatives (Doc. #17464)

13.57 Furthermore, the scientific report — which the agencies point to as the foundation of this rule — has yet to be either peer-reviewed or finalized. The EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," was sent to the EPA's Science Advisory Board to begin review on the same day the rule was sent to OMB for interagency review. The science should always come before rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.2.1. SAB Review of Rule

Specific Comments

Nevada County Board of Supervisors, State of California (Doc. #18894)

13.58 (…) 6) The agencies state that their decision on how best to address jurisdiction over "other waters" in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature in

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a report entitled Connectivity of Streams m1d Wetlands to Downstream Waters: A Review of the Synthesis of the Scientific Evidence. While it makes sense to study published and peer-reviewed scientific reports in developing the proposed rule, the rule should not have been released until the SAB's review and subsequent final report are complete and available for consideration during the public comment period on the rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.59 VI. LACK OF SCIENTIFIC JUSTIFICATION: IT IS INAPPROPRIATE TO CIRCULATE THE PROPOSED RULE FOR PUBLIC COMMENT PRIOR TO FINAL COMPLETION AND REVIEW OF THE CONNECTIVITY REPORT

Placing the proverbial "cart" before the "horse," the Agencies are conducting the public comment period for the Proposed Rule while admitting that the purported scientific foundation justifying the Proposed Rule's sweeping exertion of categorical jurisdiction on an unprecedented level, the Connectivity Report, remains a work in progress. See Proposed Rule at 22,190. Indeed, the SAB itself has recommended further analysis and numerous changes to the Connectivity Report.[4]

Dr. Mark Murphy of the SAB panel put it well:

> I must say I am puzzled as to why EPA has decided to release the Proposed Rule before receipt of our review of the Connectivity Report . . . The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' . . . The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB—just a few minor additions . . . In point of fact, the SAB Review suggested that some major additions be made to the Connectivity Report.[5]

SAB Panel Comments on Proposed Rule at 56.

Absent meaningful consideration of the significance of each alleged nexus's effect on a traditional navigable water, there can be no credible assertion of jurisdiction, categorical or otherwise. (p. 26 – 27)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

[4] See Draft SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters (Aug 11, 2014), available at http://yosemite.epa.gov/sab/SABPRODUCT.NSF/ea5d9a9b55cc319285256cbd005a472e/212bb1480331835285257d350041a1c0!OpenDocument.

[5] SAB Panel Comments on Proposed Rule at 56.

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Colorado Association of Commerce and Industry (Doc. #16172)

13.60 The research findings which the Agencies have relied upon to support the proposed rule were not fully or even partially vetted by scientific peer reviews and at the same time have not been readily available for the public to access. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Family Farm Alliance (Doc. #17459)

13.61 The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft connectivity report, which is currently under review by the Science Advisory Board (SAB).

Given this ongoing SAB Panel review of the adequacy of the science to support the proposed rule, commenters should have at least an additional 90 days from the time when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters," and the public deserves the opportunity to comment on the conclusion of that review process.

A significant amount of time and technical expertise will be required first to evaluate the report from the SAB Panel and agencies' scientific conclusions and responses and then to prepare substantive and thoughtful responses. The comment period should be extended to give stakeholders that additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback. (p. 2 – 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Associated Industries of Florida (Doc. #19325)

13.62 Second, the Agencies should await completion of the review being conducted by USEPA's Science Advisory Board, and further extend the comment period deadline if necessary to allow interested parties to see the Board's review before the comment deadline. Doing so is only fair to interested parties who would like to know the rule's final form before being required to submit comments. (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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13.2.2. Connectivity Study

Specific Comments

Kansas Senate Committee on Natural Resources (Doc. #15022.1)

13.63 Because court rulings do not supersede legislative mandates and longstanding protocols require administrative rules to be based upon peer-reviewed science, this committee needs to understand the scientific and procedural processes EPA used to develop, circulate and revise its Connectivity Report. [6] I am particularly interested in comments EPA received from the peer-review community prior the March, 2014 publication of WOWS in the Federal Register. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Sealaska Corporation (Doc. #15356)

13.64 VI. COMMENTS ON CONNECTIVITY REPORT

The EPA report is a synthesis of peer-reviewed scientific literature on the connectivity of streams and wetlands. It is a large-scale review that relies on a broad array of scientific literature documenting research nationwide and indeed worldwide. However the report lacks Alaska specific information and references. The report explores three main methods of stream and wetland connection (physical, chemical and biological) and discusses hundreds of scientific studies. It does not however explain how waters and wetland systems that may be hydrologically connected demonstrate a significant nexus and therefore on its own does not support the agency's jurisdiction by rule.

Sealaska objects to backwards process employed by EPA of identifying science to support already reached conclusions to support the proposed rulemaking. The process should start with applicable science and then establish conclusions. Backwards process EPA has used not consistent with rule making. (p. 22)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Indiana Department of Environmental Management (Doc. #16440)

13.65 1. The Proposed Rule is premature and inappropriately relies on the draft Connectivity Report.

The U.S. EPA relied on a draft report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*" for the scientific support for the Proposed Rule. However, this report had not been released when the

[6] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. EPA/611/R-R98B. September, 10, 2013.

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Proposed Rule was issued, and it still has not been adequately peer-reviewed. It is extremely difficult, if not impossible, to appropriately respond to, and comment on, a proposed ruled based on a draft scientific study. The Proposed Rule should be withdrawn and held until after the report is finalized and has undergone a thorough peer-review process. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

New Mexico Environment Department (Doc. #16552)

13.66 The "Connectivity Report"

13.67 The Department is alarmed by the timing and final comment on the Agencies' supporting scientific document titled the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence ("Report").7According to the Federal Register notice, the Agencies' assertion of jurisdiction is based on the Report. 79 Fed. Reg. 22,180, 22,190. Because the Report was in draft form when the proposed rule was published, the Agencies agreed to postpone the proposed rule's final adoption until the Science Advisory Board ("SAB") issued their findings and recommendations. Id. On September 30, 2014, the SAB issued its summary findings on the technical and scientific basis of the proposed rule. Dr. David T. Allen, Chair, Science Advisory Board, "Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA 's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act" (Sept. 30, 2014).8 The SAB also issued a more detailed review of the Report on October 17,2014. Dr. David T. Allen, Chair and Dr. Amanda D. Rodewald, Chair, Science Advisory Board SAB Panel for the Review of the EPA, Water Body Connectivity Report, "SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" 17, 2014).9 Such a late release of the final Report and SAB comments, only 45 days from the public comment deadline, provides inadequate time to submit substantive comments on such an important document. (p. 10 – 11)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

State of Oklahoma et al. (Doc. #16560)

13.68 b. Cart before the horse

[7] The Agencies draft Report, dated September, 2013, was marked "draft-do not cite or quote."
[8] Available at http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$FileIEPASAB-14-007 +unsigned.pdf.
[9] Available at http://yosemite.epa.gov/sab/sabproduct.nsfl02ad90b136fc21ef85256eba00436459/AF1A28537854F8AB85257D74005003D2/$FileIEPA-SAB-15-001+unsigned.pdf.

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Further, it defies logic and scientific reason that EPA and the Corps would expedite submittal of the draft Connectivity Report[10] of the EPA Science Advisory Board (SAB) at the same time they submitted the proposed rule to OMB. As a scientist, I am concerned by what can only be described as an effort to effectively cut off the ongoing scientific deliberation vital to the fundamental questions underlying this proposed rule. Such a rushed, uncollaborative process is foreign to state regulatory agencies like the OWRB that are often engaged in developing highly technical rules over extended periods of time with multiple opportunities for input, first by the scientist that help better inform the decision-making process, then by those burdened with implementing or complying with such rules. (p. 8 – 9)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

State of Idaho (Doc. #16597)

13.69 EPA and the Corps should finalize the Connectivity Report before proceeding with any action regarding the Proposed Rule. EPA's Science Advisory Board (SAB) is reviewing a draft report on the connectivity of differing water bodies that will inform the Final Rule. Despite requests from the Western Governors' Association, the Western States Water Council, and others, EPA and the Corps published the Proposed Rule for public comment before SAB completed its review and before the report was finalized.

More recently, EPA and the Corps indicated they will wait until the Connectivity Report has been completed before issuing a Final Rule. The State of Idaho appreciates this decision. However, EPA and the Corps also should continue to accept comments for a reasonable period of time after the Connectivity Report is complete in order to utilize the Report and such comments to revise or otherwise develop the Proposed Rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Franconia Township (Doc. #8661)

13.70 We also believe that the underlying science of the proposed rule has not been fully vetted by the agencies in collaboration with the public to allow the rule to move forward. We request that a public comment period be opened on the final Connectivity Report currently under review by the Science Advisory Board (SAB) of the EPA when the report is finalized with the SAB recommendations attached. This report should be finalized, with a public comment period, prior to the closing of the comment period on the proposed rule. (p. 1)

[10] U.S. Environmental Protection Agency, Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPAl660R-111098B (Sept. 2013), available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Maricopa County Board of Supervisors (Doc. #14132.1)

13.71 The Connectivity Study The study, labeled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," provides the scientific underpinnings for the proposed rule, so EPA should permit public comment on the completed study. Unfortunately, EPA did not release this study until October 17, 2014, less than a month before comments of the proposed rule are due. This is insufficient time to properly review and analyze the document, especially because the document regularly suggests that further research and refinements are still needed. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

City of Golden Public Works, Colorado (Doc. #14617)

13.72 The proposed rulemaking should be delayed until a final version of the Connectivity report is issued and impacted entities are able to review and comment. Once the final version of the Connectivity Report is finalized and any revisions to the Proposed Rule are complete, additional and ample time for all impacted entities to review and comment should be provided in order to generate the most effective rule. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

San Joaquin County Board of Supervisors (Doc. #15017)

13.73 We also believe that the underlying science of the proposed rule has not been fully vetted by the agencies with the public. We request that a public comment period be opened on the final Connectivity Report when the EPA's Science Advisory Board (SAB) completes its review. This report should only be finalized subject to a public comment period, prior to the closing of the comment period on the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

National Association of Counties (Doc. #15081)

13.74 The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed “waters of the U.S.” rule.

Recommendations:

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Reopen the public comment period on the proposed "waters of the U.S." rule when the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence report is finalized. (p. 7)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

City of Poway, California (Doc. #15156)

13.75 The proposed rule should be drafted and reviewed after the scientific report used to justify the proposed rule is completed. We are concerned with the sequence and timing of the draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed WOTUS rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the scientific report is finalized seems premature and the agencies may miss a valuable opportunity to review issues raised in the final report that would aid in the development of the proposed rule. (p. 2 – 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Carroll County Board of Commissioners (Doc. #15190)

13.76 We also note that the scientific report, *Connectivity of Streams and Wetlands to Downstream Synthesis of the Scientific Evidence*, has not yet been finalized. This important analysis should be completed and its assessments reviewed prior to any further action on the proposed rules. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Fort Bend Flood Management Association (Doc. #15248)

13.77 d. Jurisdiction is improperly expanded as the science supporting the sought after connectivity to establish jurisdiction has not been supplied.

The Agencies published the proposed rule prior to the science upon which it is supposedly based having been finalized, something that should have occurred prior to the proposed rule having ever been formulated. EPA's Connectivity Report is still not finalized and has only recently been peer-reviewed. While the report documents the presence of connections between waterbodies, it appears to fail in supplying the scientific basis needed to determine when such connections may, or may not, significantly affect downstream waters. The voluminous amount of data released after publication of the proposed rule is too complex to have reviewed in the limited time allowed, and specific scientific comments cannot be provided. Instead, we offer that when policy is crafted and an implementing rule drafted all in advance of peer-reviewed sound science being published, transparency is lost and data driven decision-making has not occurred. (p. 5)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Sacramento County, California (Doc. #15518)

13.78 Proposed rule should follow, not precede, draft science report

In addition to the aforementioned issues, we are also concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Republican River Water Conservation District (Doc. #15621)

13.79 **8. The Rulemaking Process Should Be Stayed Pending Completion of the Connectivity Report**

According to the preamble, the EPA's "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" report forms the scientific basis for the proposed rule. This report remains in draft form and a review of the report by the Science Advisory Board ("SAW) was only recently completed. The EPA has stated that it intends to review the final report issued by the SAB and ' W e any adjustments to the final rule that are appropriate. . . ." While the RRWCD appreciates the fact that the original comment period was extended, the decision to push forward and solicit public comment before the scientific inquiry is complete has made it difficult to prepare meaningful and comprehensive comments on the rule. Rather than forge ahead, the better approach is to either withdraw the rule or extend the public comment period to allow for a thorough review of the SAB's report and time to modify the proposed rule, as may be warranted. (p. 8 – 9)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

City of Poquoson (Doc. #17358)

13.80 The rule is based on an unfinished document: The scientific basis for this proposed rule was the draft report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." Releasing the proposed rule before the connectivity report was finalized was premature and resulted in the agencies missing valuable comments or concerns on the draft report that should have informed the rulemaking process. (p. 3)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

State of Wyoming (Doc. #14584)

13.81 The lack of a timely release of the science report and the lack of concrete and applicable conclusions are serious problems. After withdrawing the 2011 guidance, the Agencies appeared to recognize the need for a scientific approach. A "scientific report" was the result. See *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Washington, DC: U.S. Environmental Protection Agency (preliminary draft 2013). Yet the Agencies failed to wait for the final scientific report prior to issuing the proposal, calling into question the integrity of both the report and the proposed rule.

The Agencies put the cart before the horse. They released a rule supposedly backed by science before the science was known and without time for analysis by commenters. When pressed, the EPA has indicated that the conclusions of the science report were unnecessary to those developing comments as the science was already "known." The draft report included information that essentially described the hydrologic cycle. The reasoning - all water is connected according to the laws of physics so a nexus exists and therefore all waters should fall under federal jurisdiction - is not sound and falls short. It is a faulty bootstrap by which to snatch jurisdiction over all waters. Such a conclusion does not answer the question of relative significance and fails to acknowledge that Congress already recognized the states' authority over certain waters.

Insufficient consideration has been given to establishing and quantifying metrics for relatively permanent" connections within the report. The report should be revised to address quantity and significance and made available for comment prior to another proposal. An adequate report, which does not currently exist, could be the basis for the states and the EPA to discuss the thresholds for state versus federal jurisdiction. (p. 5 – 6)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

South Carolina Association of Counties (Doc. #15573)

13.82 The Proposed rule should follow, not precede, the EPA draft science report

SCAC and its member counties are further concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. It is unclear how this report fits into the proposed "Waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies will undoubtedly miss valuable opportunities to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2 – 3)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.83 The Public Comment period is insufficient for review of complex CWA issues

SCAC is concerned that the time for public review and comment is insufficient, even with the recently announced extension until November 14, 2014. The scope and complexity of this issue cannot be adequately addressed in full in this time-frame. In order to fully understand what the rule does or does not do, we recommend that the agencies adopt a multi-step consideration process. We thank the agencies for their efforts to educate our members on the proposal; however, due to its technical and complex nature and the potential unintended consequences this proposal could have on our communities the Administration should, at the very least, reopen the comment period for ninety (90) days after EPA's *Connectivity* report is released and updates are made to the proposed rule based on the final report. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Oklahoma Municipal League (Doc. #16526)

13.84 The report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, is not yet completed. From the rule's preamble, it is clear the Agencies place significant reliance on this report. Until the report is finalized and peer-reviewed, is not possible for the regulated community to determine the full jurisdictional reach proposed under the rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Colorado Clean Water Coalition (Doc. #3533)

13.85 We have taken a periphery review of the most recent proposed ruling of Definitions of "Waters of the United Rates" Under the Clean Water Act. As suggested, with regard to the proposed rule and local impacts, we voiced, in our meeting with you, and are formally submitting the following requests with this summary: Two of the documents prepared for the proposed rule, The *Connectivity of Streams and Wetlands to Downstream Waters: A review and Synthesis of Scientific Evidence* and *The Economic Analysis of Proposed Revised Definition of the Waters of the United States* prepared March 2014 by the USEPA and USACE are currently under peer review and are not final. We formally request the proposed rule not be published in the Federal Register to start the 90 (ninety) day review period until the peer reviews are complete. The final peer reviews are a necessary component in the review process due to the complexity of the proposed rule. Also, due to the complexity of the proposed ruling, we formally request a longer period of public comment no shorter than 6 (six) months to fully review the documents. (p. 2)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Southern States Energy Board (Doc. #13011)

13.86 (…) WHEREAS, the justification for the scope of the proposed rule rests on a scientific analysis that is still under review and the proposing agencies decided to proceed with development of a proposed rule addressing issues associated with the connectivity of waters prior to being informed by the Science Advisory Board Review and the implications of its findings; and (…) (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Pennsylvania Chamber of Commerce and Industry (Doc. #14401)

13.87 The PA Chamber appreciates the efforts and time of EPA and Corps' staff in considering our comments, which were developed after drawing from the resources and views from a range of its members. The PA Chamber respectfully requests that the EPA withdraw this rulemaking and re-propose if needed only after careful consideration of all stakeholder comments, the convening of public hearings throughout the country, and the finalization of the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the draft Connectivity Report). (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.88 Because the EPA's Draft Connectivity Report Remains a Draft, This Rulemaking is Premature

EPA and the Corps published this draft "waters of the United States" rulemaking this past April, with the stated purpose of issuing the proposal 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*." The decisions in these cases limited EPA's authority. EPA and the Corps have proposed this rulemaking on the basis of a draft Connectivity Report, which is only now being reviewed by the EPA's Scientific Advisory Board. While the draft Connectivity Report may have been intended to make the case on a scientific basis that isolated or intermittent "waters" are connected to "navigable" waterways traditionally regulated by the Clean Water Act, the report remains a draft. Any development or revision to regulatory frameworks, particularly a revision with the scope, magnitude and ramifications of this proposed rulemaking, should certainly proceed with a modicum of caution and be based, on the very least, on reports that have been made final after being vetted by the public. The PA Chamber urges that this rulemaking be rescinded until the Connectivity Report is finalized, and re-proposed only after careful consideration of all stakeholder comments and holding a serious of public hearings with the regulated community. (p. 4)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

McPherson Law Firm, PC (Doc. #16397)

13.89 The EPA has charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The regulated community, including the LGAC, is uncertain how to comment on this without the benefit of these important and critical definitions being in final form. I therefore join the LGAC in suggesting the agencies wait to craft a new proposed rule until the Connectivity Study has been finalized and published for public review. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Construction Industry Roundtable (Doc. #8378)

13.90 (…) (2) Rule-Making Before the Science: In the official announcement of April 21, 2014, EPA and Corps contended that the rule-making (and its extensive conclusions) was supported by or buttressed to some extent by scientific literature and findings – more specifically, an EPA "Report" on the subject matter.[11] [At the time of the proposed rule's publication the Federal Registry, the final "Report" had NOT been fully reviewed or even "completed."] It is this latter concern that both is troubling and disconcerting when applied to the new "Waters of the U.S." rule making proposal [see footnote 13 for details]. Simply stated, the federal agencies have not shown the inclination, willingness, nor restraint to limit their reach or to construe their mandate in a narrow least intrusive manner, but rather they too often "exploit" loosely defined words or phrases that can be manipulated to justify wider reaching results. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.91 (…) TO UNDERSTAND the full import of the EPA admission in the announcement: Essential decisions incorporated into the proposed rule were based on or relied upon a "Report" that had not been fully completed, reviewed, or vetted – EPA proceeded to make judgments and findings using the draft as a basis. Even more breath-taking is EPA's assumption that it can simply offer its own "Report" to be the basis of its own findings! [This raises serious questions especially since the very nature of the "Report" is a "synthesis of scientific evidence" – which can be "cherry picked" to simply reinforce pre-determined assumptions and agency conclusions]. As such, the EPA/Corps have FAILED to provide compelling scientific evidence that warrants their expansive conclusions (and none other) as to this rule-making. (p. 5)

[11] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Washington, DC; U.S. Environmental Protection Agency, 2013). [Hereinafter referred to as "Report"] [79 Fed. Reg. 22,190 (April 21, 2014)]

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Perkinscoie (Doc. #15362)

13.92 In addition to their above-referenced substantive concerns with the Proposed Rule, the Southwest Developers also have procedural qualms with how the agencies have proceeded. Essentially, the agencies are precluding any public comment on the Draft Connectivity Report after it is finalized, despite the fact that the Proposed Rule acknowledges that the agencies will rely on that final version to inform its final definition of the scope of waters protected under the Clean Water Act. See 79 fed. Reg. at 22 189 (jurisdiction over "other waters" will be" informed by the final version or the EPA's Office of Research and Development synthesis of published peer reviewed scientific literature discussing the nature of connectivity and effects or streams and wetlands on downstream waters,") (emphasis added). EPA has not yet finalized the Connectivity Report, and to do so, EPA must take into account the SAB's final peer review (issued less than one month ago) and the 133,110 comments that EPA received on the Draft Connectivity Report, including comments submitted by the Southwest Developers. Because the Draft Connectivity Report will not be finalized until *after* the deadline for public comments on the Proposed Rule – in contravention of basic principles of administrative law- we request that the agencies open for public comment any changes to the Proposed Rule that they make based on the final version of the Draft Connectivity Report. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Illinois Coal Association (Doc. #15517)

13.93 B. Reliance on an incomplete scientific analysis casts further doubt on the validity ofthe Proposed Rule.

Compounding the numerous concerns addressed elsewhere in these comments regarding the Agencies' legal authority are other serious procedural deficiencies stemming from the Agencies' handling of the scientific analysis that purportedly serves as the foundation for the Proposal. For one, the scientific report - U.S. Environmental Protection Agency, Draft Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013) ("Connectivity Report") - which the Agencies cite as the key foundation for their Proposal had undergone neither a complete peer-review nor been finalized at the time the Agencies published the Proposed Rule. In fact, the Connectivity Report was submitted to the EPA's Science Advisory Board ("SAB") to begin review on the same day the Proposed Rule was provided to EPA's Office of Management and Budget ("OMB") for interagency review. Not only does this defy basic principles of administrative rulemaking," as well as specific White House regulatory guidelines', it is particularly concerning for a major rulemaking like this where the scientific and legal

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concepts are inextricably linked and where the sponsoring agencies rely heavily on a scientific basis for promulgating the regulatory scheme. (p. 5 – 6)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

National Pork Producers Council (Doc. #1433)

13.94 The WOTUS proposal and the related Interpretive Rule and the technical documents in the docket supporting them are extremely complex and highly technical in nature. Indeed, the underpinnings of the proposal depend largely on a complex "Connectivity Study"[12] that itself is still in draft form[13] and remains in development before EPA's Science Advisory Board. (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Alameda County Cattlewoman (Doc. #8674)

13.95 (…) First, the agencies only included in the proposed rule a draft scientific report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity report).[14] The agencies have indicated that the Connectivity report will not be completed until after the comment period has closed and therefore will not be available for the public to comment.[15] EPA's website states, "This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction…," (emphasis added).[16] Second, the agencies have failed to provide the

[12] "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" EPA/600/R-11/098B. Docket ID: EPA-HQ-OW-2011-0880-0004. Available online at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf

[13] The version of the Connectivity Report (see footnote 1) provided on EPA's official page of regulatory documents associated to the Waters of the United State rulemaking includes both of the following exceedingly clear statements on the cover page:

- "DRAFT DO NOT CITE OR QUOTE."
- "THIS DOCUMENT IS A PRELIMINARY DRAFT. It has not been formally released by the U.S. Environmental Protection Agency and should not be construed to represent Agency policy. It is being circulated for comment on its technical accuracy and policy implications." Furthermore, page 2 of the document consists only of the following disclaimer: "This document is distributed solely for the purpose of predissemination peer review under applicable information quality guidelines. It has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency determination or policy. Mention of trade names or commercial products does not constitute endorsement or recommendation for use."

Finally, every page of the 331 page document includes the following disclaimers at the bottom:

- "This document is a draft for review purposes only and does not constitute Agency policy."
- DRAFT—DO NOT CITE OR QUOTE

[14] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Washington, DC: U.S. Environmental Protection Agency, (2013).

[15] EPA website, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed on Sept. 3, 2014).

[16] Id.

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public with relevant maps created for the agencies by the U.S. Geological Service detailing vast networks of streams across the United States that would become jurisdictional under the proposed rule. Third, the proposed rule contains a vast number of requests for methods of regulating the public under this rule without providing the agencies' proposed option, leaving the public to wonder what the agency is even considering and not allowing comments on any specific proposal. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.96 (…) First, the Connectivity report is a draft report. On the same day the report was released to the public, the proposed rule was sent to the Office of Management and Budget (OMB) for interagency review. Numerous officials at numerous times have indicated that the final report will not be made available for the public to comment on. This is inappropriate and prevents the public from being able to provide meaningful comments on the proposed rule. The Connectivity report is the scientific basis the agencies rely on to support their proposed rule. The science should be final before a proposed rule is developed. Should a final report be completed that is different from the draft report, the public will have been prohibited from commenting on the validity of such science. This flies in the face of this Administration's assertion of transparency and in the face of the APA, which requires that the data (or science) the rule is based on to be presented to the public for comment.17 ACCW assert the proposed rule must be either withdrawn or re-proposed with the final Connectivity report available for the public to review.

Recently the agencies extended the public comment period with the justification to allow the public to comment on the Scientific Advisory Board's final report.[18] This extension fails to rectify the procedural failures of the agencies for not providing a final report in the proposed rule for comment for a number of reasons. First, the extension is for an additional 25 days, which is hardly enough time to review a technical scientific report (should the agencies put out a final report between Oct. 20 and Nov. 14). Providing the public with the opportunity to comment on the SAB report is not the same as allowing the public to comment on the final Connectivity report and therefore the procedural fouls with this rulemaking remain unresolved. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.97 Additionally, ACCW assert that the agencies cannot rely on the Connectivity report because it has not been fully reviewed by the Scientific Advisory Board (SAB). At the time of publication in the federal register, the Connectivity report is a draft report, without incorporating the suggestions of the SAB panel. It is extremely troublesome that the agencies did not allow their own science to inform their rulemaking. It seems like the

[17] Supra Note 2.
[18] EPA Desk Statement, available at http://blogs.cq.com/cqblog-assets/govdoc-4559957.

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proposed rule was written before EPA's ORD department even assembled the Connectivity report. If that were not the case then the agencies would have waited to propose a rule until the SAB review of the report was completed. As it stands, the public will not have a meaningful opportunity to comment on a proposed rule that was informed by the final Connectivity report. The only logical reason to do this is if the agencies knew they would not have a final report that was different from the draft report. This is a brave assumption from the agencies, and shows that more likely, the agencies had the proposed rule written and then fit the science to meet its proposed rule. ACCW again assert that the agencies cannot rely on the draft Connectivity report for the reasons described above to support their proposed rule.

If the agencies incorporate a final Connectivity report in their final "waters of the U.S." definition, it will be substantively different than the proposed rule, requiring the agencies to resubmit the proposed rule to the public for comments. As it stands, the public cannot meaningfully comment on the proposed rule. (p. 15)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Colorado Cattlemen's Association (Doc. #15068)

13.98 (…) Additionally, because the report was still under review when the proposed rule was published in the federal register, it is not a final document and therefore is subject to change and the public will not have a meaningful opportunity to comment on the final as the basis for this rule.

CCA believes that the agencies cannot rely on the Connectivity report because it has not been fully reviewed by the Scientific Advisory Board (SAB). At the time of publication in the federal register, the Connectivity report is a draft report, without incorporating the suggestions of the SAB panel. It is extremely troublesome that the agencies did not allow their own science to inform their rulemaking. As it stands, the public will not have a meaningful opportunity to comment on a proposed rule that was informed by the final Connectivity report. If the agencies incorporate a final Connectivity report in their final "waters of the U.S." definition, it will be substantively different than the proposed rule, requiring the agencies to resubmit the proposed rule to the public for comments. As it stands, the public cannot meaningfully comment on the proposed rule. (p. 6 – 7)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

National Alliance of Forest Owners (Doc. #15247)

13.99 V. The Proposed Rule Improperly Preceded a Full Scientific and Technical Analysis.

The Agencies put the cart before the horse by proposing their rule before the Science Advisory Board ("SAB") panel had even completed its final report on the underlying connectivity study. Indeed, the proposed rule is based on a draft review of scientific literature "discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and*

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Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Washington, DC: U.S. Environmental Protection Agency, 2013)."[19] Although the Agencies' draft report was still undergoing peer review by EPA's SAB at the time the Agencies issued the proposed rule, the Agencies nevertheless forged ahead with the rulemaking process.

The Agencies' process for this rulemaking signals that they effectively made all policy and regulatory decisions before fully developing their understanding of the underlying science through the SAB peer review process. In other words, the SAB review process appears to be little more than a perfunctory exercise used to support already drafted regulatory text. Recently, EPA announced the availability of the SAB's final peer review of the draft Connectivity Report.20 Nevertheless, even with that disclosure, which was less than one month before the close of the comment period, the Agencies have not provided the public with an adequate opportunity to review the results of the peer review, much less the final Connectivity Report itself. The Agencies should therefore reopen the comment period for at least 30 days to allow for meaningful comment on the proposal after the release of the final Connectivity Report. (p. 26 – 27)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Arizona Public Service Company (Doc. #15162)

13.100 D. Vast Number of Technical Documents Added to Docket Without Sufficient Review Time by Stakeholders and Public Entities

As late as October 30, 2014, technical support documents were still being added to the docket for public review and comment. In fact, on October 24, 2014, just 21 days in advance of the close of the comment period, the Agencies posted a list of 153 documents stating "EPA will be adding the following documents to the docket."[21] This late release of references deprives the public of a meaningful opportunity to review them or understand the Agencies' rationale for the rule. In order for APS to evaluate if these additional documents are important to its review and interpretation of the proposal and to provide meaningful feedback, APS requests that the Agencies delay finalizing the rule and provide an additional 60-day public review and comment period after the final Connectivity Report is published and uploaded to the docket. Not providing

the regulated community, environmental groups, or the general public with an opportunity to sufficiently review and provide comments on documents that Agencies have determined to be relative to all or parts of the proposed rule creates litigation risk for the Agencies. APS recommends that the Agencies withdraw the proposal and give interested stakeholders an opportunity to discuss and comment on the issues in advance of a re-proposal. This approach will ultimately save time by reducing the amount of

[19] http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf
[20] http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414
[21] See EPA-HQ-OW-2011-0880-8549 and -8591 (listing added references).

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comments on the re-proposal and likely reduce the amount of litigation on a final rule. (p. 5 – 6)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

County of San Diego (Doc. #15172)

13.101 13. Scientific basis of connectivity report

The new rule should be proposed only after the scientific basis has been fully vetted. The sequence and timing of the draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity

Report), and how it was utilized during the "Waters of the U.S." rulemaking process, is cause for concern. The agencies released the Connectivity Report in draft form at the same time as the proposed rule, rather than allowing review prior to developing the proposed rule. This sequence did not allow time for the public to comment on the draft Connectivity Report prior to rulemaking, nor did it provide the agencies time to review, address comments and concerns, and update the proposed rule accordingly. Comments and concerns on the Connectivity Report could provide valuable feedback that should be incorporated into the proposed rule. The County requests that the agencies consider all comments and feedback on the connectivity report (including those released on from the Science Advisory Board on October 24, 2014), revise accordingly, and re-release the report and the proposed draft rule in an appropriate sequence to allow for meaningful review and comment on each.

EXAMPLE: Typically, the sequence outlined for background reports to influence the design of rules and regulations includes a comment period, along with additions, input and revisions prior to release of a final report. After the final report is completed, proposed rules are then developed utilizing the final report as a basis. This process was not followed for the proposed Waters of the U.S. rule. (p. 9 – 10)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Murray Energy Corporation (Doc. #13954)

13.102 B. Reliance on an incomplete scientific analysis casts further doubt on the validity of the Proposed Rule.

Compounding the numerous concerns addressed elsewhere in these comments regarding the Agencies' legal authority are other serious procedural deficiencies stemming from the Agencies' handling of the scientific analysis that purportedly serves as the foundation for the Proposal. For one, the scientific report – U.S. Environmental Protection Agency, Draft Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Washington, DC: U.S. Environmental Protection Agency, 2013) ("Connectivity Report") – which the Agencies cite as the key foundation for their Proposal had undergone neither a complete peer review nor been finalized at the time the Agencies published the Proposed Rule. In fact, the Connectivity

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Report was submitted to the EPA's Science Advisory Board ("SAB") to begin review on the same day the Proposed Rule was provided to EPA's Office of Management and Budget ("OMB") for interagency review. Not only does this defy basic principles of administrative rulemaking,[22] as well as specific White House regulatory guidelines,[23] it is particularly concerning for a major rulemaking like this where the scientific and legal concepts are inextricably linked and where the sponsoring agencies rely heavily on a scientific basis for promulgating the regulatory scheme. As the House Committee on Science, Space, and Technology aptly stated in an October 18, 2013 letter to EPA Administrator McCarthy:[24]

> Any attempt to issue a proposed rule before completing an independent examination by the agency's own science advisors would be to put the cart before the horse. The agency's current approach to CWA jurisdiction appears to represent a rushed, politicized regulatory process lacking the proper consultation with scientific peer reviewers and the American people. If EPA has not urges the agency to do so immediately. Under the law, the advice of scientific experts is a prerequisite, not an afterthought. (p. 6 – 7)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

National Waterways Conference, Inc. (Doc. #12979)

13.103 The agencies' rulemaking process is entirely disordered. The scientific analysis supporting a rulemaking should be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts are intertwined. In this instance, the troubling conclusion is that the agencies set the policy goal of greater control of land use decisions first and only afterwards sought for a rationale. (p. 12)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Coalition of Alabama Waterways (Doc. #15101)

13.104 Finally, the process by which EPA proposed the rule has denied a reasonable opportunity for the public to review and comment on important scientific information. (p. 1)

[22] It is a fundamental requirement of administrative law that an agency's proposed rule and the basis for public comment must be based upon the best available scientific information. See Data Quality Act, Pub.L.106-554 (2001) and Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, EPA Office of Management and Budget (February 22, 2002).
[23] See Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365:
[24] See Letter from Rep. Lamar Smith, Chairmen, House Committee on Science, Space and Technology and Rep. Rep. Chris Stewart, Chairman, House Subcommittee on Environment to Gina McCarthy, Administrator, USEPA, dated Oct. 18, 2013, available at http://science.house.gov/sites/republicans.science.house.gov/files/documents/Letters/101813_letter.pdf

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Solid Waste Association of North America (Doc. #15264)

13.105 In addition, we are also concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "waters of the United States" rulemaking process. Access to this document is especially important as it will he used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report was finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

House of Representatives (Doc. #12751)

13.106 Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report - which the agencies point to as the foundation of this rule - has been neither peer-reviewed nor finalized. The EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" was sent to the EPA's Science Advisory Board to begin review on the same day the rule was sent to the Office of Management and Budget (OMB) for interagency review. Science should always come before rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

United States House of Representatives (Doc. #17458)

13.107 In addition, the rule relies on data from a scientific study that remains preliminary ("Connectivity of Streams and Wetlands to Downstream Water: A review and Synthesis of the Scientific Evidence"). Will the EPA finalize this study and then allow stakeholders to submit public comments on the Proposed Rule prior to the final rule being released? (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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13.2.2.1 SAB Review of Connectivity Study

Specific Comments

Small Business Administration (Doc. #1766)

13.108 (…) Advocacy also notes that the agencies have not yet finalized the report upon which this rule is substantially based.[25] Pursuant to the principles of Executive Order 13563,[26] small businesses should have the opportunity to comment on the proposed rule; the final version of the report; and the final report and recommendations of the Scientific Advisory Board simultaneously.[27] (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

National Association of Towns and Townships (Doc. #1864)

13.109 1. The Agencies Have Not Reviewed the Adequacy of the Underlying Science, But Have Asked for Commenters to Provide Complex Technical Information. Additional Time Is Needed for the Agencies to Complete and Provide Their Assessment So the Public Can Effectively Respond.

The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft connectivity report, which is currently under review by the Science Advisory Board (SAB). Indeed, the SAB Panel's discussions on recent public teleconferences demonstrate that the SAB Panel is still grappling with the proper criteria for determining under which circumstances a connection amounts to a significant nexus for the purposes of establishing CWA jurisdiction.

Moreover, in recent statements, the EPA has acknowledged that the SAB and the agency are still considering options for review of the adequacy of the science to support the proposed rule. Given the ongoing SAB Panel review, and that the EPA has not yet determined how to review the adequacy of the science to support the proposed rule, commenters should have at least 90 days from the time when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of

[25] See *Connectivity of Streams and Wetlands to Downstream Water*, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (last accessed June 4, 2014).
[26] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (January 21, 2011).
[27] The Scientific Advisory Board will be issuing a report on its findings and recommendations with regards to the Connectivity Report.

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waters28," and the public deserves the opportunity to comment on the conclusion of that review process.

A significant amount of time and technical expertise will be required first to evaluate the report from the SAB Panel and agencies' scientific conclusions and responses and then to prepare substantive and thoughtful responses. The comment period should be extended to give stakeholders that additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB rev**

National Association of State Foresters (Doc. #14636)

13.110 Second, the public has not had sufficient time to review the findings of the Science Advisory Board (SAB) on this issue and their justifications. The SAB findings suggest a broadening of jurisdiction and more specific changes to exclusions as well as to definitions of terms such as tributary, which if EPA incorporates will significantly change the draft rule. We suggest that it is inappropriate to release a draft rule for public comment before SAB findings that may lead to significant changes in the rule have been fully considered by the Agency.

Given all of these factors and the likelihood that the rule will undergo significant changes based on the comments received from the public and the SAB, NASF requests that EPA reoffer for comment a modified proposed rule once all revisions and needed clarifications have been addressed. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.111 II. Science Advisory Board

Under the law, the advice of scientific experts is a pre-requisite, not an afterthought. Specifically, the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA)[29] establishes the Science Advisory Board (SAB) as an independent body charged with providing advice to Congress and the EPA. Under ERDDAA, the "Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the ... [CAA] ... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.[30]

[28] See 79 Fed. Reg. at 22,192.
[29] Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365.
[30] Id.

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Significantly, the law explains that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation."[31] When followed, ERDDAA helps ensure that regulations are informed by sound science before they are ever proposed.

Further, EPA Senior Leadership and the SAB continue to note that waiting until the proposal stage to provide information to the SAB is too late in the process for meaningful input.[32]" For this very reason, EPA created a new process to ensure that the SAB received planned Agency actions at the pre-proposal stage so that EPA could consider the Board's advice before proposing regulations[33]".

Despite this, on September 17, 2013, the EPA and Army Corps of Engineers announced that a proposed rule defining the scope of CWA jurisdiction had been sent to the Office of Management and Budget (OMB)for interagency review. On the same day and without making the rule available to the Board, EPA submitted its Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters[34] to the SAB for peer review.[35] Along with the Report, the EPA assigned technical charge questions to the SAB expert panel with instructions to begin review of the draft Report.

The importance of the peer review process is underscored by the classification of the Connectivity Report as a "Highly Influential Scientific Assessment." In a June 27, 2012 letter to the Committee, EPA confirmed that the "Synthesis is a 'Highly Influential Scientific Assessment' as defined by OMB.[36] Specifically, the OMB's Peer Review Bulletin[37] states that "it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened." The Bulletin notes that if the review occurs too late in the process "it is unlikely to contribute to the course of a rulemaking."[38]

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[31] Id.

[32] See Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chattered SAB and SAB Liaisons, Nov. 12,2013, Attachment A, available at http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf

[33] November 12,2013 memo from the Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to the Members of the Chartered SAB provides a detailed explanation of this process. history, and the underlying legal obligations of ERDDAA.

[34] U.S. ENVIRONMENTAL PROTECTION AGENCY. Office of Research and Development. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis a/the Scientific Evidence, External Review Draft. EPAI600/R-lJ -098B. Sep. 2013. Available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

[35] The EPA did not provide the Board with the proposed rule until it was published nearly seven months later.

[36] Letter from Nancy Stoner, EPA Acting Assistant Administrator to House Committee on Science, Space, and Technology. June 27,2012. Available at http://science.house.gov/sites/republicans.science.house.gov/files/documents/06-27-2012%20EPA%20to%20Harris%20re%20CWA.pdf.

[37] EXECUTIVE OFFtCE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET. Final Information Quality Bulletin for Peer Review. Dec. 2004. Available at https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf

[38] Id

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It is clear from the statute and the Agency's own protocol that the Board should review the scientific underpinnings of draft proposals and all supporting science as part of the interagency process before a rule is ever proposed. The importance of this principle is compounded when a rule, such as this proposal, purports to rely almost entirely upon this new science. But EPA refused to wait for the science. The Agency wrote this rule and sent it to the White House over a year before the SAB completed its review or made recommendations to the Agency. The EPA's brash actions flaunt both the language and spirit of ERDDAA.

Further, throughout this process, the Science Committee has sought to pose charge questions to the Board pursuant to ERDDAA authorities.[39] However, the EPA has intercepted Congressional communications and prevented SAB response to Congressional requests for advice related to this rulemaking. Given the Agency's apparent attempts to unduly narrow the SAB's review and silence inquiries, the EPA should withdraw this proposal until adequate review and participation are complete. (p. 4 – 6)

Agency Response: **For information on extensive coordination with the SAB, please see summary responses 9(a) and 9(b) in Compendium 9. The final Connectivity Report is available at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414/.As explained in Compendium 9, the agencies consulted extensively with the SAB. Moreover, EPA's position is that this statute does not apply to this rulemaking because neither the connectivity report nor the proposed rule were "provided to any other Federal agency for formal review and comment."**

To the extent there is any ambiguity over what constitutes "formal review," EPA administers the Board statute and therefore is entitled to deference under Chevron, 467 U.S. at 842-45; see United States v. Mead Corp., 533 U.S. 218, 227-31 (2001). EPA is the sole entity charged with "establish[ing] a Science Advisory Board . . . ." 42 U.S.C. § 4365(a). EPA, along with the Board, also can establish "member committees and investigative panels as . . . necessary to carry out this section." Id. § 4365(e)(1)(A). Also, "[u]pon the recommendation of the Board, the Administrator shall appoint a secretary, and such other employees as deemed necessary to exercise and fulfill the Board's powers and responsibilities." Id. §4365(f)(1). Lastly, only EPA is given the responsibility of "mak[ing] available to the Board" the specified proposed regulatory and other agency actions for "review and comment." Id. § 4365(c)(1). Because EPA is the exclusive agency charged with administering the Board statute, EPA should be entitled to deference in its interpretations to administer that statute.

Congress has not spoken directly to the issue of what "formal review" means under the Board statute. Under EPA's interpretation, "formal review" occurs when a statute requires another agency to consult with sister agencies before it can take action and such consultation has occurred. For example, 42 U.S.C. § 7571(a)(2)(B)(i)

[39] Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365(a).

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requires EPA to "consult with the Administrator of the Federal Aviation Administration on aircraft engine emission standards" before issuing any such standards. The CWA, however, contains no such consultation requirement. Therefore the statute does not apply. In contrast, review by OMB under Executive Order 12866 is merely informal agency review. There are no provisions in the Executive Order stating how review of agency proposed rules is conducted; if or how OMB seeks comments from federal agencies on another's action; or how those agencies' comments, if any, are considered, documented, or transmitted. OMB is the sole arbiter of whether the submittal is provided in turn to other agencies for their comments. Even if ERRDDAA did apply, EPA has instituted procedures to ensure early appraisal of the Board proposed actions to facilitate meaningful and engagement and input, which were followed here. See e.g.,

Chartered Science Advisory Board (SAB) March 8, 2013 Discussion of EPA Planned Agency Action and Their Supporting Science, February 26, 2013.

http://yosemite.epa.gov/sab/sabproduct.nsf/ACD08EC935BE248E85257B1E0066F5EC/$File/SAB+WG+Chair+memo-EPA+plnd+actns++supp+sci_Redactedv2.pdf

http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/2effd460ce002b6785257cbb006752de!OpenDocument

http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/2effd460ce002b6785257cbb006752de!OpenDocument&TableRow=2.2#2.

http://yosemite.epa.gov/sab/sabproduct.nsf/MeetingCal/D8FA4EB9005D50E485257D27004E3897?OpenDocument

State of Alaska (Doc. #19465)

13.112 Failure to Include State Regulatory Experts on Science Advisory Board (SAB) Peer Review Panel. The peer review panel convened by the SAB to review the draft Connectivity Report was made up entirely of representatives from academia, creating a built-in bias toward expansive federal jurisdiction with limited relevance to a regulatory solution. (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Senator Cathy Giessel, Alaska State Legislature (Doc. #2531.1)

13.113 However, before proceeding with a new rule, we need to clarify the current terms, settle law suits and complete the scientific review document. Expansion of the authority of the EPA without the clarity of current rules, defined terms and a completed scientific review is inappropriate.

EPA's Science Advisory Board's review is not complete, yet the agencies have developed the proposed rule without the benefit of a completed independent scientific review. How does EPA know they are working with valid scientific data when they developed the proposed rule before the scientific document was complete? During the comment period how can we, the public and policy makers, be assured that the proposed

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rules follow the science when the science has not been completed or available for public review. Proposing rules before all the relevant information is completed and reviewed calls into question whether the science presented is free from any influences by the agencies involved. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Florida Stormwater Association, Inc. (Doc. #7965.1)

13.114 The report of EPA's Science Advisory Board (SAB) is not yet complete. It is impossible to provide meaningful comments until there is sufficient time to study and examine the Final Report, and it is unwise for EPA to close a comment period without the all interested parties having had sufficient time to review the Final Report of the SAB. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.115 The proposed rule is premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB). The determination of applicable science, which provides a baseline for the proposed rule, is not complete or finalized. The proposed rule cites the report and recommendations titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* which is currently being peer reviewed by the SAB. This process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant. P ADEP recommends that the states and the public be provided with a 60 to 90-day review and comment period, and an opportunity to submit additional comments on the rule given the relationship of the study to this rule. (p. 4)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

California State Association of Counties (Doc. #9692)

13.116 Based on the flaws in the CR on the determining connectivity, identified above, the rule making process should be suspended until the EPA Scientific Advisory Board's peer review of the document is completed. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

State of Idaho (Doc. #9834)

13.117 Connectivity Report:

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EPA and the Corps should finalize the Connectivity Report before proceeding with any action regarding the Proposed Rule. EPA's Science Advisory Board (SAB) is reviewing a draft report on the connectivity of differing water bodies that will inform the Final Rule. Despite requests from the Western Governors' Association, the Western States Water Council, and others, EPA and the Corps published the Proposed Rule for public comment before SAB completed its review and before the report was finalized.

More recently, EPA and the Corps indicated they will wait until the Connectivity Report has been completed before issuing a Final Rule. The State of Idaho appreciates this decision. However, EPA and the Corps also should continue to accept comments for a reasonable period of time after the Connectivity Report is complete in order to utilize the Report and such comments to revise or otherwise develop the Proposed Rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Texas Comptroller of Public Accounts (Doc. #10952)

13.118 Insufficient Public Review

The Agencies admittedly published the proposed rule even though a scientific EPA report central to the proposal — *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* — was still in draft form and not yet peer reviewed by the EPA Science Advisory Board (SAB).[40] Given the importance of using sound, peer-reviewed science in developing any rule, combined with the considerable public interest in and expected impacts of the proposal itself, EPA should publish this important report and allow for public comment. For the Agencies to base the proposal on an incomplete, unpublished report is not transparent and can lead to mistrust of the data used in the proposed rule. The Agencies should withdraw this proposal until the report has been fully evaluated by the scientific community and the public has the opportunity to review and provide complete comments on the report. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Virginia Department of Transportation (Doc. #12756)

13.119 Publishing of Proposed Rule Prior to Finalization of Scientific Report

The EPA and Corps have concluded that all "tributaries" will now be considered "Waters of the United States" as part of the proposed rule. The agencies have stated numerous times in the preamble that this finding is demonstrated based on the findings of a draft scientific report entitled, EPA 's *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Washington, DC: US. EPA, 2013 (Report). The preamble notes that the proposed rule was published in the Federal Register before EPA's Scientific Advisory Board (SAB) completed their review of the

[40] 79 Fed. Reg. 22190 (April 21, 2014).

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Report. The agencies have further stated in the preamble that they will consider the final version of the Report prior to the finalization of the proposed rule. VDOT does not support the use of a draft scientific report to conclude that all tributaries are WOUS. Such findings must first be reviewed and finalized in order to confirm the credibility and validity of the data. In publishing the proposed rule prior to the finalization of the Report, the agencies have committed to using the results of a draft document whose conclusions have not yet been confirmed. (p. 8 – 9)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the definition of tributary, see comment responses in Compendium 8.**

New Mexico Department of Agriculture (Doc. #13024)

13.120 Connectivity Report

The EPA's Office of Research and Development's report entitled, "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence (Connectivity Report)," the document, upon which all of these definitional changes are based, was not complete at the time of publication of the proposed definitional changes. The Agencies state throughout the Federal Register notice for this proposed rule that the final rule for the definition of Waters of the U.S. will not be finalized until the Connectivity Report is finalized (79 FR 22188-22274).

Meanwhile, the EPA's Scientific Advisory Board (SAB) was tasked with reviewing the Connectivity Report for the "clarity and technical accuracy of the report, whether it includes the most relevant peer-reviewed literature; whether the literature has been correctly summarized; and whether the findings and conclusions are supported by the available science?"41 The SAB completed their review of the Connectivity Report on October 17, 2014, and had substantial recommendations for improvement and further scientific analysis.

For instance, the SAB report notes technical inaccuracies in the underlying science upon which this proposed rule is based:

- "The Report often refers to connectivity as though it is a binary property rather than as a gradient that the interpretation of connectivity be revised to reflect a gradient approach ..;"
- "The SAB recommends that the EPA consider expanding the brief overview of approaches to measuring connectivity."

[41] U.S.Environmental Protection Agency Office of the Administrator Scientific Advisory Board. "SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters : A Review and Synthesis of the Scientific Evidence " October 17,2014. Available at : http://yosemite.epa.gov/sab/sabproduct.nsf/368203f97a15308a852574ba005bbd01/7724357376745f48852579e60043e88c!OpenDocument

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• "The SAB recommends that the Report more explicitly address the scientific literature on cumulative and aggregate effects of streams, groundwater systems, and wetlands on downstream waters."

These technical limitations affect the final outcome of jurisdictional determinations for all of the categories of Waters of the U.S.

EPA has the responsibility to provide finalized and complete documentation to the public, especially when other important federal actions hinge on the outcome of that documentation. Any changes in the Connectivity Report, which is still not finalized, could seriously hamper and even invalidate the language proposed in this rule by effectively barring public participation. Further, the scientific reasoning for the definitional changes to Waters of the U.S. needs improvement. NMDA requests the agencies withdraw this proposed rule and reinitiate a comment period at the time the Connectivity Report is finalized.

Stakeholders and the public in general have the right to understand the full implications that regulatory changes will have on their operations before federal regulation s are proposed. Please see our previously submitted comments on this rule pertaining to deadline incongruence resulting from the Connectivity Report still being in draft form. These comments can be found in Appendix B for further concerns regarding this document. (p. 18 – 19)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Gila River Indian Community (Doc. #13619)

13.121 IV. Other Concerns of the Community

The Community shares the concerns of many other tribes, developers, and private landowners that the Proposed Rule constitutes agency over-reach and over-regulation with unacceptable and inappropriate accompanying costs, bureaucratic processes and delays.

A. Scientific Support for the Proposed Rule is Crucial

The Agencies must also ensure that the Proposed Rule is based upon sound scientific data before subjecting stakeholders to greater regulation. The scientific conclusions upon which the Proposed Rule is based regarding the nexus between certain water bodies and navigable waters relies heavily on a draft EPA report entitled, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. This draft report, which was issued in September 2013, is under review by the EPA's Science Advisory Board, and therefore is not final. EPA Administrator Gina McCarthy has promised that the final rule defining the waters of the United States will not be promulgated until the agency reviews the Science Advisory Board's report; this is unacceptable. The Proposed Rule should not have been issued before the EPA is able to confirm the scientific conclusions upon which the Proposed Rule rests. Moreover, by proceeding in this manner, the public loses the ability to review and comment on the report, and on a Proposed Rule that is based on an EPA-reviewed report. The comment

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period for the Proposed Rule should stay open until after the Science Advisory Board publishes its final report, and EPA should provide the public ample opportunity to review and comment on the final report and the Proposed Rule in light of the final report. (p. 8)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.122 V. Recommendations

The federal agencies seek input as to which waters "should be determined non-jurisdictional."[42] Below are the Community's recommendations.

(…) 3. The EPA should finalize and allow public comment on the "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" report before basing any Final Rule on this report. (p. 9)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Washington Department of Ecology (Doc. #13957)

13.123 Connectivity report

We recommend that the agencies wait to finalize and adopt the "waters of the US" rule until after the science advisory board review is completed and the report is finalized. Washington believes that the timing of the final report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it interacts with the proposed "waters of the US" rule process is important. Since the connectivity study will be used to provide the scientific basis for the determination of jurisdiction under the rule, it seems appropriate that the agencies wait to finalize the rule until after the Scientific Advisory Board has completed their review and the report is finalized. To adopt the rule prior to the final report being released would miss an opportunity to reline the rule based on the scientific findings of the final connectivity report. (p. 6)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Texas Commission on Environmental Quality (Doc. #14279)

13.124 In addition, the EPA/USACE have stated the rule will not be finalized until the draft Connectivity Report has been finalized. The development of the report was intended to provide a scientific basis for the development of the rule. On September 30, 2014, the Science Advisory Board (SAB) documented their activities in reviewing the Connectivity Report in a letter to EPA. On October 17, 2014 the SAB provided EPA with the final

[42] Id. at 22193.

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review of the Connectivity Report. To date, the Connectivity Report has not been finalized.

The input provided on the questions posed by the EPA/USACE regarding the framework for defining "waters of the United States" as well as changes to the Connectivity Report have the potential to significantly change the proposed rule. Because of these potential impacts, the TCEQ believes it would have been more prudent for the EPA/USACE to seek such input and consult the final version of the report before proposing their rulemaking. Failure to do so will result in EPA/USACE adopting a rule for which there is not adequate public participation. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Western Governors Association (Doc. #14645)

13.125 The Western Governors thank the agencies for extending the comment period on the proposed rule by an additional 25 days. We note, however, that we have twice requested a 180-day extension of the comment period.[43] Those requests for additional review time were submitted to allow states the opportunity for sufficient analysis of the proposed rule's potential implications for water management within their boundaries. Further, states deserve time for full evaluation of the Science Advisory Board's (SAB) report on the connectivity of streams and wetlands to downstream waters, which was released just weeks before the comment deadline. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Arizona Game and Fish Department (Doc. #14789)

13.126 A proper evaluation of tributaries or other waters requires completion of Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft, EPA/600R-ll-O98B, September 2013) which is under review by EPA's independent Science Advisory Board (SAB). SAB's review and the final Connectivity report should be made available for public comment before finalizing the proposed rule. Furthermore, additional opportunity for public comment on the proposed Rule should be made available after the final Connectivity report and EPA Science Advisory Board review are published. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

[43] Western Governors' Association letters to Administrator Gina McCarthy and Assistant Secretary Jo-Ellen Darcy dated May 30, 2014 and August 27, 2014.

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Office of Water Management, Pennsylvania Department of Environmental Protection (Doc. #14845)

13.127 The proposed rule is premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB).

The determination of applicable science, which provides a baseline for the proposed rule, is not complete or finalized. The proposed rule cites the report and recommendations titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* which is currently being peer reviewed by the SAB. This process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant. PADEP recommends that the states and the public be provided with a 60 to 90-day review and comment period, and an opportunity to submit additional comments on the rule given the relationship of the study to this rule. (p. 8)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Arizona Game and Fish Department (Doc. #15197)

13.128 2. A proper evaluation of tributaries or other waters requires completion of *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (External Review Draft, EPA/600R-11-098B, September 2013) which is under review by EPA's independent Science Advisory Board (SAB). SAB's review and the final *Connectivity* report should be made available for public comment before finalizing the proposed rule. Furthermore, additional opportunity for public comment on the proposed Rule should be made available after the final Connectivity report and EPA Science Advisory Board review are published. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

13.129 Comments related to the Draft Connectivity Report

SUlT Growth Fund has concerns about the release of the Proposed Rule for comments before the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (draft Connectivity Report), has been finalized. Although the Science Advisory Board (SAB) has completed their review of the draft Connectivity Report and provided the EPA with their comments and recommendations, a final report has not been released to the public for review. SUlT Growth Fund finds that the SAB review has resulted in substantive comments that would improve the draft Connectivity Report such that it could be used more readily as a tool in jurisdictional determinations as well as provide more clarity to the Proposed Rule.

For example, the SAB recommends that the report would be more useful to agencies and the regulated public if it provided more clarity to the interpretation of connectivity, particularly with respect to methods for measuring or quantifying connectivity or the effects of streams and wetlands on downstream waters. According to the SAB Panel that reviewed the draft Connectivity Report, this could be accomplished if the report provided examples of the dimensions of connectivity that could most appropriately be quantified, ways to construct connectivity metrics, and the methodological and technical advances that are most needed[44]. These methodologies should acknowledge that connectivity is, in part, determined by the extent to which impacts to one water body will affect chemical, physical, and/or biological integrity of downstream waters. SUlT Growth Fund agrees with these SAWS recommendations and believe they should be incorporated into the report.

Since the draft Connectivity Report is used as a scientific basis for the Proposed Rule and is the Proposed Rule, changes to the report in response to the SAB's comments and recommendations would result in changes to the Proposed Rule itself. Therefore, SUlT Growth Fund believes the agencies should provide the public with the opportunity to review and comment on the updated rule as well as the finalized report.

Recommendation:

The EPA and the ACOE should re-open the comment period after changes are made to the Proposed Rule as a result of the finalized Connectivity Report. (p. 2 – 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

State of Michigan, Attorney General (Doc. #16469)

13.130 Your agencies should not have moved forward with a proposed rule that lacks a completed scientific analysis, particularly given that the draft report is the linchpin for major assumptions that are used to justify the proposed rule. While the Science Advisory Board accepted certain conclusions in the draft report, it seems very likely the draft report, and potentially the proposed rule itself, will undergo substantial changes before the final rule is issued. But the public and other interested parties will not have any meaningful opportunity to review and comment on the revised report, or a potentially revised rule. That is unacceptable for a rule of this scope and national significance. EPA and the Corps should either extend the current comment period or restart the public notice and comment process when they have all of the proposed rule's components finalized. To do otherwise undermines public confidence in the process and ultimately the legitimacy of the rule. (p. 4)

[44] EPA-HQ-OW-2011-0880-7617. U.S. Environmental Protection Agency Office of the Administrator Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report (SAB Panel). (September 2,2014)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Coastal Restoration and Protection Authority Board of Louisiana (Doc. #17043)

13.131 Similarly, uncertainty in another facet of the proposed rule threatens to undermine the validity of the proposed rule. The Agencies' decision on how best to address jurisdiction over "other waters" in the proposed rule is heavily reliant on the EPA's 2013 report *entitled Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Connectivity Report"). The Connectivity Report is under review by EPA's Science Advisory Board ("SAB"), yet the preamble to the proposed rule states that the Agencies' jurisdiction over "other waters" will be informed by the final version of the Connectivity Report. However, comments are still being considered on the Connectivity Report. Therefore, SAB's review may be complete, but the report is not final. As such, the CPRA has grave concerns as to how the Agencies can rely on a Connectivity Report as the basis for their proposed rule when comments are still being considered for the report, which has yet to be finalized. Again, this uncertainty jeopardizes the validity of the Agencies' proposed rule since the report providing the scientific basis for the rule has not been fully vetted through the comment process. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information the agencies approach to "other waters" in the final rule, see comment responses in Compendium 4.**

Allen Boone Humphries Robinson LLP (Doc. #19614)

13.132 The Proposed Rule Reflects an Improper Disregard of Science

The agencies published the Proposed Rule prior to the science upon which it is supposedly based having been finalized. For example, the agencies propose to consider adjacent waters jurisdictional because the agencies find that they have a significant nexus to jurisdictional waters. However, the agencies did not wait for the SAB's input before releasing the Proposed Rule on March 25. Moreover, the SAB itself released its study less than one month before the close of public comments on the Proposed Rule. Thus the flawed bases of the Proposed Rule's impermissible expansion of CWA jurisdiction include not only the agencies' faulty construction of the significant nexus text, but also incomplete and improper science and analysis. (p. 9)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Lee County, Florida (Doc. #1346)

13.133 We believe a 120-day extension from the EPA's release of the final report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report) would be sufficient.

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The scope of jurisdiction under the CWA is of fundamental importance to Lee County. Given the significance of the proposed rule, the public should be permitted the opportunity to thoroughly review and comment on the proposed rule as well as its supporting documentation, including its lengthy Appendices, Economic Analysis, and the draft Connectivity Report. As you are aware, EPA's Science Advisory Board ("SAB") is currently reviewing the draft Connectivity Report which serves as the scientific basis of the proposed rule. Even assuming sufficient time had been given for a thorough review, by issuing the proposed rule for comment before the completion of the SAB review, the EPA and the Corps are hindering the public's ability to make comments based on all available information. Without this analysis, the broad terms used in the draft rule give a significantly broader application than that suggested by EPA and Corps staff. As such, we believe that any public comments will be premature. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

City of Aurora, Colorado (Doc. #1448)

13.134 Given the length, scope, and breadth of the proposed rule, and the pending scientific review of the draft EPA Report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (Connectivity Report), Aurora requests that any comment period be delayed until publication and comments on the Connectivity Report are complete and final. This requested extension would give municipalities the necessary time to absorb, understand, and evaluate the proposed rule and what it means for the management and delivery of water, especially in the arid west.

Any change or clarification on the definition of "Waters of the United States" under the Clean Water Act has direct implications on western communities, where water resources are scarce. Aurora, which serves a population of 347,953, obtains our water from three different river basins, with some of our resources starting over 200 miles from our city. Like many communities along the Front Range of the Rocky Mountains, Aurora is evaluating opportunities to increase our storage to help combat drought cycles, climate change, and meet the demand of a growing city. Several reservoirs are currently in the planning stages, with permitting soon to follow. Sufficient time needs to be provided so staff can evaluate the proposed rule with an eye toward understanding the potential impacts this rule would bring to the permitting process and its relationship with the final Connectivity Report. It is important for the City to identify whether the proposed rule could potentially create delays and additional costs, which would be passed directly to our rate paying citizens.

Without completion of the Connectivity Report, requesting comments on the rule is premature and problematic. Many of our comments or questions will arise from the delineations in connectivity between water sources, especially those with intermittent seasonal flows. We are working with our partner organizations, such as the American Water Works (AWWA), the Western Urban Water Coalition (WUWC), the Western Coalition of Arid States (WESTCAS), the National Water Resources Association (NWRA), and the National Association of Clean Water Agencies (NACWA), to review

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the rule and Connectivity Report, and develop our comments for consideration. These tasks will add a tremendous workload on our staff, and without all of the necessary supporting documentation, is doubly burdensome and potentially duplicative.

Accordingly, the City of Aurora, requests that EPA extend the public comment period for the proposed rule until at least 120 days following completion of the Connectivity Report that takes into account comments received on the draft Connectivity Report and the recommendations of EPA's own Scientific Advisory Board. (p. 1 – 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Board of County Commissioners (Doc. #4679)

13.135 The EPA's Science Advisory Board (SAB) report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (Connectivity Report) serves as the scientific basis of the proposed rule, but is currently a "preliminary draft." By issuing the proposed rule for comment prior to the completion of the SAB review, the EPA and Corps are hindering the public's ability to provide comments based on all of the available information. (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Nevada County Board of Supervisors (Doc. #6856)

13.136 The agencies state that their decision on how best to address jurisdiction over "other waters' ' in the final rule will be informed by the final version of the EPA' s Office of Research and Development synthesis of published peer-reviewed scientific literature in a report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. While it makes sense to study published and peer-reviewed scientific reports in developing the proposed rule, the rule should not have been released until the SAB's review and subsequent final report are complete and available for consideration during the public comment period on the rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Murray County Board of Commissioners (Doc. #7528.1)

13.137 The EPA's Science Advisory Board is still reviewing public comments on the Office of Research Development's report, Connectivity of Streams and Wetlands to Downstream Waters.

We are concerned with the chronology in which the agencies have proposed this rule in relation to review and final publication of the U.S. EPA's Science Advisory Board's report on the connectivity of streams and wetlands to downstream waters, a synthesis of published peer reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters.

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Prefatory comments to the rule promise that the final rule will be informed by the final version of the Science Advisory Board's report. A significant number of public comments were submitted to the report, including comments from many of Minnesota's counties, watershed districts, and other local government units. This proposed rule comes at a time before the agency has reviewed, responded, and altered its report based on comments and concerns regarding unsound science, use of new terminology, and other important considerations. In the current rulemaking process, the public is afforded zero opportunity to review the final, scientific report to aid in its analysis of the proposed rule.

While we appreciate the extension given to the comment period, we recommend that the public be given ample time to review the contents of the Science Advisory Board' s final report before the comment period on the proposed rule is opened and closed. (p. 4)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.138 EPA Science report should be considered before rule is finalized. EPA's Science Advisory Board is currently finalizing a report focusing on over 1,000 scientific papers that demonstrate the interconnectedness of tributaries, wetlands, and other waters. This report titled "*Connectivity of Stream and Wetlands to Downstream Waters*" is reported to be the scientific basis for the new definition of "waters of the U.S." Moffat County is concerned with the timing of the draft science report and how it fits into the proposed rule making process defining "waters of the U.S." Releasing the proposed rule before the connectivity report is finalized does not provide the agencies opportunity to review comments or concerns raised in the final report that would inform the development of this proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Pasco County, Florida (Doc. #9697)

13.139 In addition to the concerns expressed above, the County notes that the EPA's Science Advisory Board (SAB) has not yet completed its peer review of the document "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," which forms the scientific basis for the proposed rule. The regulated community, policy makers, and the public cannot be assured that the rule reflects the science until the SAB peer review is complete and the SAB recommendations have been reviewed and incorporated into the final report.

Recommendation: Suspend rulemaking until the connectivity report is finalized. Revise the proposed rule to address recommendations in the SAB report and public comments received to date and provide for an additional public comment period. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Mesa County, Colorado Board of County Commissioners (Doc. #12713)

13.140 The EPA Science Advisory Board has not finalized their scientific back up report "Connectivity of Streams and Wetlands to Downstream Waters", which should document the need for refining the definition of WOUS. The proposed date to have this report finalized continues to change. Usually, the new deadline is later than the deadline for comments on the proposed WOUS rule. This leads to a situation where there is no scientific justification to back up the proposed Rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Board of County Commissioners, Larimer County (Doc. #14741)

13.141 Releasing the proposed rule before the science report titled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" was finalized, eliminated a valuable opportunity to review comments and concerns raised in the report that could inform development of the proposed rule. We appreciate the proposed rule extension of 25 days to review the Science Advisory boards peer review released on October 17, 2014, but the peer review is still in draft form and hasn't been fully considered in the rulemaking process. Consequently, the scientific credibility of the Connectivity Report has not been fully established. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Harris County Flood Control District (Doc. #15049)

13.142 Related Reports

The District is concerned with the sequence and timing of the proposed Waters of the U.S. rulemaking. The proposed rule utilized a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (here after referred to as Connectivity Report), as the scientific basis for the definitions. The EPA's Scientific Advisory Board (SAB) has subsequently reviewed and provided comment on the draft report. The District deems it inappropriate for the rule making to have been drafted and be finalized when the scientific report has not been finalized. Furthermore, the Connectivity Report seems to provide some basis and value for the connectivity of waters but does not provide clarity on which waters would be considered jurisdictional which is the stated intent of the proposed rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Rio Grande Water Conservation District (Doc. #15124)

13.143 8. The Rulemaking Process Should Be Stayed Pending Completion of the Connectivity Report

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According to the preamble, the EPA's "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidenc*e" report forms the scientific basis for the proposed rule. This report remains in draft form and a review of the report by the Science Advisory Board was only recently completed. The EPA has stated that it intends to review the final report issued by the SAB and "make any adjustments to the final rule that are appropriate. . . ."While the RGWCD appreciates the fact that the original comment period was extended, the decision to push forward and solicit public comment before the scientific inquiry is complete has made it difficult to prepare meaningful and comprehensive comments on the rule. Rather than forge ahead, the better approach is to either withdraw the rule or extend the public comment period to allow for a thorough review of the SAB's report and time to modify the proposed rule, as may be warranted. (p. 8)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Amador County Board of Supervisors (Doc. #17450)

13.144 4. Draft Science Report

The agencies have relied significantly on a draft report of the "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" that is currently undergoing scientific peer review. Developing a propose rulemaking based on a draft report is bad public policy. It prohibits both the agencies and the public from firmly relying on the conclusions of the report, and subjects the rulemaking to later refinement following the completion of the final scientific report. We urge the agencies to withdraw the proposed rulemaking until the scientific report is finalized. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Butte County Administration, County of Butte, California (Doc. #19593)

13.145 We also believe that the underlying science of the proposed rule has not been fully vetted by the agencies in collaboration with the public to allow the rule to move forward. We request that a public comment period be opened on the final Connectivity Report currently under review by the Science Advisory Board (SAB) of the EPA when the report is finalized with the SAB recommendations attached. This report should be finalized, with a public comment period, prior to the closing of the comment period on the proposed rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Western Urban Water Coalition (Doc. #12828)

13.146 The Western Urban Water Coalition ("WUWC") has conducted a preliminary review of the Science Advisory Board's peer review of EPA's Draft Report entitled "*Connectivity of*

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Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (the "Draft Connectivity Report" and the "Peer Review"). While notice of the Draft Connectivity Report was published in the Federal Register on September 13, 2013 (78 Fed. Reg. 58536), the Peer Review was issued just a few weeks ago on October 17, 2014. EPA has not yet published its Final Connectivity Report in light of the Peer Review. Until the public understands how EPA will incorporate the Peer Review into the Final Connectivity Report, and how it impacts the agency proposal, it is difficult to comment completely and effectively. As it stands, public comments on EPA's proposed rule on "waters of the United States" will be due only 28 days after the Peer Review was issued, leaving insufficient time to comment on that detailed technical analysis. More importantly, commenters will not have any opportunity to provide input on how the agencies will incorporate the Peer Review comments into a Final Connectivity Report. Because the Draft Connectivity Report is the basis for EPA's proposed rule and the Peer Review is the culmination of the scientific review contained in the Draft Connectivity Report, WUWC respectfully requests an extension of the public comment period on the proposed rule until at least 60 days after the issuance of the Final Connectivity Report in order to give stakeholders adequate time to consider and address the 58-page Peer Review and EPA's finalization of the Connectivity Report in public comments on the proposed rule. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.147 The agencies were clear that the proposed rule relies heavily on the Draft Connectivity Report. Moreover, the agencies acknowledged that the Peer Review would provide additional necessary detail to inform the proposed rule. For instance, in the preamble to the proposed rule, the agencies stated that their decision on how to address jurisdiction over "other waters" would be "informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters." 79 Fed. Reg. 22 188, 22 189 (Apr. 21, 2014). Because the Peer Review directly addresses the scientific basis for proposed rule, a thorough analysis of the Peer Review is vital to adequately comment on the proposed rule. Moreover, an understanding of how the agencies will incorporate the Peer Review into the Draft Connectivity Report (and possibly into the final rule) is necessary for adequate public comments. For these same reasons, on November 6, 2013, we submitted comments on the Draft Connectivity Report explaining our concern that EPA and the Corps should wait until the Draft Connectivity Report's scientific findings were peer reviewed before proposing the expansion of CWA jurisdiction in the proposed rule. The agencies failed to follow this request, and issued the proposed rule in advance of the final Connectivity Report. That error is about to be compounded by not providing the public with any opportunity to comment on the Final Connectivity Report and only 28 days to comment on the SAR's review of the draft report.

This is not merely an academic concern. For instance, the Peer Review cover letter recommends that "EPA should recognize that there is a gradient of connectivity" in the context of how tributaries (perennial, intermittent, and ephemeral) affect downstream

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waters. WUWC is very interested in this tributary issue, but it needs time to evaluate the SAB's comments on it; examine how the agencies will incorporate that Peer Review comment into a final version of the Draft Connectivity Report; consider how its public comments on the proposed rule should address the Peer Review's examination of the science behind the SAB's observation; and provide substantive recommendations to the agencies on how to address this issue.

Ultimately, the extremely short timeframe between the Peer Review publication and the deadline for comments on the proposed rule runs contrary to the agencies' clear expression of their eagerness to consider constructive public comments on the proposed rule (over and above their legal duty to do so), as well as the President's direction that federal departments and agencies ensure that their actions meet the principles of transparency, participation and collaboration. See Memorandum for the Heads of Executive Departments and Agencies, Executive Office of the President (Dec. 8, 2008). Accordingly, WUWC requests that EPA extend the public comment period for the proposed rule until at least 60 days following EPA S issuance of the Final Connectivity Report (based on the Peer Review). This time would allow WUWC and others to take into account the recommendations of EPA's own SAB, and more importantly, to submit meaningful public comments on the proposed rule as informed by the Peer Review. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Colorado Stormwater Council (Doc. #12981)

13.148 The EPA has stated that it would conduct an exhaustive and peer reviewed scientific literature review to evaluate connectivity between various surface hydrologic features and downstream Traditional Navigable Waters (TNWs) prior to development of the Proposed Rule. However, the Agencies are on the path to finalizing the Proposed Rule while the Connectivity Report currently remains in draft form. Requesting comments on the Proposed Rule before the Connectivity Report is final is problematic. The purpose of the Connectivity Report should be to provide the science and technical foundation for the Proposed Rule. The Connectivity Report is a compilation of independent peer-reviewed scientific literature that, when finalized, is intended to provide the scientific justification for the Agencies' interpretation of when waters are subject to CWA jurisdiction. The chartered Science Advisory Board (SAB) is currently conducting quality reviews of its draft peer review reports on the Connectivity Report and is deliberating on the adequacy of the scientific and technical basis of the Proposed Rule. esc requests that any final regulatory action related to CWA jurisdiction be based upon a complete and validated version of the Connectivity Report. (p. 6)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.149 CSC respectfully requests that the Agencies follow the proper course of action to ensure that the Proposed Rule is based upon a valid scientific and technical foundation: (I)

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Revise the Connectivity Report based upon the comments and concerns expressed by CSC and other stakeholders; (2) Finalize the Connectivity Report; (3) Revise the Proposed Rule accordingly pursuant to the findings and recommendations in the Connectivity Report; and (4) Reissue the Proposed Rule for public comment. (p. 6 – 7)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Association of Clean Water Administrators (Doc. #13069)

13.150 II. Timing of Proposed Rule Relative to Science Advisory Board Report

States find that the timing of the Proposed Rule was not appropriate relative to the timing of the report that EPA relied on as scientific underpinning for the Proposed Rule, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. Specifically, review of the report by EPA's Science Advisory Board (SAB) panel should have been carried out to completion before the rule was proposed, so that the Agencies would have had the full benefit of those findings in developing the Proposed Rule, and the states in reviewing the Proposed Rule. For example, in a draft review by the SAB, the panel recommended that connectivity be examined in terms of a gradient that reflects the spectrum of different aspects of connections, such as the frequency, duration, and consequences of those connections. The Proposed Rule appears to take a more binary approach, wherein connections are either present or absent, and implementation of this approach is very different and can pose challenges to regulators. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

13.151 Scientific Advisory Board's peer review

The draft Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence report appears to be the basis for many conclusions in the proposed rule defining the scope of waters protected under the CWA rulemaking. Since the connectivity report was under review by EPA's Scientific Advisory Board (SAB) when the proposed rulemaking was issued, NAFSMA believes circulation of the proposed rule for public comment at this time is premature. The Science Advisory Board panel on October 17, 2014, recommended significant changes to the connectivity report and, if EPA intends to be responsive to those concerns, the final connectivity report will differ substantially from the draft that has been made available to the public. NAFSMA requests EPA and the USACE to suspend the current public comment period and re-release the proposed rulemaking after EPA has finalized the connectivity report. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Western Urban Water Coalition (Doc. #15178)

13.152 3. Insufficient Time Between the Final SAB Peer Review and the Close of the Comment Period on the Proposed Rule

While notice of the Draft Connectivity Report was published in the Federal Register on September 13, 2013 (78 Fed. Reg. 58536), the Peer Review was issued just a few weeks ago on October 17, 2014. EPA has not yet published its Final Connectivity Report in light of the Peer Review. Until the public understands how EPA will incorporate the Peer Review into the Final Connectivity Report, and how it impacts the agency proposal, it is difficult to comment on the Proposed Rule completely and effectively.

> As a member of the SAB panel reviewing the Draft Connectivity Report commented:
>
> The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' and reputations are placed in jeopardy. The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB - - just a few minor additions. If I believed this to be the case, I would be very dismayed.

Attachment to Letter to Dr. David Allen, Chair, EPA, Scientific Advisory Board from Dr. Amanda D. Rodewald, Chair, SAB Panel for Review of EPA Water Body Connectivity Report, dated September 2, 2014, at page 89.

On November 5, 2014, WUWC requested an extension of the public comment period on the Proposed Rule until at least 60 days after the issuance of the Final Connectivity Report in order to give stakeholders adequate time to consider and address the 58-page Peer Review and EPA's finalization of the Connectivity Report in public comments on the Proposed Rule.

Moreover, the Draft Connectivity Report does not necessarily correlate science with the legislative language, legislative intent, Supreme Court precedent or agency objectives under the CWA. To support the finding that all "tributaries," all "adjacent waters," and certain "other waters" have a "significant nexus" the Draft Connectivity Report evaluated scientific studies, many of which examined biological connections between bodies of water, or water retention, without examining impacts on the quality of navigable water. (p. 5 – 6)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

The United States Conference of Mayors et al. (Doc. #15784)

13.153 In addition to the missed opportunities, we are concerned about the timing of the yet-to-be finalized Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence report, which will serve as the scientific basis for the proposed rule. In mid0October, EPA's Science Advisory Board (SAB), which was tasked with reviewing the document, sent a letter with detailed recommendations on how to modify the report. The SAB raised important questions about the scope of

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connectivity in their recommendations, which will need to be addressed prior to finalizing the report. We recommend EPA and the Corps pause this rulemaking effort until after the connectivity report is finalized to allow the public an opportunity to comment on the proposed rule in relation to the final report. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Waters Advocacy Coalition (Doc. #0851)

13.154 The Agencies Have Not Reviewed the Adequacy of the Underlying Science, But Have Asked for Commenters to Provide Complex Technical Information. Additional Time Is Needed for the Agencies to Complete and Provide Their Assessment So the Public Can Effectively Respond.

The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft connectivity report, which is currently under review by the Science Advisory Board (SAB). Indeed, the SAB Panel's discussions on recent public teleconferences demonstrate that the SAB Panel is still grappling with the proper criteria for determining under which circumstances a connection amounts to a significant nexus for the purposes of establishing CWA jurisdiction.

Moreover, in recent statements, the EPA has acknowledged that the SAB and the agency are still considering options for review of the adequacy of the science to support the proposed rule. Given the ongoing SAB Panel review, and that the EPA has not yet determined how to review the adequacy of the science to support the proposed rule, commenters should have at least 90 days from the time when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters1," and the public deserves the opportunity to comment on the conclusion of that review process.

A significant amount of time and technical expertise will be required first to evaluate the report from the SAB Panel and agencies' scientific conclusions and responses and then to prepare substantive and thoughtful responses. The comment period should be extended to give stakeholders that additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Hereford Natural Resource Conservation District (Doc. #1652)

13.155 (…) The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence be finalized and issued with a response to all the comments submitted pertaining to this report. (p. 1)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

U.S. Chamber of Commerce (Doc. #2607)

13.156 (…) Moreover, the revised definition is chiefly based upon EPA's Draft Report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," which is currently under review by EPA's Science Advisory Board. The 300+ page report discusses complex scientific hypotheses, analyses, and data, which may change after the SAB has completed its review. At a minimum, stakeholders must have sufficient time to review and evaluate the Final Report before they can knowledgably comment on the proposal. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Georgia Chamber of Commerce (Doc. #14430)

13.157 (…) Furthermore, the EPA has mismanaged the regulatory process by improperly certifying that the rule would not impact small businesses and by initiating the rulemaking process prior to the completion of the Scientific Advisory Board review of the underlying scientific report. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.158 15. Science Advisory Board (SAB)

EPA has supported its rulemaking proposal with a comprehensive, peer-reviewed scientific report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The Chamber commends EPA on this initiative.

At the time of the publication of the draft rule (April 2014) the report was being reviewed by EPA's Science Advisory Board. EPA stated at the time of the publication of the draft CWA rule that the rule would not be finalized until that SAB review and its final report are completed.

The SAB finally presented it findings to EPA on September 30, far too late for stakeholders to analyze the SAB's findings and EPA's response prior to presenting final submissions on this proposed rulemaking.

This means that stakeholders have been unable to properly participate in the federal rulemaking process. (p. 18 - 19)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Resource Development Council for Alaska, Inc. (Doc. #14649)

13.159 Instead of allowing the science to be developed, peer-reviewed, and released for public review, the EPA compiled a Draft Report on the Connectivity of Waters while developing this proposed rule. The draft scientific report was released for public comment at the same time the EPA released the rule to the Office of Management and Budget for inter-agency review. The Science Advisory Board had not finished its peer review, and the public already began commenting. (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Greater Houston Partnership (Doc. #14726)

13.160 Science Not Finalized

The 331 page draft report, issued in September 2013 and entitled: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, on which the rule is based, has not been finalized. GHP is concerned that the proposed rule has been developed without the full benefit of a completed scientific review and synthesis. GHP urges EPA to suspend the rulemaking process until the report has been peer reviewed, finalized, and issued. (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Atlantic Legal Foundation (Doc. #15253)

13.161 3. Scientific Basis

The proposed rule is based extensively upon a scientific analysis entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the "EPA Report"). However, this Report has not yet been properly peer reviewed by the Science Advisory Board (SAB). It is troubling that the proposed rule was promulgated before its foundational scientific basis could be examined. We understand that the SAB is still conducting its Panel review and its panel members have recently expressed their view that the EPA Report will require extensive revisions.[45] Such disregard for peer review, which is an essential safeguard for scientific credibility, calls into question the agencies' adherence to the Administrative Procedure Act and the rule-making process. The science analysis and peer review should always precede a

[45] On June 5, 2014 SAB Panel members reviewed and approved a draft SAB report which "recommends a substantial number of revisions to improve the clarity of the [EPA] Report, better reflect the scientific evidence, provide more quantitative measures, and make the document more useful to decision-makers." *SCIENTIFIC ADVISORY BOARD, PANEL MEMBER COMMENTS ON THE DRAFT (6-5-14) SAB REVIEW OF THE DRAFT EPA REPORT CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE* 7 (2014). It further recommends "that EPA clearly set forth the definitions used in the Report to be consistent with the definitions proposed for rulemaking and that any differences between the regulatory and scientific terminology be explained and described in terms of how it may affect interpretation of the conclusions reached." Id. at 8.

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rulemaking especially where the scientific and legal concepts are inextricably linked. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the Administrative Procedure Act, see section 13.2.1.**

Volusia County Association for Responsible Development (Doc. #1440)

13.162 Among other issues brought to your attention in this letter, it is noted that the EPA's Scientific Advisory Board has yet to complete its scientific analysis and peer review of these regulatory changes. This fact alone should convince you and the U.S. Army Corps of Engineers of the need to extend the public comment period so that your constituents will have the benefit of your own scientists' review and adequate time to provide meaningful input on this rule. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

CalPortland Company (Doc. #14590)

13.163 (…) Rulemaking should be based on sound science, yet the Science Advisory Board has not completed its review. In fact, they have raised serious questions that EPA has not answered. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Ames Construction, Inc. (Doc. #17045)

13.164 Another troubling aspect of this proposed rule is that the EPA chose not to wait for a final peer review of their 'Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence' study. This study has been touted as the basis of the proposed rule, but has not yet been peer reviewed by the EPA's own Science Advisory Board (SAB). Additionally, EPA's economic analysis seriously underestimates impacted acreage and completely ignores impacts to non-404 programs. Recognizing that state and local governments are managing water resources that are not under federal control, it is unclear why the agencies rushed through these and other important procedural steps designed to ensure that businesses like mine are protected. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the economic analysis, see comment responses in Compendium 11.**

National Association of Home Builders (Doc. #19540)

13.165 b. EPA's Use and Treatment of the Science Advisory Board has been Problematic.

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The timing and manner in which the Agencies have engaged the SAB have been questionable and disconcerting. This is particularly problematic considering the proposed rule is purported to be supported by science. (p. 146)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

13.166 i. The Agencies have Inappropriately Engaged the Science Advisory Board.

In 1978, Congress directed EPA to establish an SAB to provide scientific advice to the agency Administrator.[46] The SAB is authorized to review the quality and relevance of the scientific information used as the basis for agency regulations. NAHB is concerned that EPA and the Corps have engaged the SAB inappropriately.

On September 17, 2013, EPA and the Corps announced that a proposed rule defining the scope of CWA jurisdiction had been sent to the Office of Management and Budget (OMB) for interagency review.[47] On the very same day, EPA submitted its draft Connectivity Report to its SAB for peer review. Although the proposed rule that was sent to OMB stated, "[t]his draft rule takes into consideration the current state-of-the-art peer reviewed science reflected in the [draft Connectivity Report],"[48] the proposed rule was drafted before the SAB had an opportunity to review the Connectivity Report. In fact, the SAB did not even convene for the first time until December 16, 2013 – 91 days after the proposed rule was sent to OMB.[49]

The proposed rule states that the draft Connectivity Report is under review by the SAB, and the rule will not be finalized until that review and the final Report are complete.[50] Yet, in the proposed rule, the Agencies state they have interpreted the scope of "waters of the United States" in the CWA based on "the information and conclusions in the [draft Connectivity] Report."[51] This suggests the Agencies have little regard for the SAB's comments and scientific input, and that the outcomes of the proposed rule have been pre-determined. In disregarding the SAB's expert comments on the draft Connectivity Report during the proposed rulemaking phase yet stating a rule will not be made final until the SAB has reviewed the Report, the Agencies have undermined the critical role of the SAB and scientific review in a rulemaking process that claims to be based on the best available science. The proposed rule states, "The [Connectivity] Report summarizes and assesses much of the currently available scientific literature that is part of the administrative record for this proposal, and informs the agencies during this rulemaking. Yet, the draft Connectivity Report should have been reviewed and finalized in order to inform the Agencies before this rulemaking.

[46] 42 U.S.C. § 4365.
[47] See http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2040-AF30#1
EPA Press Release (Sept 2013), available at http:///cfpub.epa.gov/ucea/cfm/recordispaly.cfm?deid238345.
[49] 78 Fed. Reg. at 58,536.
[50] 79 Fed. Reg. at 22,190.
[51] Id. at 22,196.

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Indeed, even SAB panel members have voiced concerns over this cart-before-the-horse approach the Agencies have taken. SAB panel member Dr. Mark Murphy stated, "I must say I am puzzled as to why EPA has decided to release the proposed rule before receipt of our review of the Connectivity Report . . . I hardly expected that the draft [rule] would be released to the public before our review [of the Connectivity Report]. The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' . . . The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB-just a few minor additions. . . In point of fact, the SAB Review suggested that some major additions be made to the Connectivity Report.[52]

Additionally, the Administrative Procedure Act (APA) requires federal agencies to reveal for public evaluation "the technical studies and data upon which the agency [relies in its Rulemaking]." By releasing and taking comment on the proposed rule before the Connectivity Report is final, the Agencies have failed to comply with the APA (see Section X. a for a more thorough discussion of the Agencies' failure to comply with the APA). (p. 146 – 147)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the Administrative Procedure Act, see section 13.2.1.**

13.167 iii. The Science Advisory Board has Raised Concerns with Significant Components of the Proposed Rule, and EPA has not Released a Final Connectivity Report.

NAHB reiterates its concern, raised in Section X. a. 3., with the Agencies' preparation of a draft rule before the foundational science is peer-reviewed and final. This is even more important given that the SAB panel has recommended significant changes to the draft Connectivity Report and, if EPA intends to be responsive to those concerns, the final Connectivity Report will substantially differ from the draft that has been made available to the public.[53] In order to provide for meaningful public comment under the APA, federal agencies must disclose the data or other material on which they rely to make a final decision. Indeed, participation is not meaningful if an agency bases its action on information that is not available to the public.[54]

On September 2, 2014, the SAB panel released comments on the adequacy of the scientific and technical basis of the proposed rule.[55] The SAB panel members raised a number of serious concerns about the proposed rule's definitions and categories of

[52] 8/14/14 SAB Comments on the Proposed Rule at 56.
[53] See SAB Final Review of the Draft Connectivity Report.
[54] See United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d. Cir. 1977).
[55] Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled "definition of 'waters of the United States' under the Clean Water Act" (Sept. 2, 2014), available at http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf (hereinafter, SAB Panel Comments on the Proposed Rule).

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regulation. For example, "Panel members generally found that the term 'significant nexus' was poorly defined . . . and that the use of the term 'significant' was vague."[56] Panel members also questioned the adequacy of scientific support for several of the rule's definitions and exclusions. For instance, "[p]anelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included."[57] Substantial changes to the proposed rule and the draft Connectivity Report are needed to address these important concerns raised by the SAB panel. To comply with the APA, the Agencies must allow the public the opportunity to comment on the final report.[58] (p. 153)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the Administrative Procedure Act, see section 13.2.1.**

API Energy (Doc. #0867.1)

13.168 (…) Moreover, stakeholders should be afforded the opportunity to review and offer detailed comment on the Connectivity Report once it has been published as a final report, inasmuch as EPA has stated that the technical basis for its definition of waters of the United States, and the supporting definition of significant nexus consistent with the Kennedy decision in Rapanos, is to be provided in this Science Advisory Board report. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.169 The importance of affording the regulated community the opportunity to comment on the final Connectivity Report was recently underscored by EPA's Deputy Administrator Robert Perciasepe, who acknowledged that to date EPA has not adequately defined significant nexus , and stressed EPA's obligation to provide criteria for determining under what circumstances a nexus becomes significant for the purpose of establishing jurisdiction. The SAB has recently contemplated an approach for a decision making framework, but is struggling to develop this approach and specific, technically sound recommendations for EPA ("SAB Grapples with Gradient for Determining Waters' Significant Nexus," InsideEPA.com, April 29, 2014). In fact, the SAB has recently postponed previously planned June meetings to allow further time for deliberations. How the SAB's recommendations, once they have been developed and published in the final Connectivity Report, will affect EPA's proposed definition of jurisdictional waters is unclear and deserves to be subject to public review and comment. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

[56] SAB Panel Comments on Proposed Rule at 6.
[57] Id. at 7.
[58] See 5 U.S.C. § 553(c).

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Interstate Mining Compact Commission (Doc. #1435)

13.170 (…) Also for consideration, the Agency previously stated that the final rule on Definition of "Waters of the United States" would be informed by the results of the currently ongoing Science Advisory Board (SAB) review of the Office of Research and Development's (ORD) report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. It would be helpful for commenters to have access to the same information from the SAB review which the Agency will be taking into account in writing the final rule as we formulate our comments. Commenters may be able to provide valuable insight to the Agency on the subject and it would promote transparency in the important process of determining federal agencies' authority under the Clean Water Act. It is our understanding that the "Connectivity" study/report is not expected to be finalized until July 16. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.171 Given that we face two critical, overlapping, and complex issues that must be addressed simultaneously, and since the "Connectivity" report will not be finalized and available for review by commenters until at least July 16, we respectfully request a 60 day extension to the comment period on the proposed rule on Definition of "Waters of the United States" from July 21 to September 19, 2014. This extension will allow the states to fully evaluate and provide meaningful input regarding both of these important actions. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

American Exploration & Production Council (Doc. #2009.1)

13.172 (…) Our rationale for requesting an extension of the comment deadline is largely based on the fact that the Science Advisory Board (SAB) has yet to complete the Connectivity Report, which is to provide the scientific basis for the new definitions use in the Proposed Rule. It has been noted that the SAB has recently been trying to create a "gradient approach" and has been struggling to provide more clarity as to when water becomes a "water" and how long it remains a "water" for purposes of the Proposed Rule. In fact the SAB has only recently scheduled a public teleconference of the SAB Panel for the review of the Connectivity Report to be held on June 19, 2014. Given the scope of the Proposed Rule, AXPC simply needs more time to thoroughly assess the SAB's findings and their implications for the Proposed Rule. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Marcellus Shale Coalition (Doc. #2039)

13.173 In September 2013 the USEPA issued a draft scientific study, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, for public comment. While the study serves as background information and justification

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for the proposed rulemaking, the study is still undergoing peer review by the Science Advisory Board (SAB), which recently issued its second round of comments on the draft study (April 23,2014). The USEPA is still accepting Public Comments on the study (next teleconference is June 19, 2014), and has not issued formal responses to the comments received to date. The MSC recommends the USEPA extend the public comment period for the rulemaking until the scientific study has been finalized. The scientific study should have significant influence on how the proposed rulemaking is finalized and implemented. Accordingly, we respectfully request that the USEPA extend the public comment period to September 22, 2014. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Pulp and Paperworkers' Resource Council (Doc. #4766)

13.174 A major concern of the PPRC members is that the rule continually references a report that is not yet finalized, entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*." The draft rule states "The report is under review by the EPA's Science Advisory Board (SAB) and the rule will not be finalized until that review and the final report are complete." EPA announced on June 10, 2014, that the public comment period will be extended for an additional ninety days, the PPRC cannot understand why the EPA has set the time clock ticking for the public and stakeholders affected by the proposed rule, while the EPA's own SAB is still evaluating the scientific facts of the EPA's connectivity report that serves as the scientific basis for the agencies proposed rule change. It is not fair to force the affected parties to retain legal counsel, technical experts and economic experts to pore through tons of technical, legal and economic materials on a limited schedule, while the scientific evidence is still being technically evaluated and analyzed by the SAB.

Therefore, The Pulp & Paperworkers' Resource Council requests that the EPA and the CORPS suspend the current comment period and allow a one hundred eighty day comment period to begin after the SAB completes its review of the connectivity report, and the EPA takes action as necessary based on the SAB recommendations. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.175 Moreover, the process followed by the agencies to develop the supporting science was fundamentally flawed. The scientific basis of the rule was still evolving during most of the comment period. Yet EPA's charge questions to the SAB focused exclusively on connectivity science and never asked the SAB to address the distinction between "any nexus" and "significant nexus."[59] EPA sent the draft rule to OMB on the same day as

[59] "Connectivity of Streams and Wetlands to Downstream Waters; A Review and Synthesis of the Scientific Evidence Technical Charge to External Peer Reviewers."

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release of the connectivity report and only recently decided to provide the proposed rule to the SAB.[60] The agencies then extended the comment period from October 21, 2014, until November 14, 2014, following the release of the SAB's detailed comments on the proposed rule, which was simply too short a time period for the public to provide meaningful comments on the SAB's critique of the proposed rule. Thus, not only have the agencies improperly relied on science to control the legal test for jurisdiction, they also drew upon an incomplete report to support a vast expansion of their jurisdiction and then did not allow sufficient time to address the SAB's comments. (p. 16 – 17)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

CONSOL Energy, Inc. (Doc. #14614)

13.176 In September 2013, EPA published their Draft Connectivity of Streams and Wetlands to Downstream Waters report. The report and its subsequent conclusions were used as the foundation for the proposed rule. It is concerning that the proposed rule was published prior to the availability of the Science Advisory Board's (SAB) review, being that the report is the primary justification for the proposed change. Such an expansion of jurisdiction should not be based on a report that does not address the fundamental questions related to the significance a hydrologic connection. Following their review, the SAB reached much the same conclusion in their review of the Draft Connectivity of Streams and Wetlands to Downstream Waters report. CONSOL believes that because the SAB review was not available at the time of the proposal, the premises with which determinations were made is flawed, and further scientific evaluation is needed for such a change to be considered. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Washington Forest Protection Association (Doc. #15030)

13.177 Proposal Lacks Adequate Science Review

Adoption of the proposal is premature due to the status of scientific review of applicable documents by the Scientific Advisory Board (SAB). The SAB peer review of the applicable science to justify the rule is not complete or finalized. The timing of the key report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it interacts with the proposed rule is

The process of simultaneously evaluating the science during the comment process is a major hurdle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. WFPA recommends that the agencies wait to finalize and adopt the WOTUS rule until after the peer review is completed and the report is finalized. Adopting the proposal prior to the

[60] "EPA Science Advisors Plan Informal Review of CWA Jurisdictional Rule," BNA, June 20, 2014.

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final report being released is inappropriate and misses an opportunity to refine the proposal based on the scientific findings of the final connectivity report. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Edward Wisner Donation (Doc. #15438)

13.178 4. The proposed rule should not have been published until such time as the SAB issued its final Report.

EPA's Office of Research and Development ("ORD") had requested that EPA's Science Advisory Board ("SAB") review the EPA's draft report titled, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September of 2013) ("Report"). In response, SAB assembled an expert panel to review the Report. While instead of waiting for the review to be completed and the draft Report to be revised in accordance with SAB's comments, EPA instead went ahead and published the proposed rule in the Federal Register on March 25, 2014. It would not be until October 17, 2014, nearly seven (7) months later, that SAB would issue its comments. In essence, EPA has placed the proverbial "cart before the horse," by issuing its rule before the scientific Report on which it was to be based, was finalized. (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Georgetown Sand and Gravel (Doc. #19566)

13.179 The proposed rulemaking relies on a Connectivity Report that is not final. Even EPA's own Science Advisory Board reviewing the Report, has made statements regarding EPA's lack of transparency and true intent of proposing a rule before the Report is final. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Cattle Empire (Doc. #8416)

13.180 CONCERN REGARDING THE "REPORT"

EPA admits that the "Report" that was mentioned above is under review by EPA's Science Advisory Board (SAB) as this proposed rule is on public notice, but that the rule will not be finalized until that review and the final Report are complete. How can EPA base a proposed rule on a report that has not even been reviewed? And based on the previous statement from the preamble, it leads me to believe that the Report is not even final itself. Furthermore, the preamble states that ERG convened a one-day meeting with EPA's SAB on January 31, 2012 in Washington, DC. The meeting was closed to the public and considered an internal EPA deliberative process. This leads us to question the transparency of EPA's rulemaking process. How many other meetings have taken place without public input? On FR pg 22197 it states, "At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record,

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including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record." Will the rule be placed on public notice again after these "adjustments" are made? (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

North Dakota Soybean Growers Association (Doc. #14121)

13.181 On the date that the agencies published the proposed WOTUS rule, the EPA's Science Advisory Board had not completed its review of the report and, in fact, did not do so until 30 September 2014. Given the complex and controversial nature of the conclusions made in the report, until the public is given an opportunity to fully evaluate the peer review comments, the quality of the information in the report is unknown and cannot be relied on for important public policy development. (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Rose Acre Farms (Doc. #14423)

13.182 Reliance by the agency on the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Washington, D.C.: U.S. Environmental Protection Agency, 2013) is without any supportable basis. The report had not been fully reviewed by the Scientific Advisory Board (SAB) and therefore EPA was not able to incorporate the SAB suggestions into the proposed rule. Furthermore, this meant there could be no meaningful public comment about the details in the final rule as they had not even been established at the time of publication of the proposed rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

California Association of Winegrape Growers (Doc. #14593)

13.183 Further, CAWG is concerned that EPA and the Corps (the "Agencies") have engaged the SAB in a flawed process. First, sending a proposed rule to OMB before SAB completes its review of the underlying science suggests outcomes have been pre-determined. This approach is troubling for a number of reasons set forth in our comments below. CAWG also believes EPA's Technical Charge to SAB is too general, does not ask the right questions, and will not yield the kind of information the Agencies need to form a scientific basis for determining whether these connections have regulatory significance.

As previously mentioned it is our understanding that EPA sent a proposed rule to OMB for interagency review on September 17, 2013 while simultaneously withdrawing the 2011 Draft Proposed Rule and releasing the Report. It is also our understanding that the findings from the Report will be utilized as the scientific basis for final regulatory action pertaining to the proposed rule currently at OMB. Therefore, the Report has the potential for wide-ranging implications for many sectors of the economy including production

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agriculture. CAWG is concerned that these activities are the result of a problematic and flawed regulatory process.

First, it is not clear why a proposed rule that will be based on the scientific findings of a draft Report would be submitted to OMB prior to the SAB conducting and completing its scientific review. Submittal to OMB prior to scientific review suggests that both the scientific and policy outcomes are already predetermined rather than basing a proposed rule on a set of prior scientific findings. The optics of this approach raises legitimacy questions of the rulemaking process and reduces public confidence that the science is in fact determining policy; not the other way around.

Additionally, it is our understanding that the SAB members have not been supplied with a copy of the proposed rule to date. Special terminology and various existing legal and regulatory concepts and classifications are utilized in making jurisdictional determinations on possible "waters of the United States." Without a copy of the proposed rule, CAWG is concerned that unintended consequences will result a possible lack of understanding of the legal and regulatory framework within which the SAB's review should be properly placed. CAWG requests that the proposed rule submitted to OMB be withdrawn to allow for SAB review of the draft Report. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Missouri Soybean Association (Doc. #14986)

13.184 General Concern #1 - The public record and the public comment process has been a moving target resulting in further loss of public trust.

Connectivity Report - The proposed rule references EPA's draft scientific report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (i.e. Connectivity Report). EPA has stated that the Connectivity Report, when finalized, will provide the scientific basis and support for the WOTUS rule. To date, the Connectivity Report is a draft report which has been undergoing an EPA Science Advisory Board (SAB) review. It is clear now that the Connectivity Report will not be completed and made final until after the WOTUS rule comment period has closed. Thus, the public will not be able to consider the final connectivity report in its WOTUS rule comments. We feel it is reasonable to expect the underlining science be final and settled before a proposed rule, particularly one of this magnitude, be developed and presented to the public for comment. This situation unfairly limits the public's ability to provide meaningful comments.

Making the situation worse, the preliminary SAB review appears to suggest that the final connectivity report will include substantive changes and thus be something very different from the draft report made available during the public comment period. Therefore, these comments as well as other public comments will be prepared and based upon inaccurate and outdated information and science of which was placed in public record by EPA. This process and sequence of events will not achieve the desired clarity or provide the necessary transparency to gain public trust. Therefore, the proposed rule should be

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withdrawn and re-proposed after the final Connectivity report is made available for the public to review. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Jensen Livestock and Land LLC (Doc. #15540)

13.185 Jensen Livestock and Land LLC. assert that the agencies cannot rely on EPA's Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013). The agencies failed to have their scientific arm focus on the most fundamental scientific matters that are inseparably linked to the legal limits of the law: "significance" of connectivity, and that connectivity to TNWs instead of "downstream waters." Additionally, because the report was still under review when the proposed rule was published in the federal register, it is not a final document and therefore is subject to change and the public will not have a meaningful opportunity to comment on the final as the basis for this rule.

When the agencies crafted their proposed rule and requested its Office of Research and Development to develop this Connectivity report, the logical and fundament request to the researchers should have been to look at the importance (or "significance") of connections of these smaller waters to TNWs. It is unclear to the cattle industry how and why the agencies failed to ask the most important question that science should have informed under this regulation, "what is significance." The agencies response about that term being a legal question is weak at best. It is a legal term that requires scientific analysis. The agencies failure to even request an adequate and relevant analysis puts the entire report into the unusable category. Jensen Livestock and Land LLC assert that because the Connectivity report does not address the significance of connections it cannot be relied upon in the proposed rule.

The proposed rule states, "[t]he Report also concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas have a strong influence on downstream waters." (Proposed Rule at 22196). Unfortunately, EPA did not request its Office of Research and Development to frame the report in terms of effects on Traditionally Navigable Waters (TNWs). The report focuses on "downstream waters." It is unclear what that could entail exactly, but the broader interpretation could mean any water that is downstream from the water in question. Justice Kennedy's concurring opinion referenced above only allows isolated waters to be federally jurisdictional if they are significantly connected to a TNW, not "a downstream water." (Rapanos, J. Kennedy, concurring, at 10). This is an unwarranted expansion from the Kennedy opinion, and as he reiterates there is a limit to federal jurisdiction. His significant nexus test must be constrained to TNWs, instead of downstream waters, as the latter would obliterate any form of line describing the limit to federal jurisdiction under the CWA. The agencies cannot rely on the Connectivity report because it does not analyze the impacts to TNWs.

Additionally, Jensen Livestock and Land LLC assert that the agencies cannot rely on the Connectivity report because it has not been fully reviewed by the Scientific Advisory

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Board (SAB). At the time of publication in the federal register, the Connectivity report is a draft report, without incorporating the suggestions of the SAB panel. It is extremely troublesome that the agencies did not allow their own science to inform their rulemaking. It seems like the proposed rule was written before EPA's ORD department even assembled the Connectivity report. If that were not the case then the agencies would have waited to propose a rule until the SAB review of the report was completed. As it stands, the public will not have a meaningful opportunity to comment on a proposed rule that was informed by the final Connectivity report. The only logical reason to do this is if the agencies knew they would not have a final report that was different from the draft report. This is a brave assumption from the agencies, and shows that more likely, the agencies had the proposed rule written and then fit the science to meet its proposed rule. Jensen Livestock and Land LLC strongly assert that the agencies cannot rely on the draft Connectivity report for the reasons described above to support their proposed rule.

If the agencies incorporate a final Connectivity report in their final "waters of the U.S." definition, it will be substantively different than the proposed rule, requiring the agencies to resubmit the proposed rule to the public for comments. As it stands, the public cannot meaningfully comment on the proposed rule. (p. 14 – 15)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9.**

13.186 b. The Exclusions are Unclear and/or Undefined

i. Ditches

The agencies exclusions under (b)(3) and (b)(4) are unclear and not adequate for the livestock industry. It is impossible to determine how many ditches would even fall into these categories because, like so many other times throughout this proposed rule, the agencies have failed to carry out their duty to define key legal terms. Central to this point are the definitions of "ditches," "uplands" and "through another water." Neither of these important terms are even attempted to be explained in the proposed rule. Extraneous documents placed on the agencies' website outside of the proposed rule attempting to define uplands are not adequate nor legally binding. Any definitions the agencies create should be put out for public comment, before they are finalized. To not do so would be a violation of the APA.[61] (p. 22)

Agency Response: **This comment is not applicable to section 13.1. For information on ditches, see comment responses in Compendium 6.**

Goehring Vineyards, Inc. (Doc. #19464)

13.187 I. The Proposed Rule Improperly Relies on the Connectivity of Streams Report

[61] Supra Note 2.

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The Science Advisory Board's ("SAB") review of EPA's synthesis of the available science relative to connectivity of streams and wetlands is of utmost importance to me given my use of the land to grow food and fiber. Unfortunately, in many respects, the Report diverges unnecessarily from existing law and usage, causing great concern. I have numerous concerns with the Draft Proposed Rule as it improperly expands federal jurisdiction under the Clean Water Act ("CWA"), substantially broadens all prior guidance documents and interpretations, and is inconsistent with existing federal law and case law.

Further, I am concerned that EPA and the Corps (the "Agencies") have engaged the SAB in a flawed process. First, sending a proposed rule to OMB before SAB completes its review of the underlying science suggests outcomes have been pre-determined. This approach is troubling for a number of reasons set forth in our comments below. I also believe EPA's Technical Charge to SAB is too general, does not ask the right questions, and will not yield the kind of information the Agencies need to form a scientific basis for determining whether these connections have regulatory significance.

As previously mentioned it is our understanding that EPA sent a proposed rule to OMB for interagency review on September 17, 2013 while simultaneously withdrawing the 2011 Draft Proposed Rule and releasing the Report. It is also our understanding that the findings from the Report will be utilized as the scientific basis for final regulatory action pertaining to the proposed rule currently at OMB. Therefore, the Report has the potential for wide-ranging implications for many sectors of the economy including production agriculture. I am concerned that these activities are the result of a problematic and flawed regulatory process.

First, it is not clear why a proposed rule that will be based on the scientific findings of a draft Report would be submitted to OMB prior to the SAB conducting and completing its scientific review. Submittal to OMB prior to scientific review suggests that both the scientific and policy outcomes are already predetermined rather than basing a proposed rule on a set of prior scientific findings. The optics of this approach raises legitimacy questions of the rulemaking process and reduces public confidence that the science is in fact determining policy; not the other way around.

Additionally, it is my understanding that the SAB members have not been supplied with a copy of the proposed rule to date. Special terminology and various existing legal and regulatory concepts and classifications are utilized in making jurisdictional determinations on possible "waters of the United States." Without a copy of the proposed rule, I am concerned that unintended consequences will result a possible lack of understanding of the legal and regulatory framework within which the SAB's review should be properly placed. I request that the proposed rule submitted to OMB be withdrawn to allow for SAB review of the draft Report. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Martin Marietta Materials, Inc. (Doc. #6250)

13.188 Furthermore, EPA`s own Science Advisory Board (SAB) has not yet issued its analysis of the connectivity report which EPA indicated was to serve as the scientific basis to the proposal. EPA only recently sent the proposal to the SAB, contradicting agency claims that it would rely on the SAB analysis to develop the proposal, and raising concerns about the transparency of this particular rulemaking. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Pike County Highway Department (Doc. #6857)

13.189 I appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, I have concerns with the process used to create this proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

- Proposed rule should follow, not precede, draft science report

(…) In addition to the aforementioned issues, I am concerned with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

13.190 (…) I respectfully request that the agencies consider suspending the current public comment period and re-releasing the proposal, with the updated economic analysis (based on the comments received), after the science-based connectivity report is issued. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the economic analysis see comment responses in Compendium 11.

Ingram Barge Company (Doc. #14796)

13.191 Additionally, the rule improperly fails to account for the final scientific review of EPA's Scientific Advisory Board ("SAB") and thus denies the public a reasonable opportunity to evaluate the agencies' response to that review. At that time, the agencies sent the Proposed Rule to the Office of Management and Budget ("OMB") for review, and EPA released the SAB's draft scientific report on the connections of streams and wetlands to

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large water bodies like rivers, lakes, and oceans.[62] The agencies state that the rule will not be finalized until the completion of the final report, which will inform the final rule.[63] However, EPA indicates that the SAB 's final report will not be available until after the close of the public comment period on the rule. As EPA's draft scientific report has not yet been peer-reviewed or finalized, the Agencies' should extend the Proposed Rule's comment period until after the final report is issued to allow for proper review. (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

California Farm Bureau Federation (Doc. #16399)

13.192 I. The Proposed Rule Improperly Relies on the Connectivity of Streams Report

As stated in the Proposed Rule's preamble, the Agencies will be utilizing the Scientific Advisory Board's ("SAB") review of the Connectivity of Streams and Wetlands to Downstream Waters Report ("Report") as the scientific basis for any final regulatory action pertaining to the Proposed Rule. (79 Fed. Reg. 22,190 (April 21, 2014).) Therefore, the SAB's review of this Report has the potential for wide-ranging implications for more sectors of the economy including production agriculture.

Farm Bureau is concerned that this activity is the result of a problematic and flawed regulatory process. First, it is not logical that the Agencies would prepare a draft rule before the foundational science for the proposal is reviewed and finalized. Second, sending a proposed rule to the Office of Management and Budget before the SAB completes its scientific review of the underlying science suggests outcomes have been pre-determined. It is our understanding that the SAB only recently completed their review of the Report on October 17, 2014.

The optics of this approach raise legitimacy questions of the rulemaking process and reduces public confidence that the science is in fact determining policy; not the other way around. Additionally, the public should be afforded the opportunity to comment on the final Report prior to the deadline to review and comment on the Proposed Rule. Given that this has not occurred, the Proposed Rule's foundational reliance on the Connectivity of Streams Report is flawed. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on the economic analysis, see comment responses in Compendium 11.

BMG Marine, Inc. (Doc. #18855)

13.193 The proposed rulemaking violates the Administrative Procedure Act and various Executive Orders specifically as they relate to transparency and process. (p. 2)

[62] EPA Office of Research & Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Sept. 2013).
[63] 79 Fed. Reg. at 22,189-90.

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Agency Response: **For information on the Administrative Procedure Act, see summary response for section 13.2.1.**

American Public Gas Association (Doc. #18862)

13.194 Prejudges the Science

There are certain aspects of the NOPR that APGA finds very troubling from the standpoint of fundamental administrative law principles. The need to broaden the scope under the proposed rule is based on EPA's draft scientific study on the connectivity of waters "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidenc*e." The EPA's Science Advisory Board panel is still in the process of peer-reviewing the draft connectivity report.

In addition, the Agencies base their analysis of "significant nexus"- a key phrase in the judicial history of the reach of CWA jurisdiction[64] on a yet -to-be finished literature review which fails to examine what connections are "significant." The final report was not released during the comment period, which did not allow the affected parties adequate time to review and comment.

Moreover, it does not appear that the Agencies intend to give the public an opportunity to review the final connectivity report as part of the waters of the United States (WOTUS) rulemaking. There are numerous places throughout the preamble to the proposed rule wherein the Agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the Science Advisory Board (SAB) review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters," and the public deserves the opportunity to comment on the conclusions of that review process. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Alabama Road Builders Association (Doc. #18913)

13.195 Additionally, and even further disconcerting, is the recently released report by the EPA's Science Advisory Board recommending that the rule go even further than as proposed. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the SAB process see compendium 9.**

Florida water Environment Association (Doc. #0870)

13.196 The FWEA Utility Council respectfully requests that EPA provide a 180-day comment period and that this extended timeclock begin to tick only after the Science Advisory Board (SAB) releases its final report summarizing its analysis of the proposed rule's

[64] E.g., SWANCC. 531 U.S. at 167-68.

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underlying connectivity report and EPA incorporates the SAB' s recommendations into the rule proposal. This extension will enable the FWEA Utility Council to evaluate the hundreds of pages of proposed rule language and preamble as well as sift through the over 1,000 technical publications cited in the proposal. Additionally, delaying the comment period until after the SAB recommendations are incorporated will help ensure that the comments can incorporate the best scientific information available and are directed at the agency's latest thinking on the appropriate scope of federal jurisdiction over Florida waters. (p. 1 - 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

WateReuse Association (Doc. #1349)

13.197 Given the significance of the proposed rule, the public should be permitted the opportunity to thoroughly review and comment on the EPA's proposed rule as well as its supporting documentation, including its lengthy Appendices (Appendix A- Scientific Evidence, Appendix B- Legal Analysis), Economic Analysis, and the Draft (and Final) Connectivity Report. We believe that additional time for comment on the proposed rule is warranted for many reasons, including the following:

The agencies must complete their review of the underlying science before the rulemaking can commence. Additional time is needed for the public to respond to this final review of the science in commenting on the proposed rule.

The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft Connectivity Report, which is currently under review by the EPA Science Advisory Board (SAB). As we understand the current status of that review, the SAB is still questioning what proper criteria should be used for determining under which circumstances a connection amounts to a "significant nexus" for the purposes of establishing CWA jurisdiction.

The EPA has acknowledged publically that the SAB and the agency are still considering options for review of the adequacy of the science to support the proposed rule. Given the ongoing SAB review, and the fact that EPA has not yet determined how to review the adequacy of the science to support the proposed rule, commenters should have at least 120 days from the time when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

Throughout the 300-plus page preamble to the proposed rule, tile agencies ask the public to provide complex technical information regarding the proposed rule's scientific justifications. We believe the purpose of the SAB Panel review of the draft connectivity study was to evaluate the state of the science evolving around the connectivity of water bodies, and the public deserves the opportunity to respond at the conclusion of the review process.

A significant amount of time and technical expertise will be required first to evaluate the final Connectivity Report from the SAB and the agencies' scientific conclusions and responses) and then to prepare substantive comments on the proposed rule. We believe

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the comment period should be extended to give our members the additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback. (p. 1 – 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Yakima Basin Joint Board (Doc. #1708.1)

13.198 I am respectfully requesting an extension of the public comment period for an additional 90 days from the current due date of July 21, 2014, or for 90 days from the release of the final connectivity report by the EPA (whichever is later) on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule Defining "Waters of the United States" Under the Clean Water Act. 76 Fed. Reg. 22,188 (Apr. 21, 2014). (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Colorado Wastewater Utility Council (Doc. #1744)

13.199 The CWWUC is writing to urge you to extend the comment period for the proposed rule clarifying the definition of "Waters of the United States" under the Clean Water Act. The current comment period is 90 days. Given the importance of the proposed rule and its potential impact to the application of Clean Water Act requirements, we request the comment period be extended to 120 days after completion of the review of the report titled "*Connectivity of Streams and Wetlands to Downstream Waters/A Review and Synthesis of the Scientific Evidence*". (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Palm Bech County MS4 NPDES Steering Committee (Doc. #1755.1)

13.200 It is our understanding that the rule as proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) is being technically evaluated and analyzed by EM'S Science Advisory Board (SAB).

The 90-day comment period is simply not enough time for MS4s to adequately review and evaluate the rule and the thousands of pages of supporting materials developed by the EPA and ACOE over a period of years, especially when the basis of the proposed rule is still being reviewed by the SAB.

The Palm Beach County MS4 permittees request that the agencies allow for an 1 80-day comment period, and that the comment period not begin until the SAB completes its review and EPA takes action as necessary based on SAB recommendation. (p. 1 – 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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Littleton/Englewood Wastewater Treatment Plant (Doc. #3526)

13.201 Finally, we are concerned that the proposed new rule has been issued for comments before the SAB has concluded its review of EPA's connectivity study. This connectivity study is supposed to form part of the scientific basis for the regulation. Because the hydrology is fundamentally different in the arid West, we hope that this connectivity study will take into account these differences. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9, and http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414

Department of Public Works, City of Northglenn, Colorado (Doc. #14990)

13.202 The EPA has stated that it would conduct an exhaustive and peer reviewed scientific literature review to evaluate connectivity between various surface hydrologic features and downstream Traditional Navigable Waters (TNWs) prior to development of the Proposed Rule. However, the Agencies are on the path to finalizing the Proposed Rule while the Connectivity Report currently remains in draft form. Requesting comments on the Proposed Rule before the Connectivity Report is final is problematic. The purpose of the Connectivity Report should be to provide the science and technical foundation for the Proposed Rule. The Connectivity Report is a compilation of independent peer-reviewed scientific literature that, when finalized, is intended to provide the scientific justification for the Agencies' interpretation of when waters are subject to CWA jurisdiction. The chartered Science Advisory Board (SAB) is currently conducting quality reviews of its draft peer review reports on the Connectivity Report and is deliberating on the adequacy of the scientific and technical basis of the Proposed Rule.

Northglenn requests that any final regulatory action related to CWA jurisdiction be based upon a complete and validated version of the Connectivity Report. (p. 4 – 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

13.203 The City of Northglenn respectfully requests that the Agencies follow the proper course of action to ensure that the Proposed Rule is based upon a valid scientific and technical foundation:

(1) Revise the Connectivity Report based upon the comments and concerns expressed by Northglenn and other stakeholders;

(2) Finalize the Connectivity Report;

(3) Revise the Proposed Rule accordingly pursuant to the findings and recommendations in the Connectivity Report; and

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(4) Reissue the Proposed Rule for public comment. Following this expanded process will allow stakeholders to submit informed comments based on the best and most current available information. (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Arizona Public Service Company (Doc. #15162)

13.204 A. Agencies' Rulemaking Conducted Prior to Completion of Various Technical Analyses and Public Review of those Analyses

The Agencies state that the draft *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* provides the scientific basis for the revised definition of WOTUS. The draft report is marked "Do Not Cite or Quote"; however, since EPA stated in the preamble to the proposal that the rule will not be finalized until the draft Connectivity Report is finalized, stakeholders have no choice but to use the draft Connectivity Report for purposes of filing their comments.[65] The draft Connectivity Report is a compilation of peer-reviewed literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and EPA's interpretation of the effect of the connections on chemical, physical, and biological integrity of downstream waters. SAB was tasked with reviewing the report and answering questions regarding its clarity and technical accuracy. As tasked, SAB focused on the scientific evidence and conclusions in the report; however, APS cautions that the science must be considered in light of Supreme Court precedent on jurisdiction.[66] For example, Justice Kennedy's caution that "the required nexus must be assessed in terms of the statute's goals and purposes" has been ignored.[67] (p. 3)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Utility Water Act Group (Doc. #0852)

13.205 The connectivity report is currently undergoing review by the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report. The SAB Panel has released a 74-page draft report of its initial recommendations and findings regarding EPA's connectivity report, but the SAB Panel has not yet issued a final report. Indeed, during two recent public teleconferences, the SAB Panel discussed several major changes that should be made to the connectivity report that the Panel will likely include in its final recommendations. As a result, the science that the agencies will rely on in the final rule is still likely to change. Accordingly, the agencies ought to extend the comment period for at least 90 days from EPA's issuance of the final connectivity report so that the

[65] 79 Fed. Reg. at 22190.
[66] See UWAG Comments on WOTUS, Section II – The Proposed Rule Exceeds the Agencies' Authority Under the Clean Water Act and Is Inconsistent with Supreme Court Precedent (Nov. 14, 2014).
[67] Rapanos, 547 U.S., at 779.

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public can fully evaluate this critical scientific review before they must submit their comments. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.206 (…) Similarly, with the proposed rule's Appendix A, the connectivity report, and the SAB Panel's draft report, the agencies have provided a large amount of scientific information that must be reviewed. Recognizing the importance of careful review of that data, EPA has given the SAB members eight months to review the information and develop a report, albeit one responding to a very narrow list of questions. The public is entitled to no less an opportunity for review. Only by careful review and analysis of the large amount of scientific information available will UWAG be able to develop cogent and precise comments on the rule and its supporting documents. We will need much more time and assistance to understand all of the technical information and its implications for the agencies' decisions. For these reasons, additional time is warranted to allow the public to adequately address the proposed rule's economic impacts and underlying scientific support. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Duke Energy (Doc. #0855)

13.207 (…) Second, the connectivity report, which EPA and the Corps are relying on for the rule's scientific basis, is currently undergoing review by the Science Advisory Board (SAB) Panel [Review of the EPA Water Body Connectivity Report]. The SAB Panel released a 74-page draft report of its initial recommendations and findings regarding EPA's connectivity report, but the SAB Panel has not yet issued a final report. In a recent teleconference, the SAB Panel discussed several major changes that should be made to the connectivity report that it will likely include in its final recommendations report. As a result, the science that the agencies will rely on in the final rule is still likely to change. Accordingly, the agencies ought to extend the comment period for at least 90 days from EPA's issuance of the final connectivity report, so that the public can fully evaluate this critical scientific review before they must submit their comments. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Dynegy, Inc. (Doc. #1240)

13.208 The proposed rule is purportedly based on the scientific conclusions of EPA's connectivity report, but the report is still under review by the Science Advisory Board (SAB) panel and is likely to change significantly per the SAB panel's recommendations. (p. 2)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Association of American Pesticide Control Officials (Doc. #1651)

13.209 (…) Specifically, AAPCO asks the agencies to extend the comment period for a minimum of 90 days with a target of 90 days after the EPA Science Advisory Board (SAB) finalizes its' report on the "Connectivity of Streams and Wetlands to Downstream Waters" ("Connectivity Study"). (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.210 (…) The Connectivity Study, which the agencies have relied upon in the development of this proposal, remains to be finalized by EPA's Science Advisory Board (SAB). FIFRA State Lead Agencies, our regulatory and/or technical assistance partners potentially impacted by this proposal will benefit greatly from the opportunity to review and evaluate the final work of the SAB. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Clearwater Watershed District, et al. (Doc. #9560)

13.211 **The EPA's Science Advisory Board is still reviewing public comments on the Office of Research Development's report, *Connectivity of Streams and Wetlands to Downstream Waters.***

We are concerned with the chronology in which the agencies have proposed this rule in relation to review and final publication of the U.S. EPA's Science Advisory Board's report on the connectivity of streams and wetlands to downstream waters, a synthesis of published peer reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters.

Prefatory comments to the rule promise that the final rule will be informed by the final version of the Science Advisory Board's report. A significant number of public comments were submitted to the report, including comments from many of Minnesota's counties, watershed districts, and other local government units. This proposed rule comes at a time before the agency has reviewed, responded, and altered its report based on comments and concerns regarding unsound science, use of new terminology, and other important considerations. In the current rulemaking process, the public is afforded zero opportunity to review the final, scientific report to aid in its analysis of the proposed rule.

While we appreciate the extension given to the comment period, we recommend that the public be given ample time to review the contents of the Science Advisory Board's final report before the comment period on the proposed rule is opened and closed.

RECOMMENDATION: We recommend that the agencies indefinitely suspend current rulemaking on defining waters of the United States until the Connectivity of Streams and

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Wetlands to Downstream Waters report is finalized and the public is afforded time to analyze its findings before the deadline for comments on the proposed rule. (p. 4 – 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Mohave Electric Cooperative, Inc. (Doc. #10953)

13.212 The proposed rule is predicated on a science report that is still in draft form.

The Proposed Rule is significantly informed by the EPA's conclusions in the Science Report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence* (Report), which is described in the Proposed Rule as, "a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters." However, by the Agencies' own admission, the Report was still in peer review by the Scientific Review Board (SRB) when the Proposed Rule was published in the Federal Register. While the Agencies state that the Proposed Rule will not be promulgated until the Report is finalized, publishing a draft rule when the scientific analysis upon which it is predicated has not been completed is illogical and inappropriate.

In addition to peer review by the SRB, the Agencies solicited comments from the public on the draft Report. The ultimate fate of those thousands of comments is unclear. Did they inform the draft Report that was presented to the SRB for peer review? Were they provided to the SRB for consideration in their review? It is assumed that the Agencies will provide a discussion of the comments, and their response, in the final rule, but the public needs some assurance that the peer review being completed by the SRB has somehow acknowledged these comments. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Duke Energy (Doc. #13029)

13.213 If the agencies had waited to develop the proposed rule subsequent the development of the SAB's Final Recommendation Report and incorporation of their recommendations into the Final Connectivity Report, it could be reasonably anticipated that a different version of the proposed rule would have resulted, with potentially significant changes to wording, definitions or concepts for establishing jurisdiction of "waters of the United States." However, with the agencies issuing the proposed rule for comment prior to the SAB reviewing and finalizing their recommendations to the scientific foundation of that rule, it leads one to conclude that the SAB's recommendations will not be given adequate consideration in the rulemaking. (p. 70)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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Southern Company (Doc. #14134)

13.214 The Agencies Must Reissue a Proposed Rule for Public Review and Comment after EPA Finalizes Its Scientific Study

In their haste to finalize this rule, the agencies inexplicably issued the proposal before finalizing the foundational scientific study that forms the basis for the rule. Despite the appropriate decision by the agencies to extend the public comment period, this rulemaking has been flawed from the very beginning and has deprived the public of a meaningful opportunity to comment.

There is no justification for the flawed process the agencies have pursued. The current regulatory definition of "waters of the U.S." has been in place for over 25 years and the most recent Supreme Court decision dealing with CWA jurisdiction was decided over eight years ago. Since this most recent CWA decision, the agencies have issued two significant guidance documents and proposed a third to clarify the current regulatory definition.[68] Through this rulemaking, EPA has purportedly undertaken a comprehensive assessment of the science the agencies agree must inform any rule clarifying the scope of CWA jurisdiction—which with its Connectivity Report. See Draft Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Washington, DC: U.S. Environmental Protection Agency, September 2013) (Draft Connectivity Report). But instead of allowing the scientific review to take its course and properly conclude, thus benefiting from and allowing that review to inform the agencies' decision on the best available science, the agencies plowed ahead with concurrent processes for finalizing the rule and the scientific study. Putting the cart before the horse, the agencies proceeded to build a proposal upon a flawed and incomplete scientific assessment, without sufficient peer-review, and in a manner that has deprived the public of a meaningful opportunity for notice and comment on many important aspects of the science supposedly underlying the rule. These would be shaky grounds for any rulemaking, but are especially shaky grounds for a rule of this magnitude of importance, and where the science and policy are so intrinsically linked.

EPA's Science Advisory Board (SAB), which was tasked with reviewing the adequacy of the scientific and technical basis of the proposal, did not complete its review on this charge until September 30, 2014, leaving less than six weeks for the public to review and respond to the agencies' proposal in light of the SAB's review[69]. The final draft report from the SAB's ad hoc panel charged with conducting a peer review of EPA's Draft Connectivity Report (Connectivity Panel) was approved by the chartered SAB on September 26, 2014, yet the report was not finalized and submitted to EPA or the public for review until October 17, nearly a month later and less than a month before the

[68] See "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. U.S. & Carabell v. U.S.," Dec. 2, 2008, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

[69] See September 30 Letter from Dr. David Allen, Chair of SAB, to Administrator McCarthy.

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deadline for public comment.[70] Although the SAB generally concluded that EPA's Draft Connectivity Report is an adequate scientific basis for key components of the proposed rule, the SAB panelists have repeatedly raised serious concerns regarding definitions and approaches taken under the proposal, which strongly support scrapping the current proposal and starting all over. See generally, SAB Final Report; SAB Panel Memo; SAB Letter to EPA.

At present, EPA has yet to finalize its own Draft Connectivity Study, the purported foundation of the rulemaking. At best, this sequencing of events contravenes important public policy and administrative requirements required by law – which is especially troubling and problematic for such a significant and complex rulemaking. And at worst, the procedural leapfrogging here makes a charade of the public input and comment process.

Southern Company fails to see a compelling public interest warranting such a compressed and hasty time-frame. Alarmingly, even the agencies themselves have struggled at times to justify the urgency of this rulemaking.[71] According to the agencies, the proposal would only expand the waters protected by three percent. Viewed another way, existing regulations and guidance protect 97 percent of the waters that would be protected by the current proposal. While we firmly disagree with the agencies' three percent estimate (as discussed below), if correct, then the estimate most certainly undermines the agencies rush to regulate in this atypical, expedited manner. Whatever benefits the proposal might provide in terms of added protection over isolated and relatively insignificant waters certainly pale in comparison to the added costs it would impose on industry and federal and state regulatory agencies alike.

Indeed, there are several public interest bases requiring the agencies to take a more careful, sequential approach. To take just one example, acting well before guidance and input from the SAB, the agencies' have woven into the heart of their proposal a categorical approach to defining connectivity. Now, however, the Connectivity Panel has, nearly seven months after the agencies' first issued their proposal, released the SAB Final Report, which calls into question this very approach to defining connectivity, essentially the most critical concept underlying the proposal.

[70] See October 17, 2014 Letter from Dr. Allen and Rodewald to Administrator McCarthy transmitting SAB's 88-page Final Report, available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf (SAB Final Report); see also September 2, 2014 Memorandum from Dr. Amanda Rodewald to Dr. David Allen, Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act," available at http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf (SAB Panel Memo).

[71] See EPA Struggles To Identify Cases To Bolster Rule Defining Water Law's Reach, InsideEPA Article (May 22, 2014), available with InsideEPA.com subscription at http://insideepa.com/201405222471692/EPA-Daily-News/Daily-News/epa-struggles-to-identify-cases-to-bolster-rule-defining-water-laws-reach/menu-id-95.html?s=mu.

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Moreover, the agencies' rushed proposal contravenes current law and basic principles of notice-and-comment rulemaking, as well as The Whitehouse Office of Management and Budget (OMB) guidelines governing administrative process.[72] As stated above, these procedural deficiencies are especially concerning for a substantial rulemaking such as this one where the scientific and legal concepts are inextricably linked and where the sponsoring agencies rely heavily on a scientific basis for promulgating the regulatory scheme. As the House Committee on Science, Space and Technology rightly noted in an October 18, 2013 letter to EPA Administrator McCarthy, [a]ny attempt to issue a proposed rule before completing an independent examination by the Agency's own science advisors would be to put the cart before the horse…. The Agency's current approach to CWA jurisdiction appears to represent a rushed, politicized regulatory process lacking the proper consultation with scientific peer reviewers and the American people. Under the law, the advice of scientific experts is a pre-requisite, not an afterthought.

At present, although the SAB has concluded its review, the EPA has yet to revise and finalize its Draft Connectivity Report to account for the SAB's extensive comments. Yet, as the SAB Final Report now reveals, EPA's Draft Connectivity Report has major technical deficiencies and inaccuracies. Assuming the agencies proceed with finalizing this key feature underlying the proposal with additional changes based on the SAB Final Report, the public will have been denied an opportunity to review and comment on those changes. To, on the other hand, ignore this important scientific critique and simply plow ahead with finalizing the proposal in spite of it, would be equally unacceptable.

Among other serious shortcomings, the SAB Connectivity Panel expressed concern that EPA failed to explain EPA's "weight of evidence" approach for screening, compiling, and synthesizing the peer-reviewed scientific literature. See SAB Final Report at 10. As the SAB noted, peer-reviewed literature is often subject to publication and selection bias, and EPA's approach may suffer from the same bias and therefore the EPA needs to be more "transparent" in its process. See SAB Final Report at 2, 10. Toward this end, the SAB Final Report provides:

The extent to which an exhaustive literature review was performed should be clearly stated in the Report. The SAB recommends that the EPA report include a separate section

[72] See Information Quality Act, Pub.L.106-554 (2001); see also Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Office of Management and Budget (Feb. 22, 2002). Even viewing the process employed by the agencies through the most charitable lens, the proposal fails on so many levels to meet the basic tenets of administrative procedure. See also Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365:
The Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the ... [CWA] ... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.
Significantly, the Environmental Research, Development and Demonstration Authorization Act goes on to explain that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation." Id.

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that details methods used to identify, screen, compile and synthesize evidence from the literature. This should address both the studies used to derive "weight of evidence" conclusions and those used for illustrative case studies. This section should include, as applicable, details such as databases searched, keywords used, screening criteria applied, and additional approaches used to identify relevant literature. These and related details would help engender confidence that the report's conclusions are based on an objective and systematic review of the available evidence.

SAB Final Report at 10. EPA should describe its process for selecting certain scientific studies over others, including its decision to focus solely on literature involving the connectivity of water features to traditional navigable waters (TNWs), as opposed to the role of ecosystems broadly, including upland buffer zones, in protecting water quality. Wetlands, for example, often serve as sinks to pollutants such as sediments, pesticides, nutrients, phosphorus, and mercury (see Draft Connectivity Report at 5-10, 5-12, and 5-14); whereas, uplands help to filter out pollutants before they even reach a water body. EPA's failure to include scientific literature on the role of non-jurisdictional uplands in protecting the biological, chemical and physical integrity of the nation's water bodies reveals a clear selection bias. (p. 8 – 12)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. For additional information on the final Connectivity Report, see http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414**

CropLife America (Doc. #14630)

13.215 CLA appreciates the extension of the comment deadline on this proposed rule to provide an opportunity to comment on the SAB's response to the Connectivity Report, however, this does not cure the agencies' failure to comply with the APA by publishing this proposed rule for comment before the final scientific report underlying this proposed rule is completed. "Under APA notice and comment requirements, [a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies [in its rulemaking]."[73] EPA should re-propose this rule by relying on the Final Connectivity report to provide the public meaningful opportunity to comment on a proposed rule based on science supported by substantial evidence, particularly in light of major concerns raised by the SAB.[74] Furthermore, the APA requires that a final rule be a

[73] Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 236 (D.C. Cir. 2008) (citation omitted).
[74] See generally SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence on Proposed Rule (Oct. 17, 2014).

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"logical outgrowth" of an agency's proposed rule.[75] It will be extremely difficult for the agencies to account for the SAB panel's recommendations in a final rule that is a "logical outgrowth" of this proposed rule. (p. 12)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on logical outgrowth, see section 13.2.1 on the Administrative Procedure Act.

Metropolitan Water District of Southern California (Doc. #14637)

13.216 Metropolitan reiterates its request that the Agencies postpone the comment period for the proposed rule until at least 120 days following completion of the final version of the report, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental streams and wetlands on downstream waters (Draft Connectivity Report). Due to the complexity and length of the Draft Connectivity Report, Metropolitan requests a postponement of the comment period for the proposed rule until at least 120 days following completion of the final version of the Draft Connectivity Report so that the regulated community has an opportunity to fully assess the implications of the rule.[76]

The proposed rule states that the Agencies' decision on how best to address jurisdiction over "other waters" in the final rule will be informed by the final version of the Draft Connectivity Report and other (unspecified) scientific information (79 Fed. Reg. 22189). The connectivity study is intended to provide information about the connectivity or isolation of streams and wetlands relative to large water bodies in order to understand such connections, the factors that influence them, and the mechanisms by which connected waters, singly or in aggregate, affect the function or condition of downstream waters. Therefore, this study will inform not just policy decisions related to "other waters," but also the Agencies' definition of significant nexus, a key concept addressed in the U.S. Supreme Court cases, *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), and *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). The Science Advisory Board's recent review (dated October 17, 2014) of the Draft Connectivity Report suggests a number of major revisions to this report that could significantly change the terminology and scope of the proposed rule. Therefore, we respectfully submit that soliciting comments on the proposed rule should follow completion of the final Draft Connectivity Report. (p. 3 – 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

[75] Small Refiner Lead-Phase Down Task Force v. EPA, 705 F.2d 506, 543 (D.C. Cir. 1983).
[76] Metropolitan submitted a comment letter to the Agencies on May 28, 2014, requesting an extension of the current comment period for the proposed rule until at least 120 days following completion of the final version of the Draft Connectivity Report (Enclosure 3).

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Utility Water Act Group (Doc. #15016)

13.217 Indeed, the Proposed Rule was drafted by the Agencies without waiting for any of the technical analysis provided by the SAB panel or the public, drawing into question the extent to which the Agencies actually value the establishment of a valid scientific technical basis for tying jurisdictional limits in the Proposed Rule to measureable, objective connections to those "waters that were or had been navigable in fact or which could reasonably be so made," and which thereby served as "Congress['] . . . authority for enacting the CWA" SWANCC, 531 U.S. at 172. As such, the Proposed Rule should be withdrawn so that it can be revised in consideration of the comments that follow, the SAB's and other parties' criticisms of the Draft Connectivity Report, and other science cited by UWAG in Appendix A and by other regulated entities in response to the Proposed Rule. (p. 106)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Northern California Water Association (Doc. #17444)

13.218 We also believe that the underlying science of the proposed rule has not been fully vetted by the agencies with the public to allow for the rule to move forward. We would like to see a public comment period opened on the final Connectivity Report currently under review by the Science Advisory Board (SAB) of the EPA when the report is finalized with the SAB recommendations attached. The report should be finalized subject to a public comment period, prior to the closing of the comment period on the proposed rule. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Protect Americans, Board of Directors (Doc. #12726)

13.219 The agencies rely heavily on the Scientific Report which provides "a context for considering the evidence of connections between downstream waters and their tributary waters, and to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which the connections affect the function or condition of downstream waters." Id. at 22,196. Incredibly, however, "[t]he Report is [still] under review by EPA's Science Advisory Board" and, therefore, is incomplete. Id. at 22,190. Reliance on the draft Report is misguided. It is also very troubling given that the agencies have indicated it may support a determination that even more waters fall into the "jurisdiction by rule" categories. Id. at 22,198 ("The Report indicates that there is evidence of very strong connections to some subcategories that are not included as jurisdictional by rule. The agencies solicit comment on making such subcategories of waters with very strong connections jurisdictional by rule.").

The general public cannot be expected to review, analyze and rely on a 330 page scientific report that serves as the scientific basis of much of the rule, particularly when said Report is an unfinished draft. (p. 13)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Colorado Wastewater Utility Council (Doc. #13619)

13.220 Furthermore, we are concerned that the proposed new rule has been issued for comments before the SAB has concluded its review of EPA's connectivity study. This connectivity study is supposed to form part of the scientific basis for the regulation. Because the hydrology is fundamentally different in the arid West, we need assurances that this connectivity study will take into account these differences. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the agencies consideration of the Connectivity Study see compendium 9, and Final Connectivity Report at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414 .**

Coalition of Alabama Waterways (Doc. #15101)

13.221 At that time, the agencies sent the Proposed Rule to the Office of Management and Budget ("OMB") for review, and EPA released its draft scientific report on the connections of streams and wetlands to large water bodies like rivers, lakes, and oceans.[77] The agencies stated that the rule would not be finalized until the completion of the final connectivity report, which would inform the final rule.[78] However, the draft report was under review by the EPA's Scientific Advisory Board ("SAB") during most of the comment period. EPA did not release the SAB's final review of the connectivity report until October 17, 2014. The agencies provided four additional weeks after the close of the public comment period on the rule to allow stakeholders to consider the SAB's final review.[79] (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.222 The Proposed Rule Reflects an Improper Disregard of Science

As noted above, EPA's connectivity report, which the agencies purport to rely on as the foundation of the Proposed Rule, has only recently undergone review at the SAB and is not final. The data released after publication of the proposed rule is too complex and voluminous to review during the time allowed, even with the four-week extension. At least as important, EPA has not provided a formal response to the SAB's review or indicated its view as to the legal and regulatory significance of the SAB's findings. That

[77] EPA Office of Research & Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Sept. 2013).
[78] 79 Fed. Reg. at 22,190.
[79] 79 Fed. Reg. 63,594 (Oct. 24, 2014).

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is critically important and something the agencies can and should publish for notice and comment prior to finalizing a rule.

The agencies' rulemaking process is entirely disordered. The scientific analysis supporting a rulemaking should be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts are intertwined. In this instance, the troubling conclusion is that the agencies set the policy goal of greater control of land use decisions first and only afterwards sought for a rationale. (p. 13)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Mobile Baykeeper (Doc. #16472)

13.223 The new rule should also not include a categorical exclusion for groundwater and waste treatment systems. Categorical exclusion of groundwater will lead to regulatory confusion and is not supported by sound science as described by numerous members of the SAB. Further, EPA lacks the authority to exempt waste treatment system impoundments that are otherwise waters of the U.S. from coverage under the CWA and EPA is doing so in violation of the Administrative Procedure Act. (p. 2)

Agency Response: **For information on exclusions for groundwater and waste treatment systems, see comment responses in Compendium 7.**

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

13.224 Finally, the rule improperly fails to account for the final scientific review of EPA's Scientific Advisory Board (" AS") and thus denies the public a reasonable opportunity to evaluate the agencies' response to that review. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.225 The Proposed Rule Reflects an Improper Disregard of Science

As noted above, EPA' s connectivity report , which the agencies purport to rely on as the foundation of the Proposed Rule, has recently undergone review at the SAB and is not final. The data released after publication of the proposed rule is too complex and voluminous to review during the time allowed, eve n with the four-week extension. At least as important, PA has not provided a formal response to the SAB's review or indicated its view as to the legal and regulatory significance of the SAB's findings. That is critically important and something the agencies can and should publish for notice and comment prior to finalizing a rule.

The agencies ' rulemaking process is entirely disordered. The scientific analysis supporting a rulemaking should be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts and intertwined. In this instance, the troubling conclusion of that the agencies set the policy goal of greater control of land use decisions first and only afterwards sought for a rationale. (p. 11)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

13.226 The Science Has Not Been Peer-Reviewed

Because those promoting the new rule claim their argument is backed by scientific research, it is vital that the science be double-checked. With so much at stake, the agencies must be certain that their science is accurate, unbiased, and compared in relation to potential costs. We urge the agencies to release the scientific review upon which this new rule is based for public scrutiny and peer-review before making any final decisions. Peer-review and repeatability of conclusions is a vital part of the scientific method and one with which the agencies must comply if they wish to make such sweeping changes. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Society of American Foresters (Doc. #15075)

13.227 The Proposal utilizes the not-yet-completed Connectivity Report as the basis for making these categorical determinations on significance (EPA 2013). The Report, however, fails to document the significance of physical, chemical, or biological connections, and instead focuses on the mere presence or absence of those connections. As a result, the Proposal makes categorical findings about connectivity that leave no room for case-by-case determinations of significance.

The Science Advisory Board (SAB) review on the scientific and technical accuracy of the Connectivity Report was published in the Federal Register on October 17, 2014 (EPA-SAB-15-001). Though the SAB found the Report to be a technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters, substantial revisions were recommended and included: (1) a conceptual framework that integrates spatially continuous hydrological, chemical and biological flow paths that connect watersheds; (2) an interpretation of connectivity that reflects variation in the frequency, duration, magnitude and predictability of connections (i.e., gradient approach to defining connectivity); and (3) terminology and concepts that adequately describe the variable nature of connectivity (e.g., longitudinal, lateral, vertical, and temporal). These revisions, with an accompanying peer review process, are necessary before the Report should be cited to support regulatory definitions of "significance" applied to water features that would qualify as WOTUS. Furthermore, the Report is not comprehensive and the WOTUS framework will still need to provide an allowance for case-by-case determinations given the broad variation of "significance" in and among physical, chemical, or biological connections. (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the**

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final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. For additional information on the final Connectivity Report, see compendium 9 and http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414

American Legislative Exchange Council (Doc. #19468)

13.228 (…) WHEREAS, the justification for the scope of the proposed rule rests on a scientific analysis that is still under review and the proposing agencies decided to proceed with development of a proposed rule addressing issues associated with the connectivity of waters prior to being informed by the Science Advisory Board Review and the implications of its findings; and (…) (p. 4)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

13.229 Scientific Advisory Board's peer review

The draft Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence report appears to be the basis for many conclusions in the proposed rule defining the scope of waters protected under the CWA rulemaking. Since the connectivity report was under review by EPA's Scientific Advisory Board (SAB) when the proposed rulemaking was issued, NAFSMA believes circulation of the proposed rule for public comment at this time is premature. The Science Advisory Board panel on October 17, 2014, recommended significant changes to the connectivity report and, if EPA intends to be responsive to those concerns, the final connectivity report will differ substantially from the draft that has been made available to the public. NAFSMA requests EPA and the USACE to suspend the current public comment period and re-release the proposed rulemaking after EPA has finalized the connectivity report. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Marcia L. Fudge, Member of Congress, 11th District, Ohio (Doc. #1376)

13.230 Furthermore, it gives me pause that the scientific report by your agency, titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Syntheses if the Scientific Evidence*, underlying the proposed rule, has not been finalized. Also, the Science Advisory Board peer review for the report has yet to be completed. (p. 1)

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Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Senator John E. Walsh, United States Senate (Doc. #18021)

13.231 I understand that the Office of Research and Development has reviewed existing scientific literature that has already been peer reviewed. This review is to determine if the conclusions and interpretation of available scientific literature was complete and correct. I urge you to expedite completion of this revise, pending feedback from the EPA's Science Advisory Board, before finalizing the CWA rule in order to strengthen the basis of the CWA rule. Once the review is final, it is imperative that EPA integrate the findings and underlying science into the final rule. A rule that is not firmly structured around relevant scientific findings could improperly burden Montanans with regulatory restrictions that may not advance the water quality goals of the CWA. (p. 1 – 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on the scientific underpinning of the rule, see compendium 9.**

13.3. RULEMAKING PROCESS

Summary of Rulemaking Process Comments

The majority of the comments in this section address the overall rulemaking process. The commenters expressed concern that the agencies violated a number of executive orders (e.g., 12602, 12298, 12866, 13563, 12898, 13542) as well as the Regulatory Flexibility Act (RFA), the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). Some commenters did express support for moving forward with a rule rather than relying on guidance to define CWA jurisdiction but indicated that the rulemaking process needed to be transparent and include an extensive consultation process.

The commenters challenged the overall transparency of the rulemaking process. A number of commenters felt that the agencies did not provide meaningful notice and comment periods. Commenters claimed that the agencies repeatedly issued and revised supporting documents that were critical to the rule. Specifically, commenters felt that the comment period was a moving target with new information being provided at different times. Many commenters suggested the proposed rule should be withdrawn or re-proposed. Some commenters also suggested because so many comments were submitted on the proposed rule, the rule should be re-proposed. In addition, commenters indicated that state and local groups were not adequately consulted during the rulemaking process and that the public meetings were used to provide information, not to accept comment. Commenters also expressed concern regarding the lack of the Corps involvement in the outreach process.
In addition, a few commenters expressed concern that the proposed rule is an expansion of federal regulatory authority over waters historically maintained by states. Commenters indicated that the rule would place an undue burden on agriculture and do nothing to provide additional

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protections of our natural resources. Commenters felt that the rule would leave stakeholders confused and exposed to litigation.

Agencies' Summary Response to Rulemaking Process Comments

EPA's action development process outlines both internal and external steps taken in this rulemaking including the processes established by executive orders. EPA follows the action development process to ensure that scientific, economic, and policy issues are adequately addressed at the right stages during the development of both the proposed and the final rule[80].

The proposed rule was published on April 21, 2014 and provided a 90-day comment period. The 90-day comment period was expected to close on July 21, 2014; however on June 24, 2014, EPA issued an extension through October 20, 2014. And then, again on October 14, 2014, EPA issued an additional extension of the comment period through November 14, 2014. As requested by many of the initial comments, the agencies provided two extension periods to the original comment period. In addition to the comment period, the agencies launched a robust outreach effort during April, May and June of 2014 holding discussions in multiple states around the country and gathering input from stakeholders to shape the final rule. Specifically, the agencies convened over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others to provide an enhanced opportunity to provide input on the proposed rule. EPA and the Corps attempted to attend as many meetings together as possible; however, there were meetings where only one agency could participate. EPA also voluntarily undertook federalism consultation for this rulemaking and met the terms of E.O. 13132 and EPA guidance for implementing the Order. EPA held a series of meetings and outreach calls in 2011 and 2014 with state and local governments and their representatives soliciting input throughout this rulemaking process to define ''waters of the United States.'' For more detail see the section 13.2.5 on Federalism.

The public outreach and consultation process for this rulemaking enhanced the development of the final rule by allowing the agencies to hear from landowners, business people, farmers, scientists, energy companies, conservationists, states and local governments, and others who have valuable experience, different perspectives, and important information. The final rule was developed after addressing and incorporating relevant comments from the public outreach efforts. The docket provides a detailed list of the outreach efforts conducted during this rulemaking process. Some commenters claimed the agencies did not fulfill the requirements of the APA because they did not conduct public outreach prior to the proposal. However, the APA does not require agencies to solicit input prior to the issuance of a proposed rule. Nonetheless, the agencies did voluntarily reach out to stakeholders to inform the development of the proposal. For more detail on these efforts, see the sections 13.2.5 on Federalism, 13.2.6 on Tribal Consultation, and 11.1 on RFA/SBREFA in Compendium 11.

[80] For information on EPA's Action Development Process, see http://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf

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While several commenters viewed the agencies' speeches, blogs, press releases, or other public outreach materials as new information used to revise the proposed rule, they in no way modified or affected the proposed rule, and were without regulatory effect. Rather, information was intended to help inform the public regarding the proposed rule and, given the technical and legal nature of the proposal, help explain the rule in easier-to-understand communications documents. This is a common practice for any major regulatory action taken by the EPA or any other federal agency. Such documents were used to help explain the proposed rule to the regulated public but did not substitute for it. Jurisdictional determinations are being made now under existing Corps and EPA regulations and guidance, and applicable case law, not under the proposed rule. Upon issuing the final rule, the agencies' regulations and guidance, the Act, and applicable case law will continue to provide the legally binding criteria for CWA jurisdiction.

Some commenters expressed concern with the timing and sequencing of the Connectivity report, suggesting that because the only the draft Connectivity report was made available for public comment, the public could not meaningfully review the scientific basis for the rule. However, Courts have recognized that "It is perfectly predictable that an administrative agency will collect new data during the comment period in a continuing effort to give the regulations a more accurate foundation; the agency should be encouraged to use such information in its final calculations without risking the requirement of a new comment period." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644-45 (1st Cir. 1979). Courts inquire whether "… the most critical factual material that is used to support the agency's position on review . . . [has] been made public in the proceeding and exposed to refutation." *Ass'n of Data Processing Service Orgs. v. Federal Reserve*, 745 F.2d 677, 684 (D.C. Cir. 1984). Agencies may rely on studies developed after the proposal where those studies serve as additional support for the data and conclusions in the proposal. *See, e.g., Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001) ("while interested parties should be able to participate meaningfully in the rulemaking process, the public need not have an opportunity to comment on every bit of information influencing an agency's decision"). When determining whether the agency gave adequate notice of the scientific studies and technical information underlying a rulemaking, the courts consider whether the new study provides "supplementary" data that "expands and confirms" the information contained in the rulemaking, whether the new information relied upon is prejudicial, and whether the new study is "critical" in the agency's decision making. *Solite Corp. v. EPA*, 952 F.2d 473, 484-85 (D.C. Cir. 1991). While agencies cannot rely on entirely new material that was not subjected to comment as the "sole, essential support" for the final rule, they can use additional supplemental data whose purpose is to "clarify, expand, or amend" other data that has been offered for comment. *Chamber of Commerce v. SEC*, 443 F.3d 890, 903 (D.C. Cir. 2006).

As explained in response to comments on compendium 9, revisions between the draft and final Science Report were based on comments from the Science Advisory Board. Those comments were developed over the course of deliberations that included multiple opportunities for public input. Moreover, the agencies extended the public comment on the rule to provide an opportunity for the public to review and comment on the SAB's recommendations.

Most of the comments from the SAB, and as a result most of the changes between the draft and final report, dealt with the need for additional detail and suggestions for clarity and organization, rather than fundamental disagreements in the science. Indeed, in most respects part the SAB was

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supportive of the report and most of its conclusions. Therefore, the agencies did not have a duty to conduct a new round of notice and comment on the final Report

Some commenters indicated that the proposal was not specific enough for them to meaningfully provide comments. Specifically, commenters pointed to the number of topics on which EPA solicited comment. However, commenters suggesting that the proposal was vague and did not provide adequate notice are mistaken.

In the proposed rule, the agencies provided meaningful notice of the substantive terms of the final rule, as well as an extensive description of the subjects and issues involved. Accordingly, the agencies fairly apprised the public of the content of the rulemaking, and the numerous detailed comments provide ample evidence that interested parties to the rulemaking understood the issues and potential outcomes of the rulemaking. Some commenters have expressed concern that once the agency considers the many comments received, the final rule will not be a "logical outgrowth" of the proposal. However, one of the key purposes of notice and comment is for agencies to consider "data, views, and arguments" from the public. APA § 553(c). As courts have frequently recognized, "Agencies often 'adjust or abandon their proposals in light of public comments or internal agency reconsideration.'" *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 699 (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)); *United Steelworkers of America, AFL–CIO–CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (''a final rule may properly differ from a proposed rule and indeed must so differ when the record evidence warrants the change."). Whether the agency provided sufficient notice depends on whether the final rule is a logical outgrowth of the proposal. In applying this test, "[a] final rule is considered the 'logical outgrowth' of the proposed rule if at least the 'germ' of the outcome is found in the original proposal." *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988). In determining whether the final rule is a logical outgrowth, courts have "taken into account the comments, statements and proposals made during the notice-and-comment period." *Nat'l Mining Ass'n*, 512 F.3d at 696.

The proposed and final rule need not be "coterminous." *Agape Church v. FCC*, 738 F.3d 397, 412 (D.C. Cir. 2013). A final rule satisfies the logical outgrowth test "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Id.* at 411. Courts have emphasized that a "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003) (quoting *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997)). Courts inquire "whether the notice given affords exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record." *Ass'n of Am. R.R. v. DOT*, 38 F.3d 582 (D.C. Cir. 1994) (internal citations omitted). If agencies were required to renotice every change between the proposal and final rule, "the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 533 (DC Cir. 1982). Hence, agencies are required to provide an additional round of notice and comment only "when the changes are so major that the original notice did not adequately frame the subjects for discussion." *Id.*

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The proposal apprised the public of the range of options the agencies were considering and solicited input on these options to inform agency decision-making. Without seeing the final rule, some commenters have already objected that it is not a logical outgrowth of the proposed rule. However, the final rule is closely tied to the proposal and any changes the agencies made based on the public input could have been anticipated from the proposed rule. The proposal alerted stakeholders to the possibility of the changes adopted in the final rule.

The final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The Rule does nothing more than revise a definition, it does not itself regulate or impose any compliance burden on any entity. The rule does not include any waters that historically have not been covered under the Clean Water Act and places important qualifiers on some existing categories. In fact, the rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court. Waters that have never been protected remain outside the scope of the Clean Water Act. As a result, the rule is deregulatory because fewer waters will fit within the definition and, thus, fewer waters will trigger regulatory requirements set out in other CWA regulations. The rule's definitional change may make it more likely that a particular water will, or will not, be deemed a "water of the U.S." Nonetheless, any compliance requirements applicable to actions impacting that water will be imposed by existing federal regulatory requirements, not this rule. The comments regarding consistency of the rule with various Executive Orders are addressed below.

Specific Comments

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

13.232 V.Maps

> Science Committee investigations revealed that the EPA assembled maps of waters and wetlands in all 50 states. The Agency has claimed that the maps have not yet been used for regulatory purposes. However, the EPA failed to explain why it paid a private contractor to create these maps, and the details of the arrangement remain murky. While the Agency marches forward with a rule that could fundamentally re-define Americans' private property rights, the EPA kept these maps hidden.
>
> Consequently, when the EPA finally disclosed these maps, the Committee posted them on the Committee's website for public review. However, serious questions remain regarding the EPA's underlying motivations for creating such highly detailed maps. In light of the ongoing rulemaking and the obvious questions these maps raise, in an August 27, 2014, letter to the EPA the Committee requested that the Agency immediately:
>
> 1. Provide all documents and communications related to the EPA's contract with INDUS Corporation to create these maps, including original contracts, specifications of work, and any internal or external exchanges regarding the October 2013 maps;

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2. In an unaltered and original form, enter these and any other previously undisclosed maps in the EPA's possession into the official rulemaking docket for public review and comment; and

3. Keep the public comment period open for at least 60 days after the maps entry in the official rulemaking docket to provide adequate opportunity for public review and comment.

Similar to unanswered Questions for the Record referenced above, to date, the EPA has failed to reply or produce any of the related documentation. Consequently, the public has been deprived of adequate notice and an opportunity for meaningful comment. (p. 19 – 20)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

Senator Dave Kinskey, Senate District 22, Johnson County and Eastern Sheridan County, Wyoming (Doc. #6191)

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

Agency Response: **The rule implements, and is consistent with, the interpretations of the Supreme Court in the *Rapanos* and *SWANCC* decisions because the rule only covers waters that have a significant nexus with traditional navigable waters, and therefore within federal authority over channels of interstate commerce.**

Office of the Governor, State of Wyoming (Doc. #7181.1)

13.234 Several key concerns warrant this action. In a recent meeting with the U.S. Environmental Protection Agency (EPA) in Washington, D.C., (which included the Administrator and several key deputies) the EPA acknowledged that little was done to

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solicit input specific to the proposed rule prior to publication. EPA staff indicated that the agency considered comment related to previously proposed and withdrawn guidance documents as a substitute. The EPA then acknowledged that additional consultation was needed, and in an attempt to rectify the lack of opportunity for comment, the agency has been working to visit stakeholders and provide information during an extended comment period.

This approach is problematic. These sessions are public meetings publicized as "not recorded, not for comments and only to provide information." Holding public information presentations is an inadequate alternative to public comment and the consultation process that should have occurred specific to this proposed rule. The EPA reached out for input on "guidance," and then plugged this unrelated input into a rulemaking process as comment. This is unacceptable. It invites questions about whether the agency has a pre-determined goal and plans a course of action to arrive at that goal. The EPA's admission that it has little substantive change in preferred direction or content as guidance morphed into rule adds to the question. (p. 1)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. The agencies did not have a predetermined course of action in mind. Given that the public comment period on the guidance addressed many of the same issues as this rulemaking, consideration of those comments provided a good, preliminary picture of the public's views on the issues in this rulemaking. Moreover, as explained in sections on Federalism, Tribal Consultation, and RFA/SBREFA, the agency did voluntary (i.e., not legally required) outreach prior to the proposed rule, and the extensive outreach, and extended comment period provided an unprecedented degree of public input, which was fully considered by the agencies in the rulemaking.**

13.235 In public meetings, the EPA continues to assert that concerns with the content of the proposed rule are unfounded. In presentations a variety of interpretations for the proposed rule have been presented by the EPA. To be clear, the intent being expressed by the agency in verbal, non-recorded sessions, does not match the content of the proposed rule. The EPA is stating publicly that no new protections, expansion, broadening of coverage, or expanded jurisdiction of regulatory authorities is occurring. The conclusion is not borne out by the content of the rule or by the interpretation of the rule by outside agencies and states. The rule both expands authorities and discounts the narrowed reach directed by the United States Supreme Court in the Solid Waste Agency of Northern Crook County v. Army Corps of Engineers and Rapanos v. United States decisions.

The EPA has approached agriculture, industry, and government representatives to help "fix" problems being identified. The juxtaposition of assurance that there is no need for concern and hurried "fixing" is unsettling. Cobbling together "fixes" cannot address the significant deficiencies in clarity and content that underlie the proposal. Further, the EPA's information sharing does not meet the bar of consultation and is misleading at best.

The question is at what point does management responsibility shift from the states to the EPA? This cannot be pre-determined and is as much a question of policy as it is of science, arguably more so. I have growing concern with the EPA and other federal agencies. Decisions are being made without consultation or consideration of the states,

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the public and outside experts. The current process is directed to justify decisions that have already been made. There is a closing window of opportunity for the EPA to rectify the problems with this rule and to proceed in a manner that is designed to work substantively with partners in regulation - the states.

The EPA should withdraw this proposed rule now. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. As explained in the preamble and TSD, the rule is entirely consistent with the statute and case law.**

State of Iowa (Doc. #8377.1)

13.236 On April 21, 2014, concurrent with the issuance of the proposed rulemaking concerning the definition of "waters of the United States" for purposes of the Clean Water Act, the United States Environmental Protection Agency, along with the Army Corp of Engineers, announced the availability of a rule, already effective upon the regulated community, purporting to interpret or "clarify the scope" of the "normal farming activity" exemption found at § 404(f)(1)(A) of the Act. See, 79 Fed. Reg. 22276. Despite the Agencies' characterization, we do not believe this to merely be a non-legislative, interpretive rule. Rather, the rule appears to establish new policies intended to bind decision-making by the Agencies and influence actions of the regulated community. As such, its promulgation must comply with the rulemaking strictures of the Administrative Procedure Act. Indeed, the Agencies have promulgated regulations further detailing what farming activities are considered "normal." See, 40 C.F.R. 230 and 33 C.F.R. 320. (p. 1)

Agency Response: **Pursuant to Congressional directive, the agencies have withdrawn the interpretive rule.**

Texas Comptroller of Public Accounts (Doc. #10952)

13.237 The Agencies Have Not Followed a Transparent Process

As an advocate for transparency in government, I have questions about the ambiguous manner in which the Agencies have developed this proposal. Similarly, I am concerned about the Agencies' reliance on incomplete scientific and economic data to create and analyze the proposal, as well as the potential impacts on stakeholders and important economic drivers. The Agencies have stated they are proposing this rule to provide increased certainty and consistency with recent legal rulings, including the two Supreme Court rulings in 2001 and 2006,81 by revising the existing definition of "Waters of the United States" (WOTUS) in the CWA. However, the proposal fails to accomplish these goals. The following outlines several of the most significant problems with the proposal and the non-transparent process used by the Agencies in this attempt to expand the regulatory reach of the CWA. I respectfully request the Agencies withdraw and reevaluate this proposal given the substantial issues and concerns described in more detail below. (p. 1)

[81] Solid Waste Agency of Norther Cook County v. U.S. Army Corps of Engineers; and Rapanos v. United States.

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Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. For information on the economic analysis, see compendium 11.**

New Mexico Department of Agriculture (Doc. #13024)

13.238 Second Draft of the Proposed Rule

Because of the sheer quantity of requests for public input in the Federal Register notice for this proposed rule, a single draft for this proposed rule will not be sufficient. The Agencies have requested too much information from the public, and the potential for unintended consequences is high when taking into consideration every potential change to the rule resulting from public comments.

If the proposed rule is not withdrawn entirely, NMDA supports the publication of a second draft, listing the comments received and detailing EPA's responses to them. This will greatly increase transparency of the rulemaking process. (p. 19)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

Senate Natural Resource Committee, Garden City (Doc. #16427)

13.239 The record demonstrates EPA has not assessed impacts to small business or governments required by the Regulatory Flexibility Act, nor have they performed cost-benefit and analyses of alternatives required by Unfunded Mandates Act. For those concerned about impact WOTUS might have on disadvantaged, minorities and families, the requirements of Executive Orders 12602 and 12298 have been systematically ignored. What about the potential for Fifth-Amendment property takes required to be studied by Executive Order 12630? No attention whatsoever. (p. 2)

Agency Response: **For information on RFA, see the comment response in Compendium 11.**

Del Norte County, California (Doc. #8376)

13.240 We appreciate that EPA and the Corps (the agencies) are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, we have concerns with the process used to create this proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

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

13.241 After careful review of the proposed rule and thorough consideration of its potential impacts on our City, we urge the federal agencies to withdraw this rule and engage state and local governments and stakeholders in a rulemaking process that can feasibly advance the goals of the Clean Water Act. (p. 1)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

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Big Horn County Commission (Doc. #13599)

13.242 We also agree that the appropriate tool for achieving this with respect to CWA jurisdiction is through an open rule- making process as opposed to agency guidance that cannot be challenged. Regrettably, the EPA's proposed rule fails both of the tests mentioned above, namely, the EPA did not engage counties and in particular Western counties in the development of this rule, nor does the proposed rule provide any clarity for counties on whether waters will or will not be considered jurisdictional. Further, the EPA has failed to adequately explain how its proposal does not significantly increase federal jurisdiction over waters historically and effectively maintained by Wyoming and its counties. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. For information on outreach to Western states and, please see the EPA's documentation on regional headquarters outreach for the proposed rule in the docket.**

Cochise County Board of Supervisors (Doc. #14541)

13.243 In addition, these alternatives have not been fully analyzed in the analysis of the potential costs and benefits associated with this action (under Executive Orders 12866 and 13563, page 22220), in the analysis of economic impact on a substantial number of small entities (under the Regulatory Flexibility Act, page 22220), in the analysis of environmental justice in minority and low-income populations, especially for ranchers (under Executive Order 12898, page 22221), and in the analysis of environmental impacts (under the National Environmental Policy Act [NEPA], page 22222). All of the analyses would need to be rewritten and supplied for public comment prior to including the alternatives in a revised proposed rule supplied for public comment prior to issuing a final rule. (p. 2)

Agency Response: **For information on RFA, see the comment response in Compendium 11.**

CLUB 20 (Doc. #15519)

13.244 It is disingenuous at best to provide a far reaching rule such as the proposed WOTUS definition without adequate scientific data and definitive information regarding what water and which areas will be affected by the new rules and definitions. To ask for comments when complete information is not available, says that the EPA and the Corps of Engineers are not really interested in public comments, and that they will not give them full attention or review. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

National Association of Home Builders (Doc. #19540)

13.245 v. The Agencies have Manipulated the Rulemaking in Ways that are Designed to Prejudge its Outcome.

Throughout the entirety of the comment period, the Agencies have shown strong bias against the proposed rule's critics and have unlawfully prejudged its outcome. EPA Administrator Gina McCarthy has attempted to delegitimize certain questions and

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concerns about the proposal by publicly referring to them as "ludicrous" and "silly."[82] EPA has even gone so far as to create a website called "Ditch the Myth," declaring the proposed rule "clarifies protection under the Clean Water Act . . ."[83] EPA's Office of Water has also suggested that those who "choose clean water" should support their proposed rule,[84] thereby insinuating that the proposal's critics oppose clean water. NAHB and its members have been advocates of the CWA since its inception and recognize the Act has helped our Nation make significant strides in improving the quality of our waters. To suggest we and any others who oppose this fundamentally flawed and unlawful proposal do not value clean water is insulting.

Additionally, EPA's social media advocacy in favor of the propose rule prejudices the rulemaking process. EPA's own staff have sought public support to influence the agency's view of the proposed rule,[85] and EPA Office of Water's Twitter account has essentially become a lobbyist for the proposal.[86] It is hard to believe this rulemaking has been conducted in accordance with the APA and its objective that federal agencies "benefit from the expertise and input of the parties who file comments with regard to [a] proposed rule" and "maintain a flexible and open minded attitude toward its own rules[87]. What's more, the Agencies' actions raise serious questions about compliance with the Anti-Lobbying Act.[88] (p. 154 – 155)

<u>Agency Response:</u> See section 13.2.1 summary response for information regarding the Administration Procedure Act.

The Anti-Lobbying Act does not prohibit the agencies from seeking input from the public on a rulemaking or restrict the agencies from educating or informing the public on a rulemaking under development – i.e., the types of activities described by the commenter. As noted in a recent Comptroller General opinion, "agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials" – e.g. persuasive statements in "individual social security statements mailed to over 140 million Americans," and letters "encouraging prosecutors to work with legislators to update local marijuana laws". B-325248, U.S. Comp. Gen., Sept. 9, 2014. See also B-

[82] Chris Adams, EPA Sets Out to Explain Water Rule that's Riled U.S. Farm Interests, McClatchy DC (July 9, 2014), available at http://www.mcclatchydc.com/2014/07/09/232809_epa-sets-out-to-explain-water.html?rh=1
[83] See http://www2.epa.gov/uswaters/ditch-myth
[84] See Travis Loop, Do You Choose Clean Water? Greenversations: An Official Blog of the U.S. EPA (Sept. 9, 2014), available at http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/
[85] EPA's Office of Water launched a "Thunderclap" campaign entitled "I choose clean water" on Sept. 9,2014, asking the public to support the proposed rule. See http://www.thunderclap.it/projects/16052-i-choose-clean-water.

[86] ""See https:twitter.comEPAwater.
[87] McCloufh Steel Prod. Corn. v. Thomas. 838 F.2d 1317, 1325 (D.C. Cir. 1988) (internreth-e 5 U.S.C. 5 553; internal quotations omitted).
[88] See 18 U.S.C. 5 1913 (prohibiting the use of appropriated federal funds for the "personal service, advertisement, telegram, telephone, letter, printed or written matter, or other service, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation").

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319075, U.S. Comp. Gen., April 23, 2010, and B-304715, U.S. Comp. Gen., April 27, 2005.

Montana Wool Growers Association (Doc. #5843)

13.246 The Agencies should reform their rule-making procedures to better accommodate public interests. First, the Proposed Rule should be easily accessible and identifiable in the Federal Register, rather than appended to an 88-page document with no header or section name. Second, the Agencies should dispose of the twelve redundant definitions in the Code of Federal Regulations and publish instead a single regulation defining WOTUS for the entire CWA. Third, the Agencies should cite to the United States Code, not Public Law amendments. Finally, the Agencies should avoid joint rule making, particularly where one agency is responsible for all public outreach but both will be bound by the rule. Section V of this comment letter explains these recommendations in more detail. (p. 2)

Agency Response: The agencies have considered the comments above in the development and publication of the final rule. The agencies process was consistent with APA procedures. Joint rulemaking is necessary and appropriate because the definition of waters of the United States governs the scope of Corps and EPA authorities.

13.247 The Proposed Rule does not reflect the Agencies' intent as purported in public outreach. The Proposed Rule, the Preamble, and public outreach should all be adjusted to avoid further misunderstandings.

The Agencies make numerous assertions about their intent for the Proposed Rule. However, courts will not look to the Agencies' intent unless the language of the Proposed Rule is ambiguous. If the Proposed Rule is found ambiguous, courts will rely on intent evidenced in published statements, such as the Preamble, not public statements. The Agencies may not plan to assert jurisdiction as often as the Proposed Rule would permit, but third parties can sue under the Proposed Rule to force the Agencies to regulate against their will. Such deference to third parties could prove harmful to agricultural entities and increase litigation under the CWA.

The following subsections respond to assertions made by the EPA on behalf of the Agencies' with examples of contradictory language in the Proposed Rule or Preamble. Subsection headers include a general topic (underlined) followed by assertions made by the EPA on the EPA's "Ditch the Myth" webpage (italicized) or other public statements (quotation followed by citation). The "Ditch the Myth" webpage is available at http://www2.epa.gov/uswaters/ditch-myth.

A. Public Outreach: I commit to you that if you raise an issue of concern, I will address it." Gina McCarthy, Adminstr., EPA, Speech, *Remarks at the Agricultural Business Council of Kansas City on Clean Water Proposal, Prepared* (July 10, 2014) (transcript available at http://www2.epa.gov/uswaters/ditch-mvth; *select* Read a speech by Administrator McCarthy).

1. The EPA responds to general assertions about the Proposed Rule on the "Ditch the Myth" webpage, in webinars, and in public meetings without supporting citations or

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explanations of the Proposed Rule's language. Such broad assertions do not address the public's concerns, but rather force the public to rely on the EPA's interpretations as fact. In responding to critiques of, comments on, and questions about the Proposed Rule, the

Agencies should explain in detail why the Proposed Rule does what they allege and provide specific cites to the relevant language in the Proposed Rule, the Preamble, and the CWA.

2. The EPA's website presents a purely supportive face for the Proposed Rule. For instance, the website lists 34 op-eds and editorials to help educate the public about the Proposed Rule. EPA, *Op-eds and Editorials,* http://www2.epa.gov/sites/production/files/2014-07 /documents/opeds and editorials. pdf (accessed Aug. 18, 2014). Many of these articles are purely subjective, with no informative value. MWGA does not suggest the Agencies should criticize their own rule. However, MWGA does encourage the Agencies to acknowledge weaknesses in the Proposed Rule and address them openly. Public outreach should be an opportunity to understand and address public concerns, learn, and improve, not employ political campaign tactics, such as overcoming criticism with popularity by having viewers "Tweet the truth." EPA, *Waters of the U.S., Ditch the Myth,* http://www2.epa.gov/uswaters/ditch-myth (accessed Aug. 18, 2014). (p. 8 – 9)

<u>Agency Response:</u> See section 13.2 summary response for information regarding the rulemaking process.

The Anti-Lobbying Act does not prohibit the agencies from seeking input from the public on a rulemaking or restrict the agencies from educating or informing the public on a rulemaking under development – i.e., the types of activities described by the commenter. As noted in a recent Comptroller General opinion, "agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials" – e.g. persuasive statements in "individual social security statements mailed to over 140 million Americans," and letters "encouraging prosecutors to work with legislators to update local marijuana laws". B-325248, U.S. Comp. Gen., Sept. 9, 2014. See also B-319075, U.S. Comp. Gen., April 23, 2010, and B-304715, U.S. Comp. Gen., April 27, 2005.

13.248 The EPA and Corps promulgated the Proposed Rule jointly, but only the EPA has provided public guidance. MWGA worries the Corps will not adhere to the EPA's interpretation of the Proposed Rule. Notably, all three major United States Supreme Court cases addressing the WOTUS definition and leading to this Proposed Rule were cases brought by or against the Corps, not the EPA. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001); Rapanos v. U.S., 547 U.S. 715 (2006); US. v. 13 Riverside Bayview Homes, Inc. (Riverside Bayview), 474 U.S. 121 (1985).

a. The Agencies should avoid future joint rulemakings and sever the current joint rulemaking.

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Agency Response: **Joint rulemaking is necessary and appropriate because the definition of waters of the United States governs the scope of Corps and EPA authorities.**

13.249 b. The EPA and the Corps should take equal responsibility for public outreach, guidance, and explanations of the Proposed Rule. (p. 13)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

New Mexico Department of Agriculture (Doc. #13024)

13.250 Concerns from Congress

The fact that several United States legislative bills (including S. 2496: "Protecting Water and Property Rights Act of 20 14,"[89] S. 2613: "Secret Science Reform Act of 2014," [90] H.R. 5071: "Agricultural Conservation Flexibility Act of 2014," [91] and H.R. 5078:"Waters of the U.S. Regulatory Overreach Protection Act of 20 14"[92]) have been filed at the federal legislative level that requests the withdrawal or revision of the proposed rule indicates there are major problems with this proposed rulemaking as presented . Several bipartisan letters from United States senators and representatives have also been submitted requesting clarification of the proposed rule. This includes a letter signed by 13 senators who have specific concerns about the proposed rule's impact on the agricultural community."[93] (p. 17)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. The pendency of legislation that would amend the Clean Water Act does not obviate the need, as expressed by numerous stakeholders and members of the Supreme Court, to undertake rulemaking to clarify the scope of waters of the U.S.**

Family Farm Alliance (Doc. #14788)

13.251 The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft connectivity report, which is currently under review by the Science Advisory Board (SAB). Given this ongoing SAB Panel review of the adequacy of the science to support the proposed rule, commenters should have at least an additional 90 days from the time

[89] Protecting Water and Property Rights Act of 2014, S. 2496, 113 Cong. Sponsored by Sen. John Barrasso (WY). Introduced June 19, 2014,Available at: http://www.congress.gov/bill/13th-congress/senate-bill/2496/text.
[90] Secret Science Reform Act of 2014, S. 2613, 113Cong. Sponsored by Sen. John Barrasso (WY). Introduced July 16, 2014. Available at: https://www.congress.gov/bill/113th-congress/senate-bill/2613.
[91] Agricultural Conservation Flexibility Act of20 14, H.R. 5071, 113Cong. Sponsored by Rep. Reid Ribble (WI). Introduced July 10, 2014.Available at https://www.congress.gov/bill/113th-congress/house-bill/507.
[92] Waters of the U,S. Regulatory Overreach Protection Act of 2014, H.R. 5078, 113 Cong. Sponsored by Rep. Steve Southerland (FL). Introduced July 11, 2014, Available at: https://www.congress.gov/bill/113th-congress/house-bill/5078.
[93] United States Senate. Letter to U.S. Environmental Protection Agency Administrator Gina McCarthy, U.S. Department of the Army Secretary John McHugh, and US. Department of Agriculture Secretary Thomas Vilsack. Dated July 31, 2014. Available at: http://sustainableagriculture.net/blog/senate-wotus-letter/.

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when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters," and the public deserves the opportunity to comment on the conclusion of that review process.

A significant amount of time and technical expertise will be required first to evaluate the report from the SAB Panel and agencies' scientific conclusions and responses and then to prepare substantive and thoughtful responses. The comment period should be extended to give stakeholders that additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback. (p. 1 – 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. For more information regarding the Connectivity Report see section 13.1.**

Wisconsin Farm Bureau Federation (Doc. #16166)

13.252 Lastly, the method that EPA and the Corps have used in order to redefine the term "Waters of the United States" is contrary to the Congressional intent initially included in the Federal Water Pollution Control Act of 1948. There were exemptions for farms because of their importance to the economy, the necessity to have good stewards of our lands and natural resources as well as the unique challenges that each farm field presents; such as, soil type, water resources, land topography, etc. These concerns are just as relevant today as during the passage of the Federal Water Pollution Control Act in 1948 and subsequent Clean Water Act of 1972.

Wisconsin stands at the forefront of conservation and stewardship of natural resources in the United States. Our state standards protect water quality for a variety of designations for our groundwater, streams, lakes and wetlands. The proposed rule is an expansion of federal regulatory authority. It places an undue burden on agriculture in Wisconsin and does nothing to provide additional protections of our natural resources. Instead, it leaves farmers confused and exposed to litigation and will ultimately lead to a decrease in voluntary conservation and stewardship.

The Wisconsin Farm Bureau Federation requests that the rule be withdrawn and any future discussions should begin with complete transparency and collaboration with states. (p. 3)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. As explained in the preamble to the rule, nothing in the rule affects exemptions under 404(f).**

Missouri Corn Growers Association (Doc. #16569)

13.253 General Concern #1: The public record and the public comment process has been a moving target resulting in further loss of public trust.

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Connectivity Report

The proposed rule references EPA's draft scientific report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (ie Connectivity Report). EPA has stated the Connectivity Report, when finalized, will provide the scientific basis and support for the WOTUS rule. To date, the Connectivity Report is a draft report which has been undergoing an EPA Science Advisory Board (SAB) review. It is clear the Connectivity Report will not be completed and made final until after the WOTUS rule comment period has closed. Thus, the public will not be able to consider the final connectivity report in its WOTUS rule comments. We feel it is reasonable to expect the underlining science be final and settled before a proposed rule, particularly one of this magnitude, be developed and presented to the public for comment. This situation unfairly limits the public's ability to provide meaningful comments.

Guidance Documents

Throughout the public review period, the EPA has extensively relied upon its own hastily developed Q&A's, fact sheets and talking points to explain the intent behind the rule. This sort of information should have been prepared in advance of the start of the public review period for the proposed rule. Instead, a piecemeal approach by EPA has created an ever moving target for the public to review, understand and provide meaningful commentary. Furthermore, these types of informal documents do not constitute regulation, cannot be enforced, will not stand the test of time and are the very sort of things that drove and justified the need for the rule in the first place.

USACE Absent from Process

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

While the public and regulators may have honest disagreements on policy and even on science, the EPA must at all times provide the public with the information necessary to make meaningful and relevant comments on a proposed rule. As it stands, this basic public principle has not been respected or followed for the WOTUS rule and does not build public trust with the agencies or in the process. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

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13.254 Lack of clarity and greater uncertainty exposes farmers to greater legal liability Use of subjective terminology that requires interpretation through agency guidance or other means is scattered throughout the rule and must be addressed and made clear. Proving this point, EPA has themselves extensively relied on its own Q&A's, fact sheets, the rule Preamble and agency talking points to explain the intent behind the rule - much of which constitutes EPA interpretation. These types of informal documents do not constitute regulation, cannot be enforced, will not stand the test of time and frustrating moving target for farmers and other stakeholders in their review and has hampered their ability to comment. More importantly, this situation will have the same negative effect after the rule is finalized as farmers are left blindly navigating and making assumptions on its complex meaning. This results in farmers taking what would be otherwise avoidable risks that could jeopardize their operation and ultimately agriculture's public trust. The fact is this rule represents a definition and principles that are, at its very core, foundational to nearly every federal and state regulatory program involved in water - both now and into the foreseeable future. To that end, the actual text and phrases within the rule should be clear, concise and self-explanatory to the public. (p. 4 – 5)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process. Also, normal farming activities are subject to the 404(f) exemptions; the agencies have made revisions in the final rule to enhance clarity and the final provides greater specificity and clarity by adding, for example, definitions to the final rule.**

New Salem Township (Doc. #8365

13.255 I have concerns with the process used to create this proposal, and specifically whether impacted state and local groups such as townships were adequately consulted throughout the process. (p. 1)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

Dynegy, Inc. (Doc. #1240)

13.256 Additionally, on May 19, 2014 the EPA released the Final 316(b) rule, which is applicable to the "Waters of the United States". Given that the 316(b) rule has been released in the middle of the comment period for the proposed "Waters of the United States" rule, it's imperative that the comment deadline be extended to allow for sufficient understanding of how each rule impacts the other. (p. 2)

Agency Response: **There is no need to delay promulgation of this rule in light of the section 316(b) rule. That regulation established performance standards for cooling water intake structures, and this rule does not address any issues related to standards under the Act, only the scope of the statute.**

Colorado Water Congress Federal Affairs Committee (Doc. #14569.1)

13.257 Given the lack of involvement of state and local governments, regulated parties and the environmental community in the initial crafting of the proposal, the misdirected efforts of the scientific community, and the polarization existing in the legislative arena, the Water

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Congress would recommend that the agencies follow a new path towards the goal line. In particular, the agencies should:

1. Hold the current proposal in abeyance;

2. Seek input on the proposal from state and local governments, including those state and local agencies responsible for water quality regulatory compliance and the provision of water supplies;

3. Assemble representatives of the NGO stakeholder community, including the agricultural, municipal, industrial, business, utility, special district and environmental interests, for purposes of identifying "key" concerns and narrowing the scope of disagreement. The first step in this process would be to "bundle" or categorize key concerns as found in the comments submitted to date, along with the preparation of a short but substantive response of the agencies thereto. Thought could be given to the establishment of a Federal Advisory Committee. (p. 8 – 9)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

Audubon Florida and Audubon of the Western Everglades (Doc. #15251)

13.258 One additional process comment is that AF and AWE are confident that the current rulemaking process is the most efficient, science-based and equitable way to achieve long-awaited clarification of the definition of waters of the U.S. Alternatives that have been suggested by members of Congress, the agricultural industry and others to abandon this rulemaking in favor of a public dialogue led by the fifty states are not useful for establishing consensus on a national standard, and will be delayed for years by competing interests among the states and the implementing agencies for the CWA. (p. 1 – 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process.**

United States Congress (Doc. #13992)

13.259 The House of Representatives has spoken on this issue and passed H.R. 5078, "The Waters of the United States Regulatory Overreach Protection Act." This legislation upholds the current federal-state partnership to regulate the Nation's waters, prohibiting the EPA and the Corps of Engineers from following the unilateral approach imagined by this rule. If implemented, this rule would open many new waters and private property to federal regulation. This includes ditches, man-made ponds, floodplains, riparian areas, and seasonally-wet areas. H.R. 5078 was passed in a bi-partisan fashion, on a vote of 262-152 because the House believes that this rulemaking process is improper and ill-conceived. I am hopeful that this legislation, or something similar, will soon advance in the Senate.

The House Committee on Natural Resources, a committee on which I sit, held a hearing on this rule on June 24) of this year. Though Administration officials were invited to come and take questions from Members of Congress on the rule and its effects — they declined to even show up. This is important, because the Environmental Protection Agency continues to claim that this rule contains "exemptions" for all sorts of "agricultural activities" that my constituents care about. I was hoping to get some

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clarification on these exemptions at the hearing, as many commentators have described them as so broad and ill-defined as to be meaningless. Unfortunately the rule's proponents could not be bothered to make an appearance.

If the agencies tasked with implementing this proposed rule cannot be bothered to explain it to the House Committee on Natural Resources in an open and public hearing — how can we trust them to work with my constituents on the many issues that would arise with its implementation? I for one do not, and I would once again urge the EPA to abandon this rulemaking and go back to the drawing board. (p. 1 – 2)

Agency Response: **Although the agency was not able to attend the hearing on "Regulatory Overreach", EPA provided responses to the committee's questions for the record in a letter to the ranking committee member, Honorable Timothy H. Bishop, on December 17, 2014.**

13.3.1. Compliance with APA

Summary of APA Comments

The majority of the comments in this section address the requirements established by the Administrative Procedure Act (APA). A number of the commenters expressed concern that the regulatory process established by the agencies violated or failed to meet the requirements of APA. Commenters criticized the overall transparency of the rulemaking process and felt that the agencies did not provide meaningful notice and comment periods. Commenters indicated that the agencies repeatedly issued and revised supporting documents that were critical to the rule, making it difficult to produce a final rule that would be a direct outgrowth of the proposed rule. Many commenters specifically called out the request for comment on the proposed rule by the agencies prior to producing the Final Connectivity Report. Commenters indicated that the public cannot be expected to provide meaningful comment on a moving target. Ultimately, commenters requested the agencies extend, re-propose, stay, or suspend the rulemaking process. Some commenters also criticized the agencies for their outreach and communication through, for example, social media, as reflecting bias and that the agencies had prejudged the outcome of the rulemaking, and that the agencies' actions raised "serious questions" about compliance with the Anti-lobbying Act.

Agencies' Summary Response to APA Comments

The Administrative Procedure Act (APA) governs the process by which federal agencies develop and issue regulations. The APA requires agencies to publish a notice of proposed rulemaking in the *Federal Register* and provides an opportunity for the public to comment on notices of proposed rulemaking. The proposed rule was published on April 21, 2014 with a 90-day comment period. The 90-day comment period was expected to close on July 21, 2014; however on June 24, 2014, EPA issued an extension through October 20, 2014. And then, again on October 14, 2014, EPA issued an additional extension of the comment period through November 14, 2014. As requested by many of the initial comments, the agencies provided two extension periods to the original comment period. The agencies did not feel it was necessary to extend the

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public comment period beyond November 14, 2014. The agencies received over one million public comments to help inform the final rule.

In addition to the comment period, the agencies launched a robust outreach effort during April, May and June 2014, holding discussions in multiple states around the country and gathering input from stakeholders to shape the final rule. The public meetings were announced on the agencies' websites as well as through mass email distributions to known stakeholders. Specifically, the agencies convened over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others to provide an enhanced opportunity for input on the proposed rule. EPA and the Corps attempted to attend as many meetings together as possible; however, there were meetings where only one agency could participate. EPA also voluntarily undertook federalism consultation for this effort and met the terms of E.O. 13132 and EPA guidance for implementing the Order. EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input throughout this rulemaking process to define ''waters of the United States.'' For more detail see the section 13.2.5 on Federalism.

The public outreach and consultation process for this rulemaking enhanced the development of the final rule by allowing the agencies to hear from landowners, business people, farmers, scientists, energy companies, conservationists, states and local governments, and others who have valuable experience, different perspectives, and important information. The final rule was developed after addressing and incorporating relevant comments from the public outreach efforts. The docket provides a detailed list of the outreach efforts conducted during this rulemaking process.

To help inform the public regarding the proposed rule, during the public comment period the EPA had taken steps to translate the legal language and scientific principles of the proposed rule into easier-to-understand communications documents. This is a common practice for any major regulatory action taken by the EPA or any other federal agency. Such documents (ex. speeches, blogs, press releases, or other public outreach) were used to help explain the proposed rule to the regulated public but did not substitute for it. Upon issuing the final rule, the agencies' regulations and guidance, the Act, and applicable case law will continue to provide the legally binding criteria for CWA jurisdiction.

The Agencies' outreach during the rulemaking was perfectly appropriate and does not reflect "bias" and prejudgment by the agencies. The activities cited by some commenters reflected EPA's efforts to communicate with the public to promote an accurate understanding of the agencies' rulemaking and its importance to ensuring effective administration of the statute. . Moreover, The Anti-Lobbying Act does not prohibit the agencies from seeking input from the public on a rulemaking or restrict the agencies from educating or informing the public on a rulemaking under development – i.e., the types of activities described by the commenter. As noted in a recent Comptroller General opinion, "agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials" – e.g. persuasive statements in "individual social security statements mailed to over 140 million Americans," and letters "encouraging prosecutors to work with legislators to update

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local marijuana laws". B-325248, U.S. Comp. Gen., Sept. 9, 2014. See also B-319075, U.S. Comp. Gen., April 23, 2010, and B-304715, U.S. Comp. Gen., April 27, 2005.

Specific Comments

Alaska State Legislature, Alaska State Leadership (Doc. #7494.1)2q$

13.260 Frequently, the expanded scope occurs via "regional supplements" beyond the procedural requirements established by the Administrative Procedure Act[94] ("APA"). Over objections, Alaska, infamously, was subjected to the 2007 Final Alaska Regional Supplement to the 1987 Wetland Delineation Manual.[95] (p. 3)

Agency Response: The Regional Supplements to the 1987 Wetland Delineation Manual are outside the scope of this rulemaking effort. The rule defines "waters of the U.S." under the Clean Water Act and does not change the definition of "wetland," the three parameters required to meet the definition of "wetland," the 1987 Manual, or the Regional Supplements to the Manual. The Regional Supplements went out on public notice for public comment and are based on science, technical skills, field data collection, and agency experience. The Regional Supplements are not agency regulation and do not require rulemaking under the Administrative Procedure Act for their publication. The Regional Supplements did not expand scope of jurisdiction; they merely provide a method of identifying wetlands' three parameters in order to delineate their boundaries. Wetland delineation does not equate to the determination of their jurisdictional status under the Clean Water Act.

State of Iowa (Doc. #8377)

13.261 Further, numerous stakeholders have expressed concerns that the Federal government is thwarting important requirements of the Administrative Procedure Act (APA) and undermining the public's opportunity for meaningful comment by repeatedly issuing and revising, outside of the APA process, explanations and information critical to the rule. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the rulemaking process Administrative Procedure Act.

Energy Producing States Coalition (Doc. #11552)

13.262 Further, over 60 organizations have expressed their concerns that continued ad hoc regulatory interpretations and revisions in guidance documents - through the media and blog posts rather than the formal rulemaking process - violate the spirit and letter of the Administrative Procedure Act by skirting public notification and input requirements. 3 Adding to this troubling record, we have been informed that the Administration's cost benefit analysis of the underlying proposal relied on 20-year old data that had not been

[94] Many were frustrated when the Corps did not use the formal Administrative Procedure Act ("APA") process when it approved the Alaska regional supplement on October 26,2007. EPA-HQ-OW-2011-0880 provides an opportunity to clarify some terms relevant to the state including (the definition of wetlands as it relates to permafrost).

[95] *See http://www.usace.army.milIPortalsl21docs/civilworkslregulatorylreg_supplalaska_spn-2006-445-final.pdf.*

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adjusted for inflation and did not fully examine the wide-ranging implications of additional CWA compliance. (p. 2 – 3)

Agency Response: **See section 13.2.1 summary response for information regarding the rulemaking process Administrative Procedure Act.**

New Mexico Department of Agriculture (Doc. #13024)

13.263 EPA has been unable to present consistent interpretations of the changes in the definitions of Waters of the U.S., in spite of claims that the document's purpose is to increase clarity. To this point, the U.S. House of Representatives Committee on Science, Space, and Technology recently requested maps that show jurisdictional waters under the CWA.[96] In a response letter from EPA, Administrator Gina McCarthy states," I wish to be clear that EPA is not aware of maps prepared by any agency, including the EPA, of waters that are currently jurisdictional under the CWA or that would be jurisdictional under the proposed rule."[97]

Because many newly proposed definitional changes rely on waters (s) (I) through (4), NMDA requests maps of these waters. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in wasters (s) (5) through (7) of the proposed rule. Providing clear and thorough maps of jurisdictional waters will assist in increasing transparency, accountability, and clarity in this rulemaking. (p. 15)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

[96] Chairman Lamar Smith, U.S. House of' Representatives Committee on Science, Space, and Technology. Letter to U.S. Environmcntal Protection Agency Administrator Gina McCarthy. Dated August 27, 2014. Available at http://science.house.gov/epa-maps.state.2013

[97] Administrator Gina McCarthy, U.S. Environmental Protection Agency. Letter to Chairman Lamar Smith, U.S. House of Representatives Committee on Science, Space, and Technology. Dated July 28, 2014. Available at: http://science.house.gov/epa-maps-state-2013

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13.264 EPA has claimed extensive outreach to state and local agencies before the development of the proposed rule.[98] For instance, the Federal Register states," ... EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors ' Association, the Western States Water Council, and the Association of State Wetland Managers participated in various calls and meetings" (79 FR 22221). NMDA has been party to conversations with multiple state and local agencies throughout the West - including the Wyoming Department of Agriculture, Utah Department of Agriculture and Food, Idaho State Department of Agriculture, Colorado Department of Agriculture, and New Mexico Environment Department - and has been unable to locate even a single one indicating outreach from EPA. If public records of this outreach exist, NMDA requests this information he published.

During telephone conversations and webinars EPA and the Corps hosted after the publication of the proposed rule, EPA has maintained a defensive tone.[99] [100] Rather than either address concerns raised by the public or state that comments would be taken seriously in the revision of the proposed rule, the Agencies merely restated that the intent of the rule is to increase clarity. NMDA maintains that stakeholders with concerns do, in fact, understand the implications of this rule and implores that EPA consider the concerns brought up by this and other state and local agencies and revise the proposed rule accordingly. (p. 16)

Agency Response: **All comments provided from the public have been considered in development of the final rule.**

Maine Department of Environmental Protection (Doc. #14624)

13.265 The Agencies should provide the opportunity for public participation on the revised regulatory proposal.

After the U.S. Supreme Court struck down the Agencies' overreach of jurisdiction in the SWANCC decision, the Agencies developed guidance in 2008 to determine the extent to which waters are classified as "Waters of the United States" and therefore can be regulated under the Clean Water Act. This guidance more appropriately reflected: (1) the nexus of "other waters" to TNWs and (2) the need for site-specific determinations regarding the significance of a nexus of "other waters" to TNW. This guidance did not undergo notice and opportunity for public participation pursuant to the Administrative Procedure Act ("APA") (5 U.S.C. Subchapter II). To the extent that Maine has the delegated authority to administer many of the provisions of the CWA, Maine supports efforts of EPA to ensure that the definition of WOTUS has been developed pursuant to

[98] U.S. Environmental Protection Agency. "EPA Summary of the Discretional Small Entity Outreach for Planned Proposed Revised Definition of 'Waters of the U S.'" Available at: http://www2.epa.gov/uswaters/epa-summary-discretionary-small-entity-outreach-planned-proposed-revised-definition-waters.

[99] University of Nebraska Livestock and Poultry Environmental Learning Center. "Waters of the U.S. Proposed Rule Webinar" Hosted 6/20/14. Archived at: http://www.extension.org/pages/71028/epas-proposed-waters-of-the-us-regulations#.VC8F7xYa5F8.

[100] U.S, Environmental Protection Agency. "Waters of the U.S.: Clarifying Misconceptions." Hosted 7/16114. http://www2.epa.gov/uswaters/waters-united-states-webinar-clarifying-misconceptions.

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the APA. Guidance which has not gone through the APA is not judicially enforceable under Maine law. (5 M.R.S.A. §8002(9)). Maine requests that the proposal be revised and re-posted for public comment. (p. 5)

Agency Response: See section 13.2.1 summary response for information regarding the rulemaking process Administrative Procedure Act.

State of Alaska (Doc. #19465)

13.266 Muddled Process and Failure to comply with the Administrative Procedure Act (APA). The proposed rule is based on the Connectivity Report, which was developed without consultation with state, local, or tribal governments, or industry. The report has not been completed, and lacks regional examples, including for Alaska. Yet, EPA has inexplicably pressed forward with its rulemaking. The rulemaking must be founded on a reasonable schedule, explore all potential consequences to the federal and state agencies, as well as the regulated community. (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For information on consultation see sections 13.2.5 on Federalism, 13.2.6 on Tribal Consultation, and 11.1 on RFA/SBREFA in compendium 11.

13.267 C. The rulemaking fails to comply with applicable rulemaking requirements and results in a muddled and confusing rule that generates enormous uncertainty.

Despite EPA and the Corps' claim that the proposed rule promotes "transparency, predictability, and consistency,"[101] the numerous difficulties in implementing the rule and the severe consequences it will wreak have not been adequately considered. The rulemaking fails to comply with the APA41 and Executive Order 13563,42 in large part because the federal agencies have not adequately considered the likely impacts of the rulemaking, nor allowed for meaningful public comment or review of the data the agencies rely upon. (p. 12)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Hinsdale Colorado Board of County Commissioners (Doc. #1768)

13.268 A Guidance Document is not the Correct Path Forward. While the Draft Guidance states that it is a non-binding document, we believe the practical effect of the document on all stakeholders will be more like a rule. We believe that EPA and Corps regional offices will inappropriately rely on this Draft Guidance to claim federal jurisdiction over bodies of water that are currently not under federal jurisdiction. We believe the wiser course involving a change as controversial as determining federal jurisdiction under the "waters of the U.S" definition is to look to the rulemaking process, which under the Administrative Procedure Act (APA) offers an open and transparent means of proposing and establishing regulations and ensures that state, local and private entity concerns are

[101] 77 Fed. Reg. at 22190.

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fully considered and properly addressed. We urge EPA and the Corps to move forward with a process consistent with the AP A's rulemaking process. (p. 1)

Agency Response: **Thank you for your comment. Based on comments like these from stakeholders on the Draft Guidance in 2011, the agencies have moved forward with today's final rule.**

Beaver County Commission (Doc. #9667)

13.269 (…) Recommendation: Withdraw the proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law. Furthermore, they must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority. (p. 6)

Agency Response: **For concerns regarding expanded jurisdiction, see section 13.2 summary response for information regarding the rulemaking process.**

13.270 Issue 6: Failure to list all supporting documents.

Reference: FR page 22188, column 2. All documents in the docket are listed in the http://www.regulations.gov index.

Discussion: FR page 22188, column 1 states that the proposed rule is published "in light of'court cases. Column 3 of the same page refers to the SWANCC and Rapanos court cases. The SWANCC and Rapanos decisions are crucially important to understanding the whole reason the Agencies contend that the proposed rule is necessary, yet the Agencies have not made them available in the docket under "Supporting & Related Material. This is not only unfair to the public, but it is also a false statement made in the proposed rule.

Recommendation: Provide links to the SWANCC and Rapanos court cases as well as any other caselaw "in light of' their important connection to the proposed rule. (p. 12)

Agency Response: **Weblinks to *SWANCC* and *Rapanos* court cases are available on the agencies websites http://www2.epa.gov/cleanwaterrule/documents-related-proposed-definition-waters-united-states-under-clean-water-act The rule implements, and is consistent with, the interpretations of the Supreme Court in the *Rapanos* and *SWANCC* decisions because the rule only covers waters that have a significant nexus with traditional navigable waters, and therefore within federal authority over channels of interstate commerce.**

Pocahontas County, Indiana (Doc. #13666)

13.271 Concern about the violation of administrative procedures: We agree with the many cries of objection heard from across the country that the USEPA has violated the terms of the Administrative Procedure Act in the promulgation of the rule. We do not understand why the USEPA appears to treat this very serious matter as if it were a political campaign. Telling the truth and genuinely hearing the concerns being presented, such as ours here, should be who you are! (p. 2)

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Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

Palo Alto County Board of Supervisors (Doc. #14095)

13.272 **Concern about the violation of administrative procedures**. We agree with the many cries of objection heard from across the country that the USEPA has violated the terms of the Administrative Procedure Act in the promulgation of the rule. We do not understand why the USEPA appears to treat this very serious matter as if it were a political campaign. Telling the truth and genuinely listening to concerns such as ours would be a very welcome change.

Withdraw the proposed rule. On behalf of all of the taxpayers and property owners of Palo Alto County we strongly object to the proposed rule to expand the definition of jurisdictional waters. The potential adverse impacts have not been fully vetted and are grossly understated or are not accounted for at all. The administrative procedures have also been compromised to the point that we cannot trust that our concerns will be properly vetted and accounted for in the development of the final rule. We join the many units of government from across the country who call for the complete recall of the proposed rule. (p. 2)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

Waters of the United States Coalition (Doc. #14589)

13.273 It is imperative that the EPA get the Proposed Rule right because of the limited recourse that property owners and public agencies have in the event of a misapplication of the rule. The Fifth Circuit Court of Appeals recently held that a jurisdictional determination, alone, issued by the ACOE is not subject to judicial review under the Administrative Procedure Act. (Belle Company, LLC v. U.S. Army Corps of Engineers, No. 13-30262, slip op. (5th Cir. July 30, 2014).)

If the Fifth Circuit's decision stands, a party who disagrees with a notice that property contains waters of the United States must complete a potentially expensive permitting process, or risk an enforcement action, before seeking judicial review of the underlying jurisdictional determination. An over-inclusive or otherwise poorly drafted rule therefore poses a substantial risk to public agencies who may be operating facilities that are reclassified as waters of the United States, or who are planning projects in areas that would similarly be reclassified as a result of the Proposed Rule. (p. 9 – 10)

Agency Response: **For the reasons explained in the *Belle Company* decision, a jurisdictional determination does not impose any obligations on any party, but simply informs the party of the agency's views of the applicability of the statute. Moreover, by drawing regulatory lines, the final rule will reduce the need for jurisdictional determinations and therefore simplify and reduce the expense of the regulatory process.**

New Mexico Association of Commerce and Industry (Doc. #5610)

13.274 Additionally, ACI believes that the EPA and the Corps are pursuing rulemaking requests in a blatant attempt to circumvent a deliberative, fair, and transparent regulatory process.

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Instead, the agencies are seeking a hurried and predetermined outcome through rulemaking requests. The EPA and the Corps have continued to pursue this course of actions despite failing to 1) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), 2) appropriately consult with affected states, and 3) allow for the completion of the Science Advisory i3oard review of the so-called "Connectivity Report". (p. 1 – 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For information regarding the Connectivity Report, see Section 13.1. For information on RFA see section 11.1 in compendium 11.

13.275 The proposed rule is in fact a regulation and therefore by federal statute must be promulgated under the Administrative Procedure Act. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Water Advocacy Coalition (Doc. #7981)

13.276 We, the Waters Advocacy Coalition[102] (WAC or Coalition), 1 write to raise serious concerns with the rulemaking process associated with the proposed rule to define '·waters of the United States" under the Clean Water Act (CWA), 79 Fed. Reg. 22,188 (Apr. 21, 2014). The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (the Agencies) are thwarting important requirements of the Administrative Procedure Act (APA) and frustrating the public's opportunity for meaningful notice and comment by repeatedly issuing and revising, outside of the APA process, ad hoc explanations an d other documents critical to the rule.

Within the last month alone, outside of the rulemaking process and just one month before comments are due, the Agencies have released the following:

- A series of agency blog posts that provide new interpretations of the proposed rule's language;
- New Corps reports that detail national challenges with defining the term "ordinary high water mark," the most critical term for defining "tributary" under the proposed rule;
- Science Advisory Board comments pointing out problems with the Connectivity Report and the rule;
- USGS maps that depict perennial, intermittent, and ephemeral waters across the nation; and
- A late invitation for select small business entities to attend a meeting with the Agencies on the proposed rule.

[102] WAC is a coalition representing the nation's construction, real estate, mining, agriculture , transportation, forestry, manufacturing. and energy sectors, as well as wildlife conservation and recreation interests. *See* Attached List of WAC Members.

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The APA does not allow the Agencies to keep altering the regulatory landscape throughout the rulemaking process. Indeed, the public cannot be expected to provide meaningful comment on a moving target. As such, we call on the Agencies to immediately withdraw the proposed rule for the following important reasons:

1. **The Agencies Continue To Issue New Materials Explaining the Proposed Rule Throughout the Comment Period, Creating a Moving Target for Public Comment.**

Since the proposed rule was issued on April 21, 2014, the Agencies have continued to issue new documents, blog posts, Q&A documents, and webinars, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this ad hoc information is inconsistent with material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the Agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses.

For example, the term "upland" is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded from the definition of "waters of the United States" under the proposed rule. In stakeholder discussions throughout the comment period, the Agencies have acknowledged that they have not proposed a definition of "upland." Now, a recent Q&A document, issued by the Agencies on September 9, 2014, provides a new definition of "upland:" "Under the rule, an 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction."103 This new definiion of "upland" is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? Is the public responsible for tracking the Agencies' blog posts and ad hoc statements to piece together the meaning of key regulatory terms?104

Similarly, the EPA-prepared economic impact analysis located in the rulemaking docket estimates that "the proposed rule increases overall jurisdiction under the CW A by 2. 7%."105 Now, in the Sept. Q&A document, the Agencies back away from that estimate, and instead refer to a completely different calculation, claiming, "When the proposed rule is compared to the agencies' existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA ... "106 Worse still, at other times

[103] EPA and U.S. Army Corps of Engineers, Questions and Answers- Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, Sept. Q&A document).

[104] Likewise, although the preamble defines "perennial flow" in terms of the *presence* of water ("water that is present in a tributary year round when rainfall is normal or above normal"), 79 Fed. Reg. at 22,203, the Sept. Q&A document focuses on .*flow* ("flow[s] year-round"). Neither of these definitions provides the necessary clarity on "perennial" flow. And the conflicting information from the Agencies renders it impossible for the public to meaningfully comment.

[105] EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 12 (March 20 14), *a vailable at* http://www.regulations.gov/#!documentDetail ;D=EPA-HQ-OW-20 ll-0880-0003.

[106] Sept. Q&A at 3.

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the Agencies have relied on multiple other baselines in their outreach,107 again creating a moving target for commenters. How is the public to comment on the implications of the proposed rule if the Agencies keep changing the point of reference to avoid addressing direct concerns? If the Agencies are disregarding the EPA Economic Analysis in the rulemaking docket, should the public do the same? Again, how is the public to comment?

In addition to releasing new information, the Agencies continue to revise and remove previous blog posts and statements released throughout the comment period. On June 30, 2014, EPA released a blog post by Nancy Stoner and an accompanying Q&A document.108 Now, without any indication or notice that the June 30 Q&A has been revised, the Stoner blog post links to a different Q&A document in which some of the previous information has been removed and many of the responses have been revised. For example , under the heading "The proposed rule does NOT mean that previous decisions about jurisdiction will have to be revisited ," the June 30 Q&A document provided, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations." This entire section, including the statement about existing jurisdictional determinations, has now vanished in the revised Q&A document. Have the Agencies changed their position on revisiting previous determinations? How is the public to rely on these Q&A documents when their content is only temporary? As another example, in discussing "ordinary high water mark" (OHWM), the June 30 Q&A document provided, "Features that flow extremely rarely would not exhibit these characteristics and would not be jurisdictional." (emphasis added). Now, the document has been revised to state, "Water features that don't flow frequently enough or with enough volume to exhibit these characteristics would not be jurisdictional." (emphasis added). Not only are these sentences not accurate, but the meanings are different. Again, the Agencies are changing their story without explanation or notice. Have the Agencies changed their position on OHWM? How is the public to comment when the Agencies keep revising their stance on important issues without notice? (p. 1 – 4)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and

[107] *See, e.g.*, Remarks of Gina McCarthy at Agricultural Business Council of Kansas City on Clean Water Proposal (July l 0 , 2014), *available at* http: //go.usa.gov/Xm vh ("EPA feels confident that, under this proposal, fewer waters will be jurisdictional than under President Reagan."); Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30. 2014) ("[The rule protects fewer waters than prior to the Supreme Court cases.").

[108] http://blog.epa. go v/epaconnect/20 14/06/setting-the-record -straight-on-wous/ (June 30, 20 14).

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the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

13.277 2. Without Public Notice or Opportunity for Comment, the Agencies Are Developing Policies on Key Components of the Proposed Rule, Such as Ordinary High Water Mark.

In August 2014, the Corps Engineer and Research Development Center (ERDC) released two new guidance documents regarding OHWM: (1) A Guide to Ordinary High Water Mark OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States, and (2) A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification.[109] OHWM is the lynchpin concept of the proposed rule's "tributary" definition, but the meaning of this key term is still in flux.

Separate from the proposed rulemaking, the Agencies are redefining OHWM without the required public notice and comment. The preamble asserts that the 33 C.F.R. § 328.3(e) definition of OHWM "is not changed by [the] proposed rule."[110] Yet, the two August 2014 OHWM guidance documents indicate that the Agencies are developing a new O HWM standard. These guidance documents essentially ignore the regulatory definition at§ 328.3(e) and create a new method for determining OHWM based on the delineation of an "active channel signature" through the use of three primary indicators-topographic break in slope, change in sediment characteristics, and change in vegetation characteristics. In effect, other physical indicators explicitly referenced in§ 328.3(e) are superfluous under this new methodology. This is a clear change in regulatory practice and will have a substantial effect on how CW A jurisdiction is interpreted. Any efforts to redefine OHWM, a key term in the Agencies ' proposed "waters of the United States" definition, should be part of this rulemaking. The Agencies may not segment key components of the proposed "waters of the United States" definition and address them separately to avoid APA notice-and-comment requirements.

[109] Matthew K . Mersel and Robert W. Lichvar, U .S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), hup: //acwc.sdp.sirsi.net/ client/search/asselfl 036027 (hereinafter, Western Mountains OHWM Guidance); Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), http://acwc.sdp.sirsi.nelfclient/search/ asset/ l 0360? 6 (hereinafter, National OHWM Review).

[110] 79 Fed. Reg. at 22,202.

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Moreover, a review of the OHWM guidance documents issued by the Corps demonstrates that, contrary to the Agencies' statements in the context of the "waters of the United States" rule, determination of the OHWM is anything but simple or clear. In various blog posts, stakeholder calls, and statement s released by the Agencies during the comment period, the Agencies have touted the OHWM as "well-known" and " easy to observe and document."[111] But the recent Corps statements and publications paint a different picture. In March 2014, the Corps recognized that OHWM is a "vague definition," leading to "inconsistent interpretation of [the] OHWM concept," and "inconsistent field indicators and delineation practices."[112] Likewise, the Corps' Western Mountains OHWM Guidance states that "OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging" and notes that "it is often difficult to determine what constitutes ordinary high water and to interpret the physical and biological indicators established and maintained by ordinary high water flows."[113] For these reasons, the Corps' National OHWM Review recognizes the "need for nationally consistent and defensible regulatory practices" and suggests that "a comprehensive framework is needed."[114]

In light of the confusion surrounding OHWM definition, it is difficult to understand why the Agencies would rely on OHWM as a determinative measure of CWA jurisdiction over tributaries.[115] Indeed, the Science Advisory Board (SAB) panel questioned the proposed rule's use of OHWM as part of the "tributary" definition, and panel members were "concerned about the definition of tributary being anchored in something as regionally variable" as the OHWM concept.[116] There is a serious disconnect between the Agencies' statements that the OHWM is easy to determine and the Corps' guidance documents and recent statements to the contrary. These mixed messages from the Agencies make it difficult for the public to provide meaningful comment on the proposed rule. (p. 4 – 5)

<u>Agency Response:</u> The agencies are not redefining "ordinary high water mark." See paragraph (c) of the final rule for the definition of "ordinary high water mark." Assertions that the Corps ordinary high water mark manuals were required to go through rulemaking are outside the scope of this rulemaking effort. Because the rulemaking addresses many issues by reference to existing regulations, there is necessarily some overlap between the rulemaking and ongoing agency implementation of current regulations. Administration of the current regulations

[111] *See, e.g.* , Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), http:/ lbl og.epa. go v/epaconnect/20 14/08/mappi ng -the-truth/.
[112] Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development ofNat ional OHWM Delineation Technical Guidance (March 4, 2014),
[113] Corps Western Mountains OHWM Guidance at 1-2.
[114] National OHWM Review at 1-2.
[115] These concerns are not new. In Rapanos, Justice Kennedy criticized the Agencies' use of OHWM to determine whether tributaries are jurisdictional, because he was concerned that such a standard was overbroad and would leave room for the Agencies to assert jurisdiction over waters that do not have a significant nexus to traditional navigable waters. Rapanos v. United States, 547 U.S. 715, 781-82 (2006) (Kennedy, J., concurring).
[116] See Bridget DiCosmo, lnside EPA. com, EPA Appears to Reject SAB Calls to Clarify Controversial "Waters" Proposal (Aug. 22, 2014).

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must obviously continue during this rulemaking, and the Corps is continually seeking to improve and refine its practice through issuance of technical guidance that assists Corps field staff and the regulated public.

Since the ordinary high water mark is an important component of the identification of jurisdictional tributaries under the final rule the agencies felt that including its definition in the final rule was appropriate. The final rule definition of ordinary high water mark is the same as the definition that has been in Corps regulations and implemented by the Corps to identify the lateral extent of tributary jurisdiction for decades. The agencies acknowledge that the identification of the ordinary high water mark can be challenging in certain regions and certain types of streams which is the impetus for the manuals to assist in the identification in such challenging scenarios. The manuals, such as the manual for the arid West, provide a technical means for an efficient, effective, and consistent identification and delineation of the ordinary high water mark using indicators such as changes in vegetation, breaks in slope, and changes in the substrate texture. The agencies also recognize that there is regional variation in ordinary high water mark delineation; there are a suite of indicators that may be used in ordinary high water mark identification and certain indicators are more reliable in certain regions than others.

Because the rulemaking addresses many issues by reference to existing regulations, there is necessarily some overlap between the rulemaking and ongoing agency implementation of current regulations. Administration of the current regulations must obviously continue during this rulemaking, and the Corps is continually seeking to improve and refine its practice through issuance of technical guidance that assists Corps field staff and the regulated public.

Regarding, the commenter's reference to the SAB input, the agencies fully considered the SAB's comments on use of OHWM as part of the definition of tributary and for the reasons explained in the preamble and/or TSD, decided to retain the term in the final rule.

13.278 3. The Science Advisory Board Has Raised Concerns with Significant Components of the Proposed Rule, and EPA Has Not Released a Final Connectivity Report.

We reiterate our concern, raised in the Coalition's May 13, 2014, letter, with the Agencies' preparation of a draft rule before the foundational science, the "Connectivity Report," is peer reviewed and final. The SAB panel has recommended significant changes to the Connectivity Report and, if EPA intends to be responsive to those concerns, the final Connectivity Report will substantially differ from the draft that has been made available to the public. To comply with the APA, the Agencies must allow the public the opportunity to comment on the final report.

Moreover, on September 2, 2014, the SAB panel released comments on the adequacy of the scientific and technical basis of the proposed rule.[117] The SAB panel members

[117] Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled "definition of

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raised a number of serious concerns about the proposed rule's definitions and categories of regulation. For example, "Panel members generally found that the term 'significant nexus' was poorly defined ... and that the use of the term 'significant' was vague."[118] Panel members also questioned the adequacy of scientific support for several of the rule's definitions and exclusions. For instance, "Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included."[119] And, as recently as September 26, 2014, a member of the chartered SAB questioned why neither the Connectivity Report nor the SAB review assessed the level of importance of connectivity. He stated, "EPA scientists should consider where along the connectivity gradient there is an impact of sufficient magnitude to impact downstream waters," and noted that, although there is a continuum, scientists are depended upon to make determinations of significant or critical effects.[120] Substantial changes to the proposed rule and the Connectivity Report are needed to address these important concerns raised by the SAB. The public must be given the opportunity to review and comment on any such revisions. (p. 6)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For information on the Connectivity Report, see the summary response for section 13.1.

13.279 Land and Waters Subject to Federal CW A Jurisdiction Under the Proposed Rule.

During the comment period, there has been significant discussion over EPA maps that rely on data from the U.S. Geological Survey (USGS) and appear to depict the scope of CWA jurisdiction.[121] The Coalition commends Rep. Lamar Smith and the U.S. House of Representatives Committee on Science, Space, and Technology, for making these maps publicly available and requesting that EPA enter the maps and related information into the rulemaking docket.[122] Unfortunately, these maps are just the tip of the iceberg, as they depict only a fraction of the land and waters that would be subject to federal CWA jurisdiction under the proposed rule.

In yet another blog post, EPA states that these maps "do not show the scope of waters ... proposed to be covered under EPA's proposed rule" and "cannot be used to determine Clean Water Act jurisdiction - now or ever."[123] But why not? The proposed rule effectively provides that the Agencies intend to treat all perennial, intermittent, and

'waters of the United States' under the Clean Water Act," (Sept. 2, 2014), http://yosemite.epa.gov/ sab/sabproduct.nst/F6E 197 AC88A3 8CCD85257D49004D9EDC/$Fi le/Rodewald Memorandum WOUS+Rule 9 2 14.pdf(hereinafter, SAB Panel Comments on Proposed Rule).

[118] SAB Comments on Proposed Rule at 6.

[119] Id. at 7.

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

[121] See http://science.house.gov/ epa-maps-state-20 13#overlay-context.

[122] See Letter from the Honorable Lamar Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to the Honorable Gina McCarthy, Administrator, U.S. EPA (Aug. 27, 2014), http://science. house.gov/sites/republicans.science.house.gov / file s/ documents/08-27-20 14 %20Science%20Committee%20Chairrnan% 20Smith%20to% 20Administrator"/o 20McCarthy _ O.pdf

[123] Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28 , 2014) , http: / fbiog.epa.gov/epaconnect/20 14/08/mapping -the-truth/.

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ephemeral streams *asperse* jurisdictional (no case-specific analysis), and the preamble indicates that the Agencies will identify tributaries using USGS maps and other appropriate information.[124] How, then, can the Agencies claim that these maps do not show the scope of streams subject to federal CWA jurisdiction under the proposed rule?

Indeed, these maps indicate a total of approximately 8.1 million miles of perennial, intermittent, and ephemeral streams across the 50 states, all of which would be categorically regulated as tributaries under the proposed rule. And, these maps show only a subset of the land and waters that would be jurisdictional under the proposed rule, because they do not depict all of the other features, such as ditches and adjacent ponds, that would be categorically jurisdictional, or "other waters" that could be jurisdictional if the Agencies find a significant nexus. These USGS maps, and EPA's casual dismissal of their significance, demonstrate that, as suggested by Rep. Lamar Smith, the public is "getting the run-around" and has not been provided with significant information needed to meaningfully comment on the proposed rule. (p. 7)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

13.280 4. The USGS Maps Recently Released by Rep. Smith Depict Only a Portion of the U.S. Chamber of Commerce (Doc. #14115)

Agency Response: **The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.**

[124] 79 Fed. Reg. at 22,202.

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13.281 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.[125] 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. (p. 36)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For additional information on implementation of this rule, see comment responses in compendium 12.**

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

13.282 The EPA and Corps must comply with the federal Administrative Procedure Act (5 U.S.C. §§ 551 et seq.), and the golf industry reserves its rights to require full federal compliance with this law. (p. 2)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

National Association of Convenience Stores (Doc. #15242)

13.283 Finally, by repeatedly releasing new materials relevant to the rulemaking after opening the comment period, the Agencies are undermining the goals of the APA to protect the public's right to a meaningful notice and comment process.[126] For example, since issuing the Proposal in April 2014, the Agencies have published support documents, Q&A documents, webinars, and blog posts that have attempted to simplify the Proposal and otherwise support the Agencies' positions.[127] By continually altering the regulatory

[125] 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.).

[126] See, e.g., National Black Media Coalition v. FCC, 791 F.2d 1016 (1986); Forester v. Consumer Product Safety Commission, 559 F.2d 774, 787 (D.C. Cir. 1977)(describing the "meaningful opportunity" to participate).

[127] See, e.g., EPA and Corps, Questions and Answers – Waters of the U.S. Proposal (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf; EPA, Webinar: Clarifying Misconceptions (July 16, 2014), available at http://www2.epa.gov/uswaters/documents-related-proposed-definitionwaters-united-states-under-clean-water-act; Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014).

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landscape throughout the rulemaking process, the Agencies are not complying with the APA and foiling the right of the public to engage in the rulemaking process.[128] (p. 6)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Federal Water Quality Coalition (Doc. #15822.1)

13.284 VII. The Agencies' Procedural Errors Render the Proposed Rule Invalid.

A. The Proposed Rule Fails to Meet the Requirements of the Administrative Procedure Act.

The Administrative Procedure Act (APA) requires agencies to provide the public with the opportunity to comment on their actions. 5 U.S.C. 553(c). In order to provide for meaningful public comment under the APA, agencies must disclose the data or other material that the agency relies on to make a final decision. Participation is not meaningful if an agency bases its action on information that is not available to the public. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d. Cir. 1977).

As discussed above, the entire basis for the agencies' determination that categories of waters are per se waters of the U.S. is the Draft Connectivity Report. The SAB Panel charged with reviewing that report released their comments on October 17, 2014, and recommended extensive changes, including a recommendation to evaluate connectivity along a gradient that recognizes that connectivity is a function of frequency, duration, magnitude, predictability, and consequences.[129]

The proposed rule that is out for public comment does not reflect these recommendations. As noted by Dr. Fennessy, one of the SAB Panel members who reviewed the proposed rule:

> [ ] I was surprised about the release date of the draft rule, and to see that it does not reflect the many suggestions made by the SAB panel to strengthen the EPA Connectivity Report. While I understand the timing of the release is typical, it possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based. I hope the draft rule can be modified to reflect the work of the SAB panel. A second, related issue is that the report does not use the connectivity gradient framework that was suggested by the SAB panel. Establishing the framework early in the draft rule would aid in the discussions about what constitutes a significant degree of connectivity, which could help define jurisdictional waters.130

[128] 5 U.S.C § 500 et seq.

[129] This recommendation, as well as the limitations discussed above of the studies cited in the Draft Connectivity Report, undermines the agencies' conclusion that all "tributaries" (as defined in the proposal) and all "adjacent waters" (as defined in the proposal) have sufficient connection to navigable water to be considered "waters of the U.S."

[130] SAB Rule Review, at 29.

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The agencies have promised to issue a revised Connectivity Report before they issue a final rule.131 If the final report addresses the comments of the SAB Panel (including comments noting that connectivity is not a binary function) it will be significantly different from the draft report. Further, if the final rule is amended based on a revised final report, then material that the agencies will rely on to make a final decision will not be available during the public comment period. This means that the public will not have a meaningful opportunity to comment on the rule, violating the APA.

The agencies' plan to rely on guidance relating to the definition of OHWM, floodplain, and other terms used in the proposed rule also would violate the APA because the agencies would be changing federal jurisdiction without notice and comment.132 (p. 59 – 61)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. As stated in the preamble for the final rule, The agencies' determination that categories of waters are per se waters of the U.S. based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.**

Water Advocacy Coalition (Doc. #17921.1)

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

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

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

[131] 79 Fed. Reg. at 22197 ("At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record.").
[132] See, e.g., General Electric v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (guidance that creates legal obligations is a legislative rule).

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as the underlying scientific support for the proposed rule, is final, the agencies have not complied with this critical APA requirement.

The agencies have assured the public that the final regulatory action related to CWA jurisdiction will be based on the final version of the Connectivity Report. See 79 Fed. Reg. at 22, 190, 22,222. But throughout the comment period, the draft Connectivity Report was undergoing review by the SAB Panel. In late September 2014, the chartered SAB performed a quality review of the SAB Panel's draft conclusions on the draft Connectivity Report and submitted a letter with recommendations to the EPA Administrator.[133] On October 17, 2014, th SAB submitted final recommendations for revisions to the Connectivity Report, which incorporated the final report of the SAB Panel, to EPA Administrator Gina McCarthy. EPA now has the opportunity to make changes to the Connectivity Report based on the SAB's recommendations. Through its comments and report, the SAB Panel has recommended numerous substantive changes to the Connectivity Report.[134] This process will not be completed in time for the public to review and comment on the final Connectivity Report in their comments on the proposed waters of the United States rule. The agencies should have taken a coordinated and reasoned approach to develop a proposed rule following the SAB's peer review of the report and EPA's release of a final Connectivity Report.

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

> I must say I am puzzled as to why EPA has decided to release the Proposed Rule before receipt of our review of the Connectivity Report . . . . The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened'. . . The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB -- just a few minor additions. . . . In point of fact, the SAB Review suggested that some major additions be made to the Connectivity Report.[135]

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

> I was surprised by the release date of the draft rule and to see that it does not reflect many of the suggestions made by the SAB panel to strengthen the EPA Connectivity Report. . . .[T]he timing of the release . . . possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based.[136]

[133] Letter from David T. Allen, Chair SAB, to Gina McCarthy, Adm'r EPA (Sept. 30, 2014), available at http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf.
[134] See SAB Panel Review of Connectivity Report, Exhibit 5.
[135] SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 89 (comments of Dr. Mark Murphy).
[136] Id. at 29 (comments of Dr. Siobhan Fennessy).

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To allow informed and meaningful public comment on the proposed rule and report as required by the APA, and to fulfill its prior assurances, EPA should re-propose a rule that is informed by the final Connectivity Report and allow the public to comment on the final report. (p. 82 – 84)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

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

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

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

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

Third, throughout the comment period, the agencies have continued to issue new materials explaining the proposed rule, creating a moving target for public comment.[137] Since the proposed rule was issued on April 21, 2014, the agencies have continued to issue new documents, blog posts, Q&As, and webinars throughout the comment period, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this ad hoc information is inconsistent with material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses. For example, as discussed above, the term "upland" is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded.

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

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Now, a recent Q&A document issued by the agencies on September 9, 2014, provides a new definition of "upland."[138] This new definition of "upland" is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? Is the public responsible for tracking the Agencies' blog posts and ad hoc statements to piece together the meaning of key regulatory terms? Likewise, as discussed above, OHWM is the lynchpin concept of the proposed rule's "tributary" definition, but the agencies are now in the process of developing new guidance on OHWM, and the meaning of this key term is still in flux.[139] This continual stream of new information from the agencies prevents the public from having adequate notice and opportunity to respond to key aspects of the proposal and results in a "critical defect in the decisionmaking process." See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 376, 392 (D.C. Cir. 1973) (finding APA violations where a rule was promulgated based on data that "is only known to the agency."). The agencies' failure to disclose this information at the outset of the comment period has resulted in a lack of opportunity to comment on the proposed rule and its key concepts. See id. at 402.

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

In sum, because the final rule must follow logically from the proposed rule, and the agencies must make substantial changes to bring the proposed rule in line with case law and available science, the agencies should withdraw the current proposed rule and start afresh, in dialogue with States and the regulated community. (p. 89 – 90)

<u>Agency Response:</u> See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For information on ditches and the use

[138] Sept. Q&A document at 5 ("Under the rule, an 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.").
[139] Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), http://acwc.sdp.sirsi.net/client/search/asset/1036027; Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), http://acwc.sdp.sirsi.net/client/search/asset/1036026.

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of term "uplands" see the comment response in compendium 6. For information on other waters see the comment response in compendium 4.

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

This Administration has committed itself to public participation and transparency.[140] But EPA and the Corps did not solicit meaningful public participation in the development of the proposed rule. Some members of industry did meet with EPA to express their concerns about the potential impacts of the 2011 Draft Guidance and any proposed rule that would track that guidance, but the proposed rule does not address any of the concerns raised in this limited outreach. Only after the rule was developed, drafted, and proposed did the agencies seek more extensive outreach with industry groups, State and local organizations, and other members of the public. Instead of trying to understand the public's concerns with the potential breadth of the rule, the agencies have dug in their heels and repeated their mantra that this proposed rule will not change the scope of CWA jurisdiction. Moreover, the agencies have not been transparent during their outreach. For example, the agencies have held calls with numerous stakeholders, but those calls are initiated only by emails from the agencies to a select list of participants. There is no publicly available list of the meetings the agencies have conducted. Nor is there any advance notice of these meetings for the public. For example, in one of the few instances that the agencies did publicly announce a meeting with stakeholders, they did so after the fact – the notice of the meeting of the Local Government Advisory Committee in St. Paul on May 28 was published in the Federal Register on May 29. See 79 Fed. Reg. 30,787.

Given the critical importance of this issue, which has broad application and affects myriad stakeholders, the agencies should have made the rulemaking process more collaborative and more open. They should withdraw the proposed rule and conduct outreach the proper way, giving advance notice to the public of all meetings, and consulting with stakeholders before the rule is developed. (p. 97)

<u>Agency Response:</u> See section 13.2.1 summary response for information regarding the Administrative Procedure Act. In addition to extending the public comment period on the proposal for a total of over six months and providing outreach materials on agency websites, the agencies responded to hundreds of requests from stakeholders. For additional information on public outreach events, see the docket. The agencies published notice of outreach meetings with LGAC in the Federal Register prior to each meeting. The agencies also encouraged organizations to include information on outreach meetings to their members and where possible in their newsletters.

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

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

13.288 The proposed rule reaches too broadly and exceeds the reach of the Commerce Clause of the U.S. Constitution. The current regulation defining "Waters of the United States" clearly recognizes the Commerce Clause in defining the reach of the federal authority 33 C.F.R. 328.3(a). The proposed definition divorces itself from any basis in the Commerce Clause. As such the proposed rule, if adopted, would be arbitrary and capricious and not otherwise in accordance with law pursuant to the Administrative Procedure Act. Simply put, the proposed rule exceeds the authority given the United States and is not a reasoned interpretation of the CWA. (p. 1)

Agency Response: The final rule deletes reference to interstate commerce in order to conform with the decisions in *Rapanos* and *SWANCC.* Because the rule, consistent with those decisions is consistent with the statutory interpretation of those decisions and is tied to federal authority over channels of interstate commerce, it is constitutionally valid.

Pennsy Supply, Inc. (Doc. #15255)

13.289 The proposed rulemaking violates the Administrative Procedure Act and various Executive Orders specifically as they relate to transparency and process. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

National Association of Home Builders (Doc. #19540)

13.290 iii. EPA Unlawfully Intercepted Questions Congress Posed to the Science Advisory Board.

In addition to the procedural flaws associated with proposing a rule before the supporting science was reviewed, EPA unlawfully intercepted questions posed to the SAB by the House Science Committee. In his opening statement at the July 9, 2014 House Science Committee hearing entitled "Navigating the Clean Water Act: Is Water Wet?", Chairman Lamar Smith (R-Texas) stated, "The EPA wrote its new 'waters of the U.S.' rule without even waiting for the expert advice of the Agency's own Science Advisory Board. The Science Advisory Board exists to provide independent advice to the EPA and to Congress. It is the job of these experts to review the underlying science. Not only did the EPA publish its rule before the [Science Advisory] Board had an opportunity to review the report, but when [the House Science] Committee sent official questions to the [Science Advisory] Board as its review began, the EPA stepped in to prevent the experts from responding." [141]Questioning EPA Deputy Administrator Robert Perciasepe, Chairman Smith stated, "[The House Science Committee] submitted several questions to the Science Advisory Board that were intercepted by the EPA, and the Science Advisory Board was not allowed to answer our questions. That's not the way I read the law. We don't have to get the EPA's permission for the Science Advisory Board to give us answers to our questions . . . The law doesn't allow you to screen the Science Advisory

[141] Statement of Chairman Lamar Smith (R-Texas) Hearing on Navigating the Clean Water Act: Is Water Wet? (July 9, 2014).

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Board's answers or to intercept our questions . . ."[142] This Administration has consistently touted the importance of science and transparency in its operations, yet today's proposal abandons any precept of openness in exchange for expediency. Ignoring the SAB, refusing to answer the House Science Committee's questions, and issuing a proposed rule prior to SAB's review of the Connectivity Report certainly gives the impression that the Agencies have inappropriately predetermined the outcome of this rulemaking. Such an outcome serves no one. The Agencies must coordinate open and transparent lines of communication between the SAB and those who will be impacted by the proposed rule, including providing opportunities for meaningful comment. (p. 149)

Agency Response: **For additional information on the final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9.**

13.291 X. The Agencies Failed to Comply with Key Procedural Requirements.

Among the myriad of Constitutional, statutory, judicial, scientific, economic, and practical concerns surrounding the proposed rule, the Agencies have failed to comply with key procedural rulemaking requirements, including the Administrative Procedure Act, the Regulatory Flexibility Act, Executive Order 12,866, Executive Order 13,132, and Executive Order 13,536. Additionally, the Agencies have violated the Data Quality Act.

a. The Agencies Failed to Comply with the Administrative Procedure Act.

The Agencies are thwarting important requirements of the Administrative Procedure Act (APA) and frustrating the public's opportunity for meaningful notice and comment by proposing the rule prior to finalizing the Connectivity Report and repeatedly issuing, outside of the APA process, ad hoc explanations and other documents critical to the rule.

Within the last three months of the comment period alone, the Agencies have released the following:

- a series of agency blog posts that provide new policy interpretations of the proposed rule's language;
- new Corps reports that detail policies and national challenges associated with defining the term "ordinary high water mark," the most critical term for defining "tributary" under the proposed rule;
- Science Advisory Board comments pointing out problems with the draft Connectivity Report and the rule; and
- USGS maps that depict perennial, intermittent, and ephemeral streams across the nation.

The APA does not allow the Agencies to keep altering the regulatory landscape throughout the rulemaking process. Indeed, the public cannot be expected to provide

[142] Rep. Lamar Smith (Chairman, House Committee on Science, Space, and Technology) statements during House Science Committee Hearing "Navigating the Clean Water Act: Is Water Wet?" (July 9, 2014).

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meaningful comment on a moving target. Additionally, a federal agency shall "maintain a flexible and open minded attitude toward its own rules,"[143] and yet EPA and the Corps have prejudged the proposal's outcome. As such, NAHB calls on the Agencies to immediately withdraw the proposed rule for the following important reasons:

i. The Agencies Continue to Issue New Materials Explaining the Proposed Rule, Creating a Moving Target for Public Comment.

Since the proposed rule was issued on April 21, 2014, the Agencies have continued to issue new documents, blog posts, Q & A documents, and webinars offering new explanations of key terms in the proposed rule and new reasoning to support their proposed assertions of CWA jurisdiction. To make matters worse, much of this ad hoc information is inconsistent with the material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the Agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses.

For example, the term "upland" is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded from the definition of "waters of the United States." In stakeholder discussions throughout the comment period, the Agencies have acknowledged that they have not proposed a definition of "upland." Now, a recent Q & A document, issued by the Agencies on September 9, 2014, provides a new definition of "upland:" "Under the rule, an 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction."[144] This new definition of "upland" is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? It is unrealistic and inappropriate to hold the public responsible for tracking the Agencies' blog posts and ad hoc statements to piece together the meaning of key regulatory terms under the proposed rule.

Similarly, the EPA-prepared economic impact analysis located in the rulemaking docket estimates that "the proposed rule increases overall jurisdiction under the CWA by 2.7%."[145] Now, in the September 2014 Q & A document, the Agencies back away from that estimate and provide a conflicting analysis based on an entirely new baseline, stating, "When the proposed rule is compared to the agencies' existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA . . . ."[146] Despite this new estimate, it is not evident that the Agencies have revised their economic impact analysis since they decided that the relevant baseline of comparison is "the existing regulations." If the Agencies are disregarding EPA's Economic Analysis in the rulemaking docket, should the public do the same? Again, how is the public to comment?

[143] McClouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (interpreting 5 U.S.C. § 553; internal quotations omitted).
[144] September 2014 Q & A at 5.
[145] EPA Economic Analysis at 12.
[146] September 2014 Q & A at 3.

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The APA requires federal agencies, when undertaking a proposed rulemaking, to provide the public with an adequate description of the subjects and issues to be addressed under the proposed rule within the Federal Register notice.[147] However, EPA has continued to change its position on key elements of the proposed rule (e.g., providing an ad hoc definition for "upland" and releasing statements that contradict the findings contained within the agency's own economic analysis on potential increases in federal jurisdiction). Because EPA has taking these actions after publishing the proposed rule in the Federal Register, the public is effectively unable to understand the proposal's true scope or impact. The APA requires federal agencies to provide this information to the public within the proposed rule itself.[148] (p. 149 – 151)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. The agencies disagree that they have failed to comply with key procedural rulemaking requirements. See the section in the preamble on Related Acts of Congress, Executive Orders, and Agency Initiatives for further discussion about compliance with rulemaking requirements.**

The agencies received many helpful comments in response to the proposed rule which led to changes in the final rule for improved clarity for the agencies and the regulated public. The term "upland" was removed from the final rule language in the ditch exclusion language, in response to comments received. Many commenters were confused by the term "uplands" and did not feel the term had a common understanding. The ditch exclusions now focus on flow regime and on whether the ditch is excavated in or relocated a tributary.

The Economic Analysis provides information regarding predicted changes in jurisdiction reflected in the final rule language.

13.292 ii. Without Public Notice or Opportunity for Comment, the Agencies Are Developing Policies on Key Components of the Proposed Rule, Such as the Ordinary High Water Mark, through Other Efforts.

The identification of an OHWM is the lynchpin concept of the proposed rule's "tributary" definition, but the meaning of this key term is still in flux. Despite the uncertainty within the proposal, in August 2014, the Corps' Engineer and Research Development Center (ERDC) released two new guidance documents regarding "ordinary high watermark" (OHWM): (1) A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States, and (2) A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification.[149]

Separate from the proposed rulemaking, the Agencies are redefining OHWM without the required public notice and comment. The proposed rule's preamble asserts that the 33

[147] 5 U.S.C. § 553(b).
[148] 5 U.S.C. § 553(c).
[149] Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), http://acwc.sdp.sirsi.net/client/search/asset/1036027

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C.F.R. § 328.3(e) definition of OHWM "is not changed by [the] proposed rule."[150] Yet, the two August 2014 OHWM guidance documents indicate that the Agencies are developing a new OHWM standard. These guidance documents essentially ignore the regulatory definition at § 328.3(e) and create a new method for determining OHWM based on the delineation of an "active channel signature" through the use of three primary indicators—topographic break in slope, change in sediment characteristics, and change in vegetation characteristics. In effect, the other physical indicators explicitly referenced in § 328.3(e) are superfluous under this new methodology. This is a clear change in regulatory practice and will have a substantial effect on how CWA jurisdiction is interpreted. Given the fact that these guidance documents were issued during the proposal's comment period demonstrates that their timing was not a coincidence. Any efforts to redefine OHWM or any other key term in the Agencies' proposed "waters of the United States" definition must be part of this rulemaking. The Agencies may not segment key components of the proposed "waters of the United States" definition and address them separately to avoid APA notice-and-comment requirements.

Moreover, a review of the OHWM guidance documents issued by the Corps demonstrates that, contrary to the Agencies' statements in the context of the "waters of the United States" rule, determination of the OHWM is anything but simple or clear. In various blog posts, stakeholder calls, and statements released by the Agencies during the comment period, the Agencies have touted the OHWM as "well-known" and "easy to observe and document."[151] But, as described in Section VI. c. iv. 3. a., the recent Corps statements and publications paint a different picture. In March 2014, the Corps recognized that OHWM is a "vague definition," leading to "inconsistent interpretation of [the] OHWM concept," and "inconsistent field indicators and delineation practices."[152] Likewise, the Corps' Western Mountains OHWM Guidance states that "OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging" and notes that "it is often difficult to determine what constitutes ordinary high water and to interpret the physical and biological indicators established and maintained by ordinary high water flows."[153] For these reasons, the Corps' National OHWM Review recognizes the "need for nationally consistent and defensible regulatory practices" and suggests that "a comprehensive framework is needed."[154] NAHB agrees, but such a framework should only be developed through the proper channels, including APA compliance. (p. 151 – 152)

<u>Agency Response:</u> The agencies are not redefining "ordinary high water mark." See paragraph (c) of the final rule for the definition of "ordinary high water mark." Assertions that the Corps ordinary high water mark manuals were required to go through rulemaking are outside the scope of this rulemaking effort. Because the

[150] 79 Fed. Reg. at 22,202.
[151] See, e.g., Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014). Available online: http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/
[152] Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of National OHWM Delineation Technical Guidance (March 4, 2014)
[153] Western Mountains OHWM Guidance at 1-2.
[154] National OHWM Review at 1-2.

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rulemaking addresses many issues by reference to existing regulations, there is necessarily some overlap between the rulemaking and ongoing agency implementation of current regulations. Administration of the current regulations must obviously continue during this rulemaking, and the Corps is continually seeking to improve and refine its practice through issuance of technical guidance that assists Corps field staff and the regulated public.

Since the ordinary high water mark is an important component of the identification of jurisdictional tributaries under the final rule the agencies felt that including its definition in the final rule was appropriate. The final rule definition of ordinary high water mark is the same as the definition that has been in Corps regulations and implemented by the Corps to identify the lateral extent of tributary jurisdiction for decades. The agencies acknowledge that the identification of the ordinary high water mark can be challenging in certain regions and certain types of streams which is the impetus for the manuals to assist in the identification in such challenging scenarios. The manuals, such as the manual for the arid West, provide a technical means for an efficient, effective, and consistent identification and delineation of the ordinary high water mark using indicators such as changes in vegetation, breaks in slope, and changes in the substrate texture. The agencies also recognize that there is regional variation in ordinary high water mark delineation; there are a suite of indicators that may be used in ordinary high water mark identification and certain indicators are more reliable in certain regions than others.

Because the rulemaking addresses many issues by reference to existing regulations, there is necessarily some overlap between the rulemaking and ongoing agency implementation of current regulations. Administration of the current regulations must obviously continue during this rulemaking, and the Corps is continually seeking to improve and refine its practice through issuance of technical guidance that assists Corps field staff and the regulated public.

The agencies fully considered the SAB's comments on use of OHWM as part of the definition of tributary and for the reasons explained in the preamble and/or TSD, decided to retain the term in the final rule.

13.293 iv. The USGS Maps Recently Released Depict Only a Portion of the Land and Waters Subject to Federal CWA Jurisdiction Under the Proposed Rule.

During the comment period, there has been significant discussion over EPA maps that rely on data from the U.S. Geological Survey (USGS) and appear to depict the scope of CWA jurisdiction.[155] NAHB commends Rep. Lamar Smith and the U.S. House of Representatives Committee on Science, Space, and Technology, for making these maps publicly available and requesting that EPA enter the maps and related information into the rulemaking docket.[156]

[155] See http://science.house.gov/epa-maps-state-2013#overlay-con

[156] See Letter from the Hon. Lamar Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to the Hon. Gina McCarthy, Administrator, U.S. EPA (Aug. 27, 2014

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Unfortunately, these maps are just the tip of the iceberg, as they depict only a fraction of the land and waters that could be deemed categorically jurisdiction under the proposed rule.

In yet another blog post, EPA states that these USGS maps "do not show the scope of waters . . . proposed to be covered under EPA's proposed rule" and "cannot be used to determine Clean Water Act jurisdiction—now or ever."[157] But why not? The proposed rule explicitly states that the Agencies intend to treat all perennial, intermittent, and ephemeral streams as per se jurisdictional (no case-specific analysis), and the preamble indicates that the Agencies will identify tributaries using USGS maps and other appropriate information.[158] How, then, can the Agencies claim that these USGS maps do not show the scope of streams subject to federal CWA jurisdiction under the proposed rule?

Indeed, these maps indicate a total of approximately 8.1 million miles of perennial, intermittent, and ephemeral streams across the 50 states, all of which could be categorically regulated as tributaries under the proposed rule. What's more, these maps show only a subset of the land and waters that would be jurisdictional, because they do not depict all of the other features, such as ditches and adjacent ponds, that would be categorically jurisdictional, or "other waters" that could be jurisdictional if the Agencies find a significant nexus. These USGS maps, and EPA's casual dismissal of their significance, demonstrate that, as suggested by Rep. Lamar Smith, the public is "getting the run-around" and has not been provided with significant information needed to meaningfully comment on the proposed rule. (p. 153 – 154)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

[157] See Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), available at http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/.
[158] 79 Fed. Reg. at 22,202.

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Snyder Associated Companies, Inc. (Doc. #18825)

13.294 The proposed rulemaking violates the Administrative Procedure Act and various Executive Orders specifically as they relate to transparency and process. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Georgetown Sand and Gravel (Doc. #19566)

13.295 The proposed rulemaking violates the Administrative Procedure Act and various Executive Orders specifically as they relate to transparency and process. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

13.296 2. There is a Lack of Compliance with the Administrative Procedure Act (APA) and Other Procedural Requirements fo.r this Rulemaking.

a. The Administrative Procedure Act (APA)[159] is the federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations.[160] APA requires that agencies inform the public of the data and technical studies they relied on in their rulemaking, indicating the "most critical factual material" used by an agency must "ensure that agency regulations are tested through exposure to public comment . . ."[161]

In the proposed rulemaking, the Agencies have assured the public that this final regulatory action will be based on the final version of the EPA Science Advisory Board's (SAB) Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September, 2013 External Review Draft (EPA/600/R–11/098B) (Connectivity Report)[162]. However, because the proposed rule has been published, and EPA and the Corps are taking comments on the proposed rule before the Connectivity Report review is final, and because the Agencies have stated the Connectivity Report is the underlying scientific support for the proposed rule, the Agencies have not complied with this critical APA requirement.

In the SAB's Connectivity Report review comments, they have indicated disappointment by the Agencies' decision to proceed with a rule before their review of the Connectivity Report is complete. Their comments suggest that the "sequence employed by EPA suggests to the public that there is no critical input needed by the SAB...", but in fact, the

[159] Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946.
[160] Found at http://www.archives.gov/federal-register/laws/administrative-procedure/.
[161] Ibid.
[162] 79 FR 22190.

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SAB Review suggested that there are major additions that should be made to the Connectivity Report.[163] (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.

Alameda County Cattlewoman (Doc. #8674)

13.297 The Proposed Rule Would Violate the APA Because the Public has Not had an Opportunity to Provide Meaningful Comment

The Administrative Procedure Act (APA) requires federal agencies to ensure public participation in the rulemaking process by providing a meaningful opportunity for the public to comment on the rule's content.[164] The agencies have failed to provide the data the rule is based upon.[165] There are a vast number of missing pieces in the proposed rule and throughout the rulemaking process that have precluded the public from receiving a meaningful comment period. And, it has been obvious that the Corps of Engineers did not share equally in developing this rule. It has been frustrating to attend stakeholder outreach meetings where one of the jointly proposing agencies is not in attendance. One example is the small entities meeting that took place on Oct. 15, 2014 at EPA Headquarters. It was stated by EPA officials that the Corps was invited but did not choose to participate in the meeting. This is deeply disappointing, especially considering the regulator-landowner interactions that the Corps has the lead role in under some of the major programs. (p. 1 – 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

13.298 ACCW would like to provide the agencies with more extensive comments on the proposed rule. Unfortunately, there are too many significant legal holes throughout the document to be able to meaningfully comment on the scientific and legal extent of the proposed rule. As such, we provide comments on what is in the proposed rule, but cannot provide comments on that which is not included. Therefore, ACCW assert that the proposed rule prevents the American public from being able to provide meaningful comments on the proposed rule, thereby violating the APA.[166] To correct this fatal flaw the agencies must withdraw the rule and possibly at a later date fill in the gaping holes and provide the public with the information to make meaningful comments. (p. 2)

[163] SAB Panel Comments on Proposed Rule found at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf .

[164] 5 U.S.C. § 553 (b)-(c); American Med. Ass'n v. Reno, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994); Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673

[165] Engine Mfrs. Ass'n, 20 F.3d at 1181 ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.").

[166] Supra Note 1.

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Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

13.299 (…) Next, the agencies failed to provide the public with relevant maps that were available to the agency that detail the stream systems and wetlands across the U.S.[167] The proposed rule includes a definition of "tributary" that includes anything connected to an otherwise jurisdictional water that has a bed, bank and Ordinary High Water Mark (OHWM) as a jurisdictional water.[168] A map of the U.S. stream systems would be extremely relevant in illustrating the types of streams that the agencies propose to regulate. The agencies have not identified which waters located on the maps are not jurisdictional under their proposed rule. Instead of attempting to be transparent and actually clarify which streams and ditches across the country the agencies intend to regulate under this proposed rule, the agencies have withheld vital information that the public would have used to evaluate the proposal. ACCW assert that the agencies have inappropriately withheld relevant maps showing the nation's streams and wetlands in violation of the APA.

Without providing maps or more information in some form, the public has been left to comment on a proposed rule that is unintelligible. At outreach meetings and in presentations, agency officials have refused to articulate how the rule would be interpreted on the ground and refused to answer hypothetical situations. Without doing so the agencies have failed to provide the public with a clear picture of what they propose to regulate, thereby depriving the public of a meaningful opportunity to provide comment. If the agencies cannot articulate on maps or through other means a clear picture of what they propose to regulate how is the American public supposed to comment on what they cannot possibly understand?

Finally, there are over forty places in the proposed rule where the agency has requested comments. Many of these requests ask for new ideas and approaches relative to the topic because the agency has failed to provide a proposed approach. As an example the agencies' request comments on:

"… specific options for establishing additional precision in the definition of ''neighboring'' through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered

[167] House Science Committee, EPA State and National Maps of Waters and Wetlands, (accessed on Sept. 2, 2014), available at http://science.house.gov/epa-maps-state-2013#overlay-context.
[168] Proposed Rule at 22199.

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adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters." (Proposed Rule at 22209).

If the agencies receive public comments on these extremely important criteria and circumstances and finalize a rule that establishes criteria and obligations on landowners by selecting a certain interval of floodplain or circumstances based on a public comment, the agencies must then allow the public at large to comment on the approach the agencies have selected. These issues are too important for the agency to leave blank in the proposal, choose a suggestion made by one public commenter and then finalize a rule based on such selection. The public will not have had an opportunity to comment on the basis of EPA's selection of such an approach. Instead, the agencies should select an approach gathered from public commenters and then re-propose the rule to allow for meaningful comments on such approach. As it currently stands the agencies have failed to adequately define what approach they are proposing in order to receive meaningful comments on how that approach will impact the public.

EPA and the Corps must provide the public with the information they need to make meaningful comments on the proposed rule. As it stands, the agencies have gone out of their way to prevent the public from accessing relevant information in the agencies' possession, and have no intent of allowing the public to comment on the final scientific basis. (p. 3 – 4)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

13.300 II. The Proposed Rule Does Not Provide Additional Clarity

ACCW are disappointed in the proposed rule's lack of clarity due to ambiguous or undefined terms and phrases. This section describes in detail the terms and phrases throughout the proposal that were left undefined or whose definition is left so ambiguous that farmers and ranchers will be left wondering, with no possible way of determining, whether waters on their property will be jurisdictional or not. The agencies have failed in their stated purpose of providing clarity to the regulated community and the public at

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large. The proposed rule only increases confusion. ACCW encourage the agency to withdraw the proposed rule, continue to fill in the blanks and only re-propose a new definition when those gaps have been filled. As it stands, it is extremely unclear how far the agencies intend federal jurisdiction to extend and if taken to the maximum extent possible the proposed rule wraps in virtually every feature across the nation, which contravenes not only the CWA itself but also the Commerce Clause of the U.S. Constitution.

a. Ambiguous Terms and Phrases

ACCW assert that the vast instances of undefined terms and phrases throughout the proposed rule make meaningful comments on the proposed rule impossible. ACCW cannot provide comments on the impact of a proposed definition that does not exist, or has a wide range of interpretations. This section attempts to identify those legally important terms and phrases that the agencies have failed to adequately describe. However, ACCW assert that unless the agencies re-propose the definition with adequately defined terms and phrases for these legally significant terms that the public can comment on, they have not satisfied the notice and comment requirements under the APA.

i. Dry Land

The agencies use the phrase "dry land(s)" numerous times throughout the proposed rule, yet never defined the phrase.[169] It is unclear to ACCW where a water ends and "dry land" begins. EPA and the Corps should define the term to allow the public to fully understand the proposed rule and its extent.

ii. Uplands

The term "uplands" is used throughout the proposed rule. It is a very significant legal term, especially as it applies to ditches and ponds, yet the agencies have failed to provide any sort of description of this important legal term. At one point, an EPA official, while looking at an ephemeral stream jumped on the bank of the stream and said "if it doesn't jiggle, it's an upland." This is woefully inadequate. The legal description of an upland should already have been included in the proposed rule. ACCW would like the opportunity to comment on it, but the agencies have failed to provide it and therefore it is impossible to meaningfully comment.

ACCW strongly criticize the agencies for failing to notice such regulatory requirements. The regulated public cannot possibly be aware of their obligations if the agencies fail to define what they mean. This regulation is one of the largest in the history of the Office of Water. It is beyond comprehension how the definition of "uplands" along with others in this section were innocently "overlooked." ACCW assert that the agencies must withdraw the proposed rule, provide the necessary legal definitions of terms and phrases throughout the proposal, and repropose it to the public, so that we can meaningfully comment. As it stands, ACCW believe it is impossible for our members to understand the impacts of the proposed rule and therefore cannot provide the agencies with educated feedback.

[169] Proposed Rule at 22193, 22199, 22218-19, 22263-74.

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iii. "Through Another Water"

Under the definition for tributary as well as the exclusions for ditches the agencies have used the phrase "through another water." (Proposed Rule at 22199). Yet, the agencies have neglected to explain what this phrase means. When an important regulatory term or phrase is left undefined the regulated community will look at the broadest logical meaning of the term or phrase to determine the scope of their liability. In this case the phrase "through another water" could mean through ground water or through a non-jurisdictional ditch. If the agency does find that a ditch lacks a surface water connection to any other jurisdictional water, but does have some groundwater connection to a jurisdictional water, that water can now fall outside the exclusions for ditches, and now is a tributary by rule.

ACCW assert that the agencies should have known they needed to provide a definition for such significant regulatory terms, and their failure to provide a definition prohibits ACCW from being able to meaningfully comment on the proposed rule. The agencies must re-propose the rule with such definitions included so that the regulated public may provide comments on its scope. ACCW assert that including groundwater in the phrase "through another water" is inappropriate and fails to recognize that there is a limit to federal jurisdiction under the CWA.

iv. "Shallow Subsurface Flow"

The agencies have failed to adequately distinguish "shallow subsurface flow" (or "shallow subsurface connection") from groundwater, and through its use of the phrase has raised the question whether groundwater is truly excluded from the category of "waters of the U.S." or not (Proposed Rule at 22207). What is Shallow Subsurface Flow? How shallow is it? And how is a landowner supposed to know whether the wetland in his pasture is connected through shallow subsurface flow?

The proposed rule states, "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." (Id., emphasis added). The agencies use of the term "or" in this definition means that even geographically isolated waters outside of a floodplain and riparian area, but that have such shallow subsurface hydrologic connection, are automatically jurisdictional. It seems this definition is in direct conflict with the Supreme Court's decision striking down the "any hydrologic connection" rule of jurisdiction because this definition allows automatic jurisdiction over waters that have only a hydrologic subsurface connection.

When "waters with a shallow subsurface hydrologic connection" to (a)(1) through (5) waters are jurisdictional simply by virtue of that connection, without any consideration of the significance of that connection. Because EPA and the Corps have not excluded any types of water from the term "waters" it could have the meaning of puddles, wetlands, ditches, or possibly damp depressions in a pasture. If that damp depression does have a shallow subsurface hydrologic connection it appears by the language of the proposed rule to be a jurisdictional water.

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Based on the intent of Congress to only regulate surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. Regulating the surface water that has this "groundwater" flow is the same as regulating the groundwater connection. Is it the agencies' position that a citizen could inject pollutants into this "shallow subsurface hydrologic connection" without running afoul of the CWA? If the answer is no then the agencies are regulating groundwater, running afoul of their stated exclusion of groundwater.

There are also additional questions regarding this phrase. How deep must a landowner dig to discover whether his pond is connected to another water via "shallow subsurface flow"? At what depth must he dig to know whether it is groundwater instead of "shallow subsurface flow?" The agencies stated intent in providing this proposed rule was to provide clarity to everyone, including landowners. ACCW assert that the agencies' decision to find adjacent waters with "shallow subsurface hydrologic connections" jurisdictional by rule puts an enormous burden on landowners to have surveys and analysis done on each and every "water" on their property to determine whether they have this type of connection and whether they can utilize their waters or must ask permission from the government to conduct numerous activities near these waters.

ACCW strongly encourage the agencies to consider not looking at groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, there is no logical way for landowners to know whether these connections exist, unfairly placing them squarely in the sites of a regulatory enforcement action without any knowledge.

v. Exclusively

The agencies have failed to provide clarity or certainty regarding livestock ponds. The proposed rule states, "Specifically, the agencies propose that the following are not ''waters of the United States'' notwithstanding whether they would otherwise be jurisdictional under section (a):…Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." (Proposed Rule at 22218 (emphasis added)).

Under the exclusion for artificial ponds the agency has failed to extrapolate on and clearly define the extent of the agencies' meaning in using the word "exclusively." The livestock industry heavily utilizes artificial stock ponds to deliver water to our animals. The exclusion of such ponds only when they are "exclusively" used for watering of livestock raises many questions. Does the term mean for commercial purposes? Does it mean 90 percent of the time what is the purpose for which it is used? If the pond is also used as a water retention system, does it lose its excluded status. If the livestock producers' children swim in the pond occasionally does that mean it is sometimes used for recreation and loses its excluded status? If, as many stock ponds provide, they are used by wildlife does that negate its excluded status? ACCW assert the agencies should have provided an explanation about the extent of the qualification that only artificial ponds used exclusively for stock watering are excluded.

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The Merriam-Webster definition of "exclusive" (root word) means "not shared: available to one person or group."[170] As used in the exclusion for artificial ponds and lakes, it is apparent the only purpose that an artificial livestock pond can ever have is livestock watering. If at any time it is used for fishing, swimming, ice skating, water retention, or any other purpose it would be removed from the excluded category and make it a "water of the U.S." ACCW are extremely disappointed that the agencies have once again failed to adequately define what their exclusions actually mean, calling into question whether any water will actually fall into such categories. ACCW believe that due to the subjective nature of the artificial ponds and lakes exclusion, very few livestock ponds will be excluded from the category of "waters of the U.S." ACCW submit that the agencies should exclude from "waters of the U.S." "all ponds used for livestock watering."

vi. Floodplain

The definition of "floodplain" is also addressed in Sec. I. b. above. The definition of floodplain in the proposed rule has been left overly broad by the agencies, providing maximum administrative flexibility for regulators, while leaving livestock owners guessing whether water features on their property are or are going to be within the floodplain designated by a regulator. Additionally, it is unclear from the proposed rule whether the entire floodplain itself is a "water of the U.S."

According to the U.S. Geological Service the Mississippi River floodplain includes over 30 million acres.[171] The proposed rule does not prevent a regulator from determining that every open water within the 30 million acres that make up the entire Mississippi River floodplain is jurisdictional. Within those 30 million acres are numerous natural ponds, perennial ditches, isolated wetlands, and isolated prairie potholes. Based on the proposed rule, the regulator decides using their "best professional judgment" the size and scope of the floodplain.[172] The proposed rule continues that it can be the same as the FEMA 100-year floodplain, but does not have to be. (Id. at 22236).

ACCW assert this does not provide clarity, but expands the type and number of waters that are jurisdictional under the CWA, and flies in the face of the Supreme Court decisions that clearly stated there is a limit to federal jurisdiction.[173] The definition of floodplain in the proposed rule recognizes no limit when, and with the stroke a regulator's pen, every water within a 30 million acre plot would become federal waters. Should the agencies choose a floodplain frequency such as 100-year, 50-year, or 5-year, ACCW would make specific comments to that frequency. Because the agencies failed to provide any sort of specificity for the regulated community, we cannot meaningfully comment on every possibility the agency might choose. Instead, the agencies should withdraw the proposed rule, fill in the many gaps that are prevalent throughout the proposal and re-propose the rule.

[170] Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/exclusive.
[171] USGS, available at http://www.umesc.usgs.gov/reports_publications/psrs/psr_1997_02.html.
[172] Proposed rule at 22209; "When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determining which flood interval to use.".
[173] SWANCC at 172; "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute.".

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The agencies' proposed rule also is unclear to the floodplain itself, leaving open the interpretation that the floodplain itself is a "water of the U.S." If every open water in a floodplain is a "water of the U.S.," then it could mean that when the water is out of its bank and covering the land in the floodplain, that is an "open water" and automatically a "water of the U.S." And of course, just like tributaries, just because the water recedes and is not present does not mean that jurisdiction ends. Can the agencies clarify this confusion for the public. We understand that the agency stated in the proposed rules, "Absolutely no uplands located in ''riparian areas'' and ''floodplains'' can ever be ''waters of the United States'' subject to jurisdiction of the CWA," (Proposed Rule at 22207), but if the floodplain itself is a "water of the U.S." then there is actually no "uplands" located within it. It is also unclear from the proposal what the agencies mean by "uplands," making the proposal even more perplexing. ACCW believe that floodplains should not be "waters of the U.S." and the agencies should make that clear in a new proposed rule.

ACCW encourage the agencies to re-think their proposal to make all open waters in a floodplain or riparian area jurisdictional by rule. It is limitless. The agencies must find a way to limit their jurisdiction to within the bounds set for it by SWANCC and Rapanos.

vii. Riparian Area

The proposed rule expands its "adjacent wetlands" category to include all "adjacent waters," which now wraps every water within a floodplain or riparian in as a "water of the U.S." by rule. While ACCW disagree that this category should be expanded as such, we also disagree with the agencies vague description of "riparian area." The agencies state,

> "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shall subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." (Proposed Rule at 22207).

ACCW would like the agencies to explain how a livestock producer should know whether a natural pond, or puddle in his pasture lies within an area where the "surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area?" The agencies have again failed miserably in providing any clarity to the public, its field personnel, or anyone else. All the agencies have done is provide themselves enough flexibility to find any water (however broad that term can be expanded) to be a "water of the U.S." ACCW assert that the agencies definition of "riparian area" is vague at best and does not articulate any discernible limit to their authority, violating both the CWA itself and the Commerce Clause of the Constitution.

viii. Similarly Situated

The agencies use of "aggregation" of "similarly situated" waters erases any limit that the agencies have claimed their proposed rule places on them. This ill-defined phrase can be used to group as many waters as a regulator can imagine together to find a "significant

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nexus" to an (a)(1) through (a)(3) water. (Proposed Rule at 22211). If a water is not categorically a jurisdictional water by rule like those in categories (a)(1) through (a)(6), and even if it by itself has no significant nexus to a TNW, it still could be a federal water if after a regulator "aggregates" it together with "similarly situated" waters "in the region" and find a significant nexus to an (a)(1) through (a)(3) water. (Id). The proposed rule states:

> "Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. How these 'other waters' are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the 'region' or watershed." (Id).

The proposed rule goes on to state that their landscape position within the watershed is generally the determinative factor for aggregating water in a significant nexus analysis, and the description of watershed is "the region." (Id). It seems clear by the language in the proposed rule that a regulator has the power to aggregate all similar waters in a watershed, yet does not define the term watershed. In other words, once again, the agencies have used terms and phrases that provide the agencies with enough flexibility to find jurisdiction over any water, and provided the cattle industry with more confusion and even less clarity.

In summary, the terms and phrases in (i) through (vii) above bring ACCW to the conclusion that the lack of clarity is an orchestrated attempt by the agencies to write the word "navigable" completely out of the CWA. The agencies cannot do this without a clear mandate from Congress, and Congress has had ample opportunities to do so and has refused. Let us be clear, ACCW assert that the agencies failure to clearly define anything throughout their proposed rule renders this comment period meaningless. The regulated public cannot meaningfully comment on the proposed rule until these fatal flaws are fixed, and to do that the agencies must withdraw this proposed rule, fill in the numerous gaping holes, and re-propose the rule. (p. 15 – 21)

Agency Response: **Based on the feedback received from public comments, the agencies have removed key terms such as "uplands" and "shallow subsurface hydrologic connection" from the rule language. The agencies have refined other terms as proposed to simplify them and more clearly articulate what these terms represent and their role on defining "waters of the US". For information on how the final rule addresses technical issues associated with adjacent waters, other waters, ditches, exclusions, and tributary, see compendiums 3, 4, 6, 7, and 8, respectively.**

The rule implements, and is consistent with, the interpretations of the Supreme Court in the Rapanos and *SWANCC* decisions because the rule only covers waters that have a significant nexus with traditional navigable waters, and therefore within federal authority over channels of interstate commerce.

Nebraska Cattlemen (Doc. #13018.1)

13.301 Nebraska Cattlemen is unable to provide meaningful comments on the proposed rule. The Administrative Procedure Act (APA) requires an agency when publishing a proposed

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rulemaking to include "either the terms of the substance of the proposed rule or a description of the subjects and issued involved." See 5 U.S.C. § 553(b)(3). "An agency commits a serious procedural error when it fails to reveal a portion of the technical basis for a proposed rule in time to allow for meaningful commentary." *Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 531 (D.C. Cir. 1982).

a. Nebraska Cattlemen is unable to provide meaningful comments on the proposed rule because of significant legal holes resulting from the use of broad and ambiguous terminology or complete lack of definition of terms.

There are a multitude of legally significant terms and phrases which were left undefined or are so ambiguous Nebraska's farmers and ranchers are unable to know with any certainty or clarity what waters on their property will be jurisdictional or not under the CWA. In order to satisfy the notice and comment requirements under the APA, the Environmental Protection Agency (EPA) must withdraw the proposed rule, provide the necessary legal definitions for all significant terms and phrases and re-propose the rule in order for the public to have the opportunity to provide meaningful comment. (p. 1)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

13.302 (…) The failure of EPA to define legally significant terms and phrases and the use of broad and ambiguous terminology when defining others leaves Nebraska Cattlemen without the ability to provide meaningful comments on the proposed rule. The ability to provide meaningful commentary is an essential requirement under the APA and EPA must withdraw the proposed rule, provide the necessary legal definitions and re-propose the rule in order to satisfy this statutory obligation. (p. 4)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

13.303 b. Nebraska Cattlemen is unable to provide meaningful comments on the proposed rule because of EPA's failure to articulate what regulatory approach will be used when determining extremely important legal criteria and circumstances under the CWA.

There are countless instances in the proposed rule where EPA has requested comments from the public for submission of entirely new ideas and approaches that EPA may utilize in its regulatory approach to determine which waters are jurisdictional under the CWA. Two examples include:

"The agencies therefore request comment whether there are other reasonable options for providing clarity for jurisdiction over waters with these types of [adjacent] connections. Options could include asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, the bank-to-bank width of the water to which the water is adjacent." (Proposed rule at 22208).

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"The agencies seek comment on specific options for establishing additional precision in the definition of ''neighboring'' through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters." (Proposed Rule at 22209).

What regulatory approach is used to define "adjacency" or "neighboring" makes a water jurisdictional by rule under the CWA in the proposed rule. These are just two examples of legally important criteria and circumstances that EPA has left entirely open to significant modification in a final rule. If EPA receives public comments on these and other extremely important criteria and circumstances for determining jurisdiction and finalizes a rule encompassing one or more of these with a new regulatory approach the agency must allow the public to comment on the specific regulatory approach chosen. These issues are too important for EPA to leave blank and Nebraska Cattlemen is completely unable to provide meaningful comment as a result. EPA may select a regulatory approach gathered from public comments under this proposal; however, it must then re-propose the rule to allow for the statutorily obligated meaningful comment on the regulatory approach it will be utilizing to determine jurisdiction. (p. 4 – 5)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For additional information on the rulemaking process, see section 13.2.**

13.304 c. Nebraska Cattlemen is unable to provide meaningful comment as a result of EPA's failure to publicly disclose USGS data maps used to develop the proposed rule.

Since publication of the proposed rule it has come to light EPA failed to make publicly available USGS maps utilized by the agency in creating the proposed rule. The House of Representatives Committee on Science, Space and Technology had to call EPA before Congress and require they be turned over as part of full public disclosure. These maps were finally released to the public in August 2014 and clearly show the proposed rule, with its vague, overly broad or lack of definitions will regulate many new water features and vast amounts of private property. See http://science.house.gov/epa-maps-state-2013.

Again, it is a "serious procedural error" for an agency to fail to reveal any portion of the technical basis behind a proposed rulemaking. It is deplorable EPA failed to make this data publicly available and they have utterly failed in their obligation to provide an opportunity for Nebraska Cattlemen to provide meaningful commentary under the APA. (p. 5)

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Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

13.305 (…) Furthermore, EPA's Connectivity Report, has not been fully reviewed by the Scientific Advisory Board at the time of publication of the proposed rule in the federal register. Thus, none of the suggestions or modifications of the Scientific Advisory Board have been incorporated in to the proposed rule which is extremely problematic. Without such guidance EPA has entirely failed to consider relevant and important scientific data that it should have relied upon when taking action. For this reason as well, the use of the Connectivity Report and reliance by EPA on it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. (p. 7)

Agency Response: **See section 13.1 summary response for information regarding the Connectivity Report.**

13.306 III. EPA issuance of the proposed rule is in excess of statutory jurisdiction, authority, or limitations because it unlawfully expands the scope of federal agency jurisdiction under the CWA.

Under the APA a Court shall set aside agency action which is "not in accordance with the law" or "in excess of statutory jurisdiction, authority or limitations." See 5 U.S.C. §706(2)(A),(C). "[T]he judiciary, not the agency is the final authority on issue of statutory construction," and will "reject any administrative constructions contrary to this clear congressional intent." Massachusetts v. Dep't of Transp., 93 F.3d 890,893 (D.C. Cir. 1996)(internal quotation marks and citations omitted).

a. The proposed rule supersedes a 2003 Legal Memorandum and a 2008 Joint Guidance Memorandum which were limited to CWA § 404 determinations thereby wrongfully expanding the scope of federal agency jurisdiction under the CWA.

The proposed rule represents the EPA and the U.S. Army Corps of Engineers (Corps) interpretation of the current jurisdictional reach of the CWA. The proposed rule will supersede a 2003 Joint Memorandum which provided clarifying guidance on the Supreme Court's Solid Waste Agency of Northern Cook County v. US Army Corps of

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Engineers (SWANCC) and a 2008 Joint Guidance memo issued after another Supreme Court case of Rapanos v. United States (Rapanos), (collectively "Existing Guidance"). Both of those cases involved wetlands issues with the Corps under §404.

As noted, the proposed rule addresses the definition of "waters of the United States" for all CWA purposes. And yet, the model for the regulatory approach here is the Existing Guidance which was limited on its face to §404 deteinations.

One stated purpose of the proposed rule is to reduce the use of the Corps' Wetlands Delineation Manual of 1987 and its supplements. The Manual is the tool the agencies use to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis. Case-by-case determinations using the Manual are frequently difficult, time consuming, and bureaucratic.

Nebraska Cattlemen do not argue that the current §404 permitting process needs to be reformed. Time delays and regulatory uncertainty does exist. However, there is at least a current level of predictability with jurisdictional determinations. And, there is at least the ability for Corps field staff to apply common sense and flexibility when there may be a close call. However, the proposed rule will not only take that away for §404 determinations, it will also bring under regulation many new water features and land uses that are subject to jurisdiction categorically because the proposed rule applies to the entirety of the CWA, not just § 404.

Land use features such as ditches, waterways, and dry creek beds which rarely carry water will now categorically be under federal jurisdiction. Isolated wetlands and other waters outside of these areas may still be subject to CWA jurisdiction after a Corps determination of significant nexus. The EPA states that the purpose and intent of this proposed rule is to provide clarity and certainty to the current analysis and decision-making under §404. In reality though, the proposed rule will dramatically and wrongfully expand the scope of federal jurisdiction beyond the understanding of the current, Existing Guidance.

EPA should withdraw the proposed rule, fix the current bureaucratic nightmare of §404 permitting and re-propose a rule that is in line with Supreme Court case law and appropriately limited on its face to §404 determinations. (p. 7 – 8)

Agency Response: **See the Technical Support Document Section I for a summary of the legal basis for the final rule. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The updated Economic Analysis provides additional information on predicted changes in jurisdiction.**

The agencies understand the definition of "waters of the U.S." applies to all CWA programs. The agencies modified the final rule from the proposed rule in response to comments received in order to ensure unintended effects to those other CWA programs were reduced or eliminated. The agencies received many helpful comments on the proposed rule which resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies note that

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the final rule provides for certain categories of waters that are jurisdictional by rule, which will result in a more efficient process.

The substantive requirements of the Section 404 permitting program is outside the scope of this rulemaking effort. None of the existing procedures, permitting mechanisms, efficient permitting tools such as general permits, or activity exemptions will be modified as a result of this rulemaking; therefore, existing procedures should not be further complicated by this rule.

Certain waters will require case-specific significant nexus determinations to determine whether they are jurisdictional under the Clean Water Act. Certain waters which may have been determined "isolated" under the 2003 guidance may now fall under (a)(7) or (a)(8) waters under the final rule and would require a case-specific significant nexus determination. See the section in the preamble "Case-Specific Waters of the U.S." for additional information.

The final rule includes exclusions under paragraph (b) for certain ditches and erosional features, including ephemeral waters that do not meet the definition of tributary.

13.307 V. Conclusion

Nebraska Cattlemen appreciates the opportunity to offer comments. However, Nebraska Cattlemen cannot provide meaningful comment because of the complete lack of definition, clarity and provision of essential scientific information within the proposed rule. Furthermore, the proposed rule violates the Administrative Procedure Act as it is arbitrary and capricious and in excess of statutory authority granted to EPA by the CWA. Lastly, EPA has failed to comply with their congressional obligations under the Regulatory Flexibility Act. For these reasons and those articulated in more detail above the proposed rule must be withdrawn. (p. 18)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

Missouri Agribusiness Association (Doc. #13025)

13.308 Science Advisory Board (SAB) Review of EPA's Water Body Connectivity Report:

First concerning the process relating to the SAB's review of the draft connectivity report, EPA has not complied with the Administrative Procedure Act (APA) by publishing the proposed rule prior to the final connectivity report. EPA should have incorporated the SAB's comments into the draft connectivity report, published a final connectivity report, and then published a proposed rule. The process actually followed does not allow for public comment after a final connectivity report. The process actually followed is flawed. (p. 9)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.**

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North Dakota Soybean Growers Association (Doc. #14121)

13.309 The Administrative Procedure Act, U.S.C 553, and the Notice of Proposed Rulemaking must fairly appraise interested persons about issues for the rulemaking process. The vague and confusing nature of the proposal's new and existing definitions, coupled with the unknown and unexplained ways these definitions will be applied, separately or in combination, makes it difficult, even for CWA experts, to comprehend the true impact of the proposal. Major regulatory concepts are not adequately explained. The agencies provide no example for how they perceive that these new definitions would be applied or the magnitude of the changes' impact. On the contrary, the agencies simply assert that the proposal will have no regulatory effect that differs from what exists today. (p. 5)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. Based on the feedback received from public comments, the agencies have refined several terms as proposed to simplify them and more clearly articulate what these terms represent and their role on defining "waters of the US". For more information see the preamble.

Western Growers Association (Doc. #14130)

13.310 D. Agencies' Process Violates the Administrative Procedure Act

Enacted in 1946, the Administrative Procedure Act (APA) governs the way in which administrative agencies of the federal government may propose and establish regulations. As the agencies well know creating the APA was a painstaking process that involved years of background work compiled in hundreds of pages of documents used to craft the statute's various provisions. A fundamental purpose of the APA is to keep the public informed and allow for "public participation in the rulemaking process".[174] Indeed as the courts have interpreted these fundamental requirements they have stated that "the Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."[175]

Critically, the scientific basis the agencies rely upon to support their proposed rule, the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report was released when it was not final.[176] How can the members of the public accurately comment upon the proposed rule when the scientific analysis upon which the rule is built is not finished? This flies in the face of the requirements found under the APA which would seemingly require the public to see, and be made aware of the final scientific analysis that underlies a proposed rule. Western Growers contends that the agencies should withdraw the rule pending the final completion of the Connectivity report. Only once that report is final should the proposed rule be submitted for public comment. (p. 10 – 11)

[174] U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, I. Fundamental Concepts, 1947; see 5 U.S.C. § 553 (b)-(c).
[175] *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994).
[176] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Washington, DC: U.S. Environmental Protection Agency, (2013).

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Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.**

Kansas Farm Bureau (Doc. #14408)

13.311 Opportunities to Comment:

The agencies have failed to meet the requirements of 40 C. F. R pt 25.10 which requires EPA to provide the maximum amount of information possible to the public with regard to proposed regulations that are significant and controversial. These proposed rules are very significant and controversial as they seek to redefine key terms of the CWA that dictate which waters are regulated and which are not. Definitional changes may greatly impact a particular water body and its surrounding lands and what activities may or may not be done on or near such water body by landowners.

Unfortunately, EPA and the Corps have not held ANY hearings in Kansas. Representatives from agricultural organizations were invited to attend a roundtable discussion with EPA Region 7 Administrator Karl Brooks on April 29, 2014. In late summer, Administrator Gina McCarthy made a presentation to the Agricultural Business Council of Kansas City but the general public was not in attendance. These meetings do not meet the requirements of the regulations for open public participation. The process has not allowed potential affected parties to inquire as to the extent and impact of the proposed regulations. As noted in the preamble of the proposed regulation, the economic analysis and the scientific methodologies used to show interconnectivity of water bodies are still under review.[177] Without these critical pieces of information, the public is effectively left to its own expertise to evaluate the proposed regulations. The public is entitled to know the basis for agency decisions. In addition to these deficiencies, the agencies have limited the time for comment. The proposed regulation was published on April 21, 2014, and even with an extension (to November 14, 2014) the regulated community was only given approximately seven months to respond. Proposed regulations with the potential to impact millions of acres of private lands demand longer periods for comment. Without clear opportunities to question and review documentation in support of the regulations, the agencies have failed to meet the administrative procedures for significant rule promulgation.

Kansas Farm Bureau respectfully requests that EPA and the Corps, prior to adoption of the proposed rules, extend the comment period and host a hearing in Kansas so that agricultural producers, state legislators, and representatives from any industry engaged in activities that affect land or water are informed of the proposed regulations. (p. 2 – 3)

Agency Response: **The commenter is incorrect that the rulemaking process did not "meet the requirements of the regulations for open public participation." Under the APA, EPA is required to take comment on the rule through written submissions but is not required by statute or regulation to hold public meetings. However, EPA voluntarily engaged in extensive outreach, and through that process held two stakeholder meetings in Topeka, KS on April 29, 2014. For more information on**

[177] 79 Fed. Reg. 22190

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these and other outreach events hosted nationwide, see the summary of public outreach found in the docket.

Kansas Agriculture Alliance (Doc. #14424)

13.312 Not only does it exceed the agencies jurisdictional authority under the CWA, but its interpretive terms are conflicting and ambiguous such that the agency cannot sufficiently amend the proposed rule in a final rule to comport with the requirements of the Administrative Procedure Act (APA).178 Additionally, the rule was advanced without consultation with the states and thus, is contrary to the CWA. We respectfully request the agencies withdraw this proposal, in total, along with the previously released interpretive rule.179 If additional clarification for administering the CWA is contemplated, the agencies must do so in coordination with the states, using properly defined terms that comport with the jurisdictional limits placed on the agencies by Congress and the U.S. Supreme Court. (p. 1)

Agency Response: **See the summary response for information regarding APA. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

13.313 Proposed Rule Prejudges the Science

The EPA and U.S. Army Corps of Engineers (the agencies) posit that the determinations made in its proposed rule are based on EPA's September 2013 draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (EPA Connectivity Report). This connectivity report is argued by EPA to serve as the scientific basis for the proposed rule. However, EPA released its proposed rule before the EPA's Science Advisory Board.

As a practical matter, the very process of issuing the proposed rule before the final SAB report was issued distorts the process of having a full and fair public comment period as required by the Administrative Procedure Act.[180] (p. 10)

Agency Response: **See section 13.1 summary response for information regarding the Connectivity Report.**

[178] 5 U.S.C. § 500 et seq.
[179] U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A), 79 Fed. Reg. 22276 (notice of availability April 21, 2014).
[180] Administrative Procedure Act, 5 U.S.C. § 500 et seq., as amended.

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Tennessee Farm Bureau Federation (Doc. #14978)

13.314 Public Advocacy Violated Administrative Procedures

The unprecedented public advocacy activities of the Agencies during this comment period was inappropriate. We have never observed the level of promotion used by EPA to garner support for this rule. Public notice and comment is to allow public input so the Agencies can make the best decisions when crafting rules. Public notice and comment is not for the purpose of marketing rules and shaping public policy. Rather, public notice and comment is to ensure rules are written in compliance with the Congressional action which authorized it. There have been multiple fact sheets, Q&A sheets, government blogs, and all types of statements providing new interpretations and details. This campaign caused confusion. How can the U.S and Tennessee citizens, including farmers of Tennessee, provide meaningful comments when the Agencies are misleading by confronting and belittling those who have a different viewpoint on the proposed rule?

We believe the "Ditch the Myth" webpage was extremely misleading to farmers and was full of mistruths about what this rule does. Please consider the first "Myths" and "Facts" listed on the page:

> "MYTH: The rule would regulate all ditches, even those that only flow after rainfall.
>
> TRUTH: The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round."

We have provided you a picture of a "ditch" the Army Corps of Engineers already considers a jurisdictional water because they have recently started regulating ephemeral streams much like the proposed rule prescribes. We cannot imagine where a ditch constructed through dry lands and only flowing in dry lands would be. All ditches are interconnected. This proposed rule makes no distinction where a dry land ditch ends and a ditch in a floodplain begins. We have counties in Tennessee where a majority of the land is located within a class of floodplain. This proposal does not specify if the floodplain is a 25 year, 100 year, 500 year, or 1,000 year storm event. So yes, based on our knowledge of this state and the Agencies' proposal the rule would regulate all ditches.

Consider the next example:

> "MYTH: Ponds on the farm will be regulated.
>
> TRUTH: The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands."

This proposal expands the jurisdiction of the Agencies by including ephemeral drainages and isolated wetlands. This is where ponds are built in Tennessee. Literally thousands of ponds are built to impound a drainage in a low area of the drainage. The Agencies use of the term "Dry Land" excludes ephemeral features and isolated wetlands. The Agencies make this exemption for farm ponds meaningless by expanding jurisdiction. You have told farmers they have an exemption in places that do not exist in Tennessee.

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We disapproved of the way EPA used comments from 2008 regarding the proposed guidance for Clean Water Act jurisdiction after Rapanos. In the document *Persons and Organizations Requesting Clarification of "Waters of the United States By Rulemaking*, it listed the Tennessee Farm Bureau and included an excerpt from comments submitted in 2008. Even though EPA included a disclaimer saying a request for rulemaking did not imply support it still appeared this organization was in favor of the policies contained in this rule. This should not have been included in the "Ditch the Myth" site which was established to market the policies in this proposed rule. This could easily be misleading to our members. We asked the Agencies to use the rulemaking process to address changes needed after the Rapanos case instead of using a guidance document. We were not in favor of the policies contained in the guidance document and did not support using a guidance document to change regulations. However, by including the Tennessee Farm Bureau on the "Ditch the Myth" site it could infer we support the policies contained in this proposal. We ask EPA to remove the Tennessee Farm Bureau from this document. (p. 7 – 8)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

National Milk Producers Federation (Doc. #15436.1)

13.315 Administrative Procedure Act

Some of the confusion created by the IR may have been alleviated had EPA issued the IR as a proposed rule and given stakeholders a chance to comment on the rule before it was made effective. Doing so would have met the requirements of the law. Under 5 U.S.C. 5 551(4) of the Administrative Procedure Act, a rule is defined as:

"the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy

Rules are required to be published in accordance with the procedures specified at 5 U.S.C. g 553."

The agency statement of policy contained in the IR is a rule that is required to be published in accordance with § 553. The statement is of general applicability and future effect and prescribes a new, detailed procedure for securing an exemption from the requirements of section 404 of the CWA. EPA is not relieved of this duty because the procedure is arguably voluntary. Moreover, there are potential adverse legal consequences for those members of the public who fail to comply with the procedure. As such, it affects the substantive interests of the public, further strengthening the obligation of EPA to issue the rule in compliance with the law. (p. 5 – 6)

Agency Response: **The Interpretive Rule has been withdrawn. All comments on the Interpretive Rule are outside of the scope of this rulemaking.**

Jensen Livestock and Land LLC (Doc. #15540)

13.316 The Proposed Rule Would Violate the APA Because the Public has Not had an Opportunity to Provide Meaningful Comment

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The Administrative Procedure Act (APA) requires federal agencies to ensure public participation in the rulemaking process by providing a meaningful opportunity for the public to comment on the rule's content.[181] The agencies have failed to provide the data the rule is based upon.[182] There are a vast number of missing pieces in the proposed rule and throughout the rulemaking process that have precluded the public from receiving a meaningful comment period. And, it has been obvious that the Corps of Engineers did not share equally in developing this rule. It has been frustrating to attend stakeholder outreach meetings where one of the jointly proposing agencies is not in attendance. One example is the small entities meeting that took place on Oct. 15, 2014 at EPA Headquarters. It was stated by EPA officials that the Corps was invited but did not choose to participate in the meeting. This is deeply disappointing, especially considering the regulator-landowner interactions that the Corps has the lead role in under some of the major programs.

First, the agencies only included in the proposed rule a draft scientific report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity report).[183] The agencies have indicated that the Connectivity report will not be completed until after the comment period has closed and therefore will not be available for the public to comment.[184] EPA's website states, "This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction…," (emphasis added).[185] Second, the agencies have failed to provide the public with relevant maps created for the agencies by the U.S. Geological Service detailing vast networks of streams across the United States that would become jurisdictional under the proposed rule. Third, the proposed rule contains a vast number of requests for methods of regulating the public under this rule without providing the agencies' proposed option, leaving the public to wonder what the agency is even considering and not allowing comments on any specific proposal.

Jensen Livestock and Land LLC would like to provide the agencies with more extensive comments on the proposed rule. Unfortunately, there are too many significant legal holes throughout the document to be able to meaningfully comment on the scientific and legal extent of the proposed rule. As such, we provide comments on what is in the proposed rule, but cannot provide comments on that which is not included. Therefore, Jensen Livestock and Land LLC assert the proposed rule prevents the American public from being able to provide meaningful comments on the proposed rule, thereby violating the APA[186]. To correct this fatal flaw the agencies must withdraw the rule and possibly at a

[181] 5 U.S.C. § 553 (b)-(c); American Med. Ass'n v. Reno, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994); Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

[182] *Engine Mfrs. Ass'n*, 20 F.3d at 1181 ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.").

[183] *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Washington, DC: U.S. Environmental Protection Agency, (2013).

[184] EPA website, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed on Sept. 3, 2014).

[185] Id.

[186] Supra Note 1.

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later date fill in the gaping holes and provide the public with the information to make meaningful comments.

First, the *Connectivity* report is a draft report. On the same day the report was released to the public, the proposed rule was sent to the Office of Management and Budget (OMB) for interagency review. Numerous officials at numerous times have indicated that the final report will not be made available for the public to comment on. This is inappropriate and prevents the public from being able to provide meaningful comments on the proposed rule. The *Connectivity* report is the scientific basis the agencies rely on to support their proposed rule. The science should be final before a proposed rule is developed. Should a final report be completed that is different from the draft report, the public will have been prohibited from commenting on the validity of such science. This flies in the face of this Administration's assertion of transparency and in the face of the APA, which requires that the data (or science) the rule is based on to be presented to the public for comment Jensen Livestock and Land LLC the proposed rule must be either withdrawn or re-proposed with the final *Connectivity* report available for the public to review. Recently the agencies extended the public comment period with the justification to allow the public to comment on the Scientific Advisory Board's final report.[187] This extension fails to rectify the procedural failures of the agencies for not providing a final report in the proposed rule for comment for a number of reasons. First, the extension is for an additional 25 days, which is hardly enough time to review a technical scientific report (should the agencies put out a final report between Oct. 20 and Nov. 14). Providing the public with the opportunity to comment on the SAB report is not the same as allowing the public to comment on the final *Connectivity* report and therefore the procedural fouls with this rulemaking remain unresolved.

Next, the agencies failed to provide the public with relevant maps that were available to the agency that detail the stream systems and wetlands across the U.S.[188] The proposed rule includes a definition of "tributary" that includes anything connected to an otherwise jurisdictional water that has a bed, bank and Ordinary High Water Mark (OHWM) as a jurisdictional water.[189] A map of the U.S. stream systems would be extremely relevant in illustrating the types of streams that the agencies propose to regulate. The agencies have not identified which waters located on the maps are not jurisdictional under their proposed rule. Instead of attempting to be transparent and actually clarify which streams and ditches across the country the agencies intend to regulate under this proposed rule, the agencies have withheld vital information that the public would have used to evaluate the proposal. Jensen Livestock and Land LLC assert that the agencies have inappropriately withheld relevant maps showing the nation's streams and wetlands in violation of the APA.

Without providing maps or more information in some form, the public has been left to comment on a proposed rule that is unintelligible. At outreach meetings and in

[187] EPA Desk Statement, available at http://blogs.cq.com/cqblog-assets/govdoc-4559957.
[188] House Science Committee, EPA State and National Maps of Waters and Wetlands, (accessed on Sept. 2, 2014), available at http://science.house.gov/epa-maps-state-2013#overlay-context.
[189] Proposed Rule at 22199.

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presentations, agency officials have refused to articulate how the rule would be interpreted on the ground and refused to answer hypothetical situations. Without doing so the agencies have failed to provide the public with a clear picture of what they propose to regulate, thereby depriving the public of a meaningful opportunity to provide comment. If the agencies cannot articulate on maps or through other means a clear picture of what they propose to regulate how is the American public supposed to comment on what they cannot possibly understand?

Finally, there are over forty places in the proposed rule where the agency has requested comments. Many of these requests ask for new ideas and approaches relative to the topic because the agency has failed to provide a proposed approach. As an example the agencies request comments on:

> "… specific options for establishing additional precision in the definition of ''neighboring'' through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters." (Proposed Rule at 22209).

If the agencies receive public comments on these extremely important criteria and circumstances and finalize a rule that establishes criteria and obligations on landowners by selecting a certain interval of floodplain or circumstances based on a public comment, the agencies must then allow the public at large to comment on the approach the agencies have selected. These issues are too important for the agency to leave blank in the proposal, choose a suggestion made by one public commenter and then finalize a rule based on such selection. The public will not have had an opportunity to comment on the basis of EPA's selection of such an approach. Instead, the agencies should select an approach gathered from public commenters and then re-propose the rule to allow for meaningful comments on such approach. As it currently stands the agencies have failed to adequately define what approach they are proposing in order to receive meaningful comments on how that approach will impact the public.

EPA and the Corps must provide the public with the information they need to make meaningful comments on the proposed rule. As it stands, the agencies have gone out of their way to prevent the public from accessing relevant information in the agencies' possession, and have no intent of allowing the public to comment on the final scientific basis. (p. 1 - 4)

<u>Agency Response:</u> See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

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13.317 The agencies should also map the sheer expanse of their proposed definition and respond to maps presented to the agencies from industry showing our projection and interpretation of their proposed definition. It is our understanding that the agencies were provided these types of maps by the U.S. Geological Service (USGS), but the agencies failed to provide this important information to the American public, which would have provided a clear picture to everyone exactly what the expansion of the proposed rule would be. Because the maps were not provided to the public by EPA in a timely manner, the public has not had adequate time to analyze and ultimately, comment on them. Precluding the public from having the ability to meaningfully comment is a violation of the APA.[190] (p. 10)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

Flathead Joint Board of Control (Doc. #19537)

13.318 Further, as expressed by the Water Advocacy Coalition in its September 29, 2014 Objections, the rule making process itself as it relates to the Proposed Rule has been severely flawed and in all likelihood is in direct violation of the Federal Administrative Procedure Act and the 14th Amendment to the United States Constitution. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Iowa Poultry Association (Doc. #19589)

13.319 I. Procedural Flaws

Specific rules are imposed on a federal agency's rulemaking process by the Administrative Procedure Act (APA), including a requirement that the public is provided

[190] Supra Note 2.

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a meaningful opportunity for the public to comment on the content and substance of the rule. Most importantly, the EPA and Corps failed to provide the full scientific background and support for the proposed rule, instead only a draft scientific report entitled Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Connectivity Study) was released prior to notice of the proposed rule. However, the full connectivity study will not be available until after the close of the comment period on the proposed rule, therefore denying the public a meaningful opportunity to analyze and comment on the full Connectivity Study and therefore the science purported to be the basis for the proposed rule. If the proposed rule is to be based on the full report, it is critical that the agencies follow proper protocol by releasing the final and full Connectivity Study, providing the public an opportunity to comment on the final Connectivity Study and then and only then drafting a proposed rule. IPA urges EPA and the Corps to withdraw the proposed rule until the final Connectivity Study is available and make any necessary changes to the proposed rule based on the findings of the final report.

Secondly, the agencies have failed to provide adequate information and maps to show the waters and streams that would fall within the jurisdiction of the Corp under the proposed rule. Without this important information, it is difficult if not impossible to provide meaningful comment when neither the language of proposed rule nor the agencies can provide any clear guidance as to which waters would become jurisdictional under the proposed rule and how the proposed rule would be interpreted by the federal agencies. If the federal agencies drafting these rules cannot provide guidance on the waters to be jurisdictional under the rule, or interpretation and implementation of the proposed rule, how is the public to know which of their activities will be regulated by the proposed rule and how they may need to alter their practices in order to comply? (p. 2 – 3)

Agency Response: **See section 13.1 summary response for information regarding the Connectivity Report.**

As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

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Association of American Railroads (Doc. #15018.1)

13.320 E. EPA Has Violated Fundamental Administrative Procedure Act Requirements

A basic and fundamental requirement of the Administrative Procedure Act and rulemaking under the CWA is the requirement to follow APA and CWA procedures. Where not followed, a reviewing court may set aside agency action that has failed to observe those "procedure[s] required by law." § 706(2)(D).[191]

The Agencies have issued various interpretations of the proposed rule through blogs, press releases, phone conferences, and other means. It is impossible to determine the precise record upon which the proposed rule was issued, and impossible to determine which of the varying interpretations propounded by the Agencies in these various forums are the official and proper interpretation upon which to submit comment. Accordingly, the Agencies have violated the basic and fundamental requirements of notice and comment rulemaking. Since those procedures have not been followed, the proposed rule must be withdrawn. (p. 15)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

BMG Marine, Inc. (Doc. #18855)

13.321 The proposed rulemaking violates the Administrative Procedure Act and various Executive Orders specifically as they relate to transparency and process. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Alabama Road Builders Association (Doc. #18913)

13.322 First, allow me to object to the process related to this proposed rule. The Administrative Procedure Act (APA) sets forth the process and requirements your agency must follow in the rulemaking process. Ignoring the requirements and obfuscating the process diminishes severely any interested party from providing adequate input. To say it is a moving target is an understatement which speaks volumes to complexity of the issue and unintended consequences and expense associated with this proposal.

I've recently read the Waters Advocacy Coalitions lengthy comments, which specifically addresses, point by point, the deficiencies readily apparent in the process. ARBA echoes these concerns and implores you to address this hap-hazardous approach to such a monumental shift to this definition. (p. 1)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

[191] *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 855 (8th Cir. 2013). *Prof'ls & Patients for Customized Care*, 56 F.3d at 596 (quoting United States v. Picciotto, 875 F.2d 345, 347 (D.C.Cir.1989)); see also *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir.2010).

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Florida Water Environment Association (Doc. #0870)

13.323 Notice and comment rulemaking under the U.S. Administrative Procedure Act requires both adequate notice (i.e. full disclosure) of the nature of and basis for the proposed agency action and an adequate opportunity to affect the agency's decision-making. 5 U.S.C. § 553(c). Specifically, "section 553(c) requires agencies to afford interested persons an opportunity to participate in public rule making through submission of written data, views, or arguments," and it "requires consideration of whatever data and views are submitted." *Mortgage Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1379 (Fed. Cir. 2000). In order to achieve the requirement of an open and transparent rulemaking process with meaningful public participation, the FWEA Utility Council respectfully requests that EPA extend the comment period to 180 days, beginning after the incorporation of the SAB's recommendations on the proposed rule's connectivity report. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.

Arizona Public Service Company (Doc. #15162)

13.324 II. DESPITE AN EXTENDED PUBLIC COMMENT PERIOD, AGENCIES FAILED TO PROVIDE ADEQUATE REVIEW OF RELEVANT DOCUMENTS

APS has identified several specific concerns below regarding how the Agencies failed to provide adequate opportunity for review of relevant documents. To support and expand upon our comments below, APS specifically incorporates by reference UWAG's comments regarding the Agencies' flawed rulemaking process in violation of the Administrative Procedure Act. As noted by UWAG, the underlying technical document upon which the Agencies relied for the rulemaking was not finalized, and other documents were not made available to the public in a timely manner.[192] (p.2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

Duke Energy (Doc. #13029)

13.325 In light of the numerous deficiencies with the proposed rule, as detailed in these and other industry comments, Duke Energy recommends that the agencies withdraw the proposed rule. Before finalizing any proposed rule, the agencies must first finalize their scientific report, and then engage in meaningful dialogue with the regulated community and States about more reasonable, focused, and clear changes to existing regulations to address the significant areas of conflict or uncertainty. Only then may the agencies issue a new proposal is clear, consistent, and does not unlawfully claim jurisdiction. (p. 11)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act.

[192] See UWAG Comments on WOTUS, Section X – The Agencies' Flawed Process of Issuing a Proposed Rule Before Completing the Underlying Science Is Unsupportable and Cuts Out Regulated Industry (Nov. 14, 2014).

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Utility Water Act Group (Doc. #15016)

13.326 X. The Agencies' Flawed Process of Issuing the Proposed Rule Before Completing the Underlying Science Is Unsupportable and Cuts Out Regulated Industry.

In addition to the substantive concerns with the Draft Connectivity Report, procedurally, the sequence of the Agencies' actions – drafting and proposing a rule before the SAB review of the Draft Connectivity Report (which serves as the basis for the Proposed Rule) was complete – makes little sense and raises serious Administrative Procedure Act ("APA") concerns.

The Agencies put the regulatory cart before the horse by issuing a proposed rule based on a scientific report that was still undergoing the SAB review. The Agencies have stated that the final WOTUS rule (if finalized)[193] would be based on the final version of the Draft Connectivity Report. Throughout the comment period on the Proposed Rule, the Draft Connectivity Report was undergoing SAB review. As discussed above, the SAB has recommended substantial changes and additional research and review of scientific literature. As one SAB panelist, Dr. Mark Murphy, explained:

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

SAB Panel Comments on Proposed Rule at 89 (emphasis in original). Indeed, the Agencies have prejudged the outcome of the scientific review by drafting and issuing a proposed rule before the SAB review of the Draft Connectivity Report was complete. Moreover, the public will not have the opportunity to comment on the final Connectivity Report in comments on the Proposed Rule.

Not only is the Agencies' decision "puzzling," but it is also in violation of the APA. The APA requires that an agency give notice of a proposed rule setting forth "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation," id. § 553(c). Under APA notice and comment requirements, "[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency [relies in its rulemaking]."[194] The

[193] As noted throughout these comments, UWAG opposes finalization of the Proposed Rule. Instead, the Agencies should withdraw the Proposed Rule and issue a re-proposal that addresses the problems and concerns presented in these comments, the WAC Comments, and the FWQC Comments.

[194] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks omitted) (citing *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006)).

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"most critical factual material" used by the agency must be subjected to informed comment to "ensure that agency regulations are tested through exposure to public comment . . . ."[195] If finalized, this rule would be based on the "final version" of the Connectivity Report, which is not complete and was never made available for public comment during the comment period for the Proposed Rule. Therefore, the Agencies have not made technical studies available at the proposed rule stage, as required by the APA.

Moreover, to comply with the APA, the final rule must be a "logical outgrowth" of the proposed rule.[196] As explained above, the Proposed Rule is not supported by science. The SAB made extensive substantive recommendations for revising the Draft Connectivity Report and the Proposed Rule. If the Agencies make substantial revisions in accordance with the SAB recommendations, the final rule would not be a "logical outgrowth" of the Proposed Rule as required under the APA. But, if the Agencies ignore the SAB's recommendations, the rule would continue to be unsupported by the science.

Similarly, to address the concerns that UWAG and other industry groups have raised about the Proposed Rule, the Agencies will need to make substantial modifications, essentially rewriting the proposal. Again, such changes could not be a "logical outgrowth" of the badly flawed Proposed Rule. Instead, they must be introduced in a new proposal or advance notice of proposed rulemaking in order to satisfy the APA requirements.

In their haste to publish the Proposed Rule, the Agencies have ignored applicable requirements and some of the most basic tenets of administrative rulemaking.[197] The only way to resolve all of these procedural issues is to withdraw the proposal and issue a re-proposal that does not suffer from the same procedural APA defects that this Proposed Rule does. (p. 135 – 137)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.

Basin Electric Power Cooperative (Doc. #16447)

13.327 Agencies Fail to Comply with Administrative Procedure Act (APA)

The overall rulemaking process is flawed because the Agencies failed to follow the APA. New documents, new explanations of key terms, and new reasoning to support the

[195] Id. (internal quotations omitted); see also *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n,* 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.").

[196] *Small Refiner Lead-Phase-Down Task Force v. EPA*, 705 F.2d 506, 543 (D.C. Cir. 1983) (citations omitted).

[197] UWAG also noticed, and disapproves of, the Agencies' incorporation of a slew of supporting materials into the docket within one month of the twice-extended comment deadline. See EPA-HQ-OW-2011-0880-8549 and -8591 (listing added references). This late release of references, without any explanation as to how the materials support the Proposed Rule, deprives the public of a meaningful opportunity to review them and/or understand the Agencies' rationale for this Proposed Rule.

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Agencies' jurisdictional assertions have been issued throughout the rulemaking. This new or revised information creates a moving target, making meaningful public comment difficult. For example, the U.S. Army Corps of Engineers recently issued new documents regarding Ordinary High Water Mark (OHWM), a key component of determining jurisdiction. These documents were issued without proper public notice and opportunity for comment. Another key piece of information with direct impact on the rulemaking (Final Connectivity Report) was also only recently released to the public. The Agencies have severely impacted the public's opportunity for meaningful review and comment by issuing this important new information extremely late in the rulemaking process. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response on the use of the Connectivity Report.

The comment related to other guidance documents issued by the Corps, is outside the scope of this rulemaking.

The Center for Rural Affairs (Doc. #15029)

13.328 Stakeholder Engagement

The agencies have come under fire throughout the rulemaking process for their communication with stakeholders. Some have argued that the EPA has been defensive or noncommittal when responding to stakeholder concerns, or that the Corps has been largely absent from efforts to reach out to the regulated community. While we agree that more can be done to engage stakeholders, we commend the agencies for some of their efforts to address concerns among those in the agricultural community. Administrator McCarthy's visit to Missouri is a good example. It showed that the EPA is committed to getting out of Washington and understanding how the rule will impact farmers on the ground. A primary complaint throughout the agricultural community is that the EPA does not recognize the impact regulations have on farming families in rural America. More visits by high level EPA administrators like McCarthy's trip to Missouri would be a step toward building a stronger, more productive rapport between the agency and farmers. Furthermore, the agencies could jumpstart their coordination with NRCS by hosting regional events bringing together regional EPA, Corps, and NRCS representatives to interact with stakeholders.

Additionally, the EPA's WOTUS Question & Answer document, issued in September 2014 in response to key concerns made apparent during the public comment period, is helpful in that it provides clear answers to stakeholder concerns. We urge the agency to continue releasing documents and additional information on the proposed rule and its implementation. Critics of the WOTUS rule have argued that the agency has been unable to verify which waters would be jurisdictional when asked. We recognize that speaking in hypotheticals around a regulation is challenging, but complaints that the agency is unclear on the scope of its own rule could be addressed by releasing in depth case studies or examples of what would constitute a water of the United States under the proposed rule.

Finally, the agencies should work with farmer and community based organizations at the regional, state, and local levels as part of their outreach efforts. Community based

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organizations, especially farmer based organizations or associations with personal relationships to farmers, can provide a valuable, rational voice to this issue. The Center for Rural Affairs is a leader in rural America and in the sustainable agriculture movement, together with our member groups located throughout the country. We would gladly help facilitate connections between the agencies and regional and local sustainable agricultural interests in any way possible.

Recommendation: Continue to promote stakeholder engagement through visits to rural farms, publication of case studies, and work with regional, state, and local level community based organizations. (p. 9 – 10)

Agency Response: **The agencies note your support for the outreach efforts during the public comment period for the proposed rule, especially with the agricultural community.**

The agencies are developing guidance to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The agencies strive to achieve consistency across the country in all districts and regions in application of the rule for jurisdictional determinations. The agencies also recognize that there are variations that occur in geography, hydrology, climate, etc., which affect jurisdictional determinations. The initial phase of implementing the rule will require education and training for agency staff as well as other stakeholders and the regulated public. The Corps is exploring options to provide joint training with other agencies such as EPA and NRCS.

There will be outreach and communication on the final rule to ensure the widest dissemination of information to the regulated and interested public.

The agencies note the offer of the commenter to coordinate connections between agencies and regional/local agricultural interests.

13.329 Helping Beginning Farmers Navigate the Rule

The agencies have an opportunity to improve stakeholder engagement and potentially build support for the rule by increasing outreach to beginning farmers. A targeted outreach effort by the EPA and the Corps to beginning farmers and ranchers, including a guide to the rule targeted toward beginning farmers that lays out background information and the impacts of the rule, would provide a valuable resource. The Center for Rural Affairs is happy to offer assistance on this issue. Recommendation: Target outreach efforts to address concerns and deliver accurate information to beginning farmers. (p. 10)

Agency Response: **For information on targeted outreach to farmers and other agricultural stakeholders, see the summary of public outreach found in the docket.**

Environmental Integrity Project, et al. (Doc. #15376)

13.330 EPA is prohibited from codifying the waste treatment exclusion without providing notice and an opportunity for public comment.

EPA may not codify the waste treatment exclusion without following notice and comment requirements. The Clean Water Act requires that public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation,

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plan, or program established by the Administrator any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States 33 U.S.C. 5 1251(e). Under the Administrative Procedure Act, EPA must provide for public participation for agency actions that create law (i.e. legislative rules or substantive rules), See, e.g. *Gibson Wine Co. v Snyder*. 194 F.2d 329,331 (D.C. Cir. 1952). Courts at all levels have stressed the importance of public participation in rulemaking, and the D.C. Circuit has determined that notice and comment works"(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *International Union, United Mine Workers of Am V. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Yet thirty-four years after promising to promptly publish a proposed rule setting forth a revised definition of "waste treatment system," EPA and the Army Corps are attempting to circumvent the Administrative Procedure Act and Clean Water Act by codifying the illegal waste treatment system exclusion without notice and comment rulemaking. (p. 4 – 5)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. The agencies are not codifying waste treatment exclusions in this rule. The rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities and does not change regulatory exclusions for waste treatment systems and prior converted cropland. Therefore, these comments are outside the scope of this rulemaking.**

The rule makes clear that municipal separate storm sewer system structures - water recycling structures created in dry land, retention and detention basins built for wastewater recycling, ground water recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling. are not waters of the United States. All existing exclusions from the definition of "waters of the United States" are retained, and several exclusions reflecting longstanding agencies' practice (ex. puddles) are added to the regulation or further clarified (ex. all erosional features, groundwater).

13.331 EPA's proposed waste treatment system exclusion and codification of the suspension is a legislative rule.

There can be no doubt that the proposed waste treatment system exclusion and codification of the suspension is a legislative rule subject to notice and comment under the Clean Water Act and the Administrative Procedure Act. To determine a regulatory action constitutes promulgation of a regulation, [courts] look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register. . . .; and (3) whether the action has binding effects on private parties or on the agency." *Iowa League of Cities v*. EPA, 711 F.3d 844, 862 (8th Cir. 2013) (citing *Molycorp, Inc.* v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)).

In the proposed rule, EPA expressly identified the action as a regulation (as opposed to an interpretive rule or general statement of policy). 79 Fed. Reg. at 22,217 ("The agencies' longstanding regulations exclude waste treatment systems designed to meet the requirements of the CWA . . . ."). The action was published in the Federal Register. Id.at

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22,188. Finally, the / action has had and will continue to have a binding effect on both dischargers and the EPA. Industrial operators will arguably have a right to discharge into waste treatment impoundments - - created by impounding waters of the U.S. without a NPDES permit so long as the impoundments i are "designed to meet the requirements of the Clean Water Act." Id. at 22,268. Accordingly, the regulation will confer rights or obligations on private parties and the agency. Thus, the waste treatment system exclusion is subject to public review and comment.

Notably, EPA must follow public notice and comment procedures under the Administrative Procedure Act not only when it enacts a rule, but when it repeals a rule as well. *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3,5 (D.D.C. 2009). As discussed previously, in spite of its promise, EPA has never provided notice and comment on the suspension even though the suspension of the last sentence alters the definition and is akin to an actual repeal of a portion of the final rule. See 45 Fed. Reg. at 48,620. Thus, EPA must follow public participation requirements for the waste treatment system exclusion. (p. 5)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedures Act. The agencies are not codifying waste treatment exclusions in this rule. The rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities and does not change regulatory exclusions for waste treatment systems and prior converted cropland. Therefore, these comments are outside the scope of this rulemaking.**

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13.332 The waste treatment system exclusion is not an interpretative rule or general statement of policy exempt from notice and comment requirements.

The proposed regulation is not an interpretive rule or general statement of policy exempt from notice and comment requirements. See 5 U.S.C. § 553 (b)(3)(A) (stating that notice and comments is not required for interpretive rules or a general statement of policy). First, the regulation is not an interpretative rule because it grants substantive rights to private parties. See, *e.g., Brown Exp., Inc. v. US.*, 607 F.2d 695,700 (5th Cir. 1979) (noting that rules that grant substantive rights are not interpretative rules). As discussed, the exclusion arguably works to allow persons to discharge into waters of the U.S. without a permit so long as it is a waste treatment system designed to meet the requirements of the Clean Water Act. Id. at 22,268.

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Further, the mere fact that an agency action amends an existing legislative rule may disqualify it from qualification as an interpretative rule. Gunderson v. Hood, 268 F.3d 1149, \ 1154 (9th Cir 2001) ("If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive."). EPA's suspension of the limits to the waste treatment system exception, whether "temporarily" on July 21, 1980 or again on April 21,2014, amends the legislative rule finalized on July 18, 1980. Thus, because it amends an existing legislative rule, the waste treatment system exclusion cannot be an interpretative rule.

EPA knows how to classify an action as an interpretative rule when it intends to do so. For example, in the current proposed rule, EPA included a section on "discharges of dredged or infill material associated with certain agricultural conservation practices . . ." and identified it as an 1 interpretative rule. 79 Fed. Reg. at 22,194. EPA is unequivocal that it intends this latter section to be an interpretive rule rather than a substantive rule-mentioning "interpretive rule" five times over the course of a single paragraph. EPA never suggests the waste treatment system exemption is an interpretative rule in the proposal.

Second, the proposed regulation is not a general statement of policy. General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. *Brown*, 607 F.2d at 701 (citing U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30n. 3 (1947)). In this case, it is clear the definition of the waste treatment system definition is not a general statement of policy. In conclusion, the waste treatment system exclusion is not an interpretative rule or general statement of policy.

For all of these reasons, EPA must follow the public participation requirements set forth in the Clean Water Act and Administrative Procedure Act. EPA cannot bootstrap a procedurally deficient regulation into the current rulemaking and evade public participation requirements. (p. 6)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedures Act.**

The agencies are not codifying waste treatment exclusions in this rule. The rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities and does not change regulatory exclusions for waste treatment systems and prior converted cropland. Therefore, these comments are outside the scope of this rulemaking.

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from the definition of "waters of the United States" are not affected (being outside the scope of the rule).

Guardians of the Range (Doc. #14960)

13.333 These are some of the objections we have to this proposed rulemaking. However, in conclusion we want state that we hold this proposed rulemaking to be in violation of the Administrative Procedure Act. It contends that "in the normal course of making jurisdictional determinations, information derived from the field observations is not always required in cases where a 'desktop' analysis furnishes sufficient information to make the requisite findings. This blanket decision making framework lends itself to cookie cutter decisions. Justice Kennedy clearly addressed "significant nexus" test which has been ignored by the Connectivity Report used in this proposed rulemaking. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. For information on "significant nexus", see compendium 5.

National Association of Convenience Stores (Doc. #15242)

13.334 B. The Agencies Have Not Complied with the Administrative Procedure Act and did not Sufficiently Consider the Proposal's Impact on Small Businesses.

Both the Proposal and the entire rulemaking process surrounding it have been plagued with procedural flaws.

By repeatedly skirting correct procedure, the Agencies have not complied with the Administrative Procedure Act ("APA") during this rulemaking process.[198] This faulty process began on September 17, 2013 when the Agencies released their Proposal to the Office of Management and Budget ("OMB") for interagency review before the Scientific Advisory Board ("SAB") had reviewed the connectivity report, the primary scientific supporting document underlying the Proposal.[199] In fact, the SAB's final peer review of the EPA Connectivity Report was only made available to the public on October 24th—just three weeks before the comment deadline.[200] (p. 5)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.

[198] 5 U.S.C § 500 et seq.

[199] U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft. EPA/600/R-11-098B (Sept. 2013), available at http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[200] Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule, Notice of Availability, 79 Fed. Reg. 63,594 (Oct. 24, 2014). NB: the SAB panel members published a memorandum on September 2, 2014, where the panel raised concerns about various definitions used in the report. See Dr. Amanda Rodewald, Chair, Science Advisory Board for the Review of the EPA Water Body Connectivity Report, Letter from Sept. 2, 2014, available at http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf.

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Missouri and Associated Rivers Coalition (Doc. #15528)

13.335 Should the Agencies seek to proceed with the proposed rule, we ask that the following specific comments be addressed in accordance with the rulemaking process under the APA.

1. Key terms necessary to understanding the "definition of Waters of the U. 5." And applying the proposed rule are not supplied.

Application of the proposed rule relies on understanding what "upland means, a term not defined in the proposed rule. A questioning of agency regulatory officials yielded different interpretations. Some defined the term "upland" through physical characteristics that 1 could be identified in the field. Others expressed its intent to mean "upland of" as in "beyond the limits of jurisdiction" of the CWA. This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits.

Outside of the rulemaking process and the requirements of the APA a definition of "upland has been supplied by the Agencies in a Q&A document. While the Q&A sheet, should one happen upon it, may be seen to supply a definition for this key term, "upland" is not defined by the proposed rule, it is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Just as the public cannot reasonably rely on a Q&A sheet as an authoritative source for defining a key term used in rulemaking, nor can the Agencies use a Q&A sheet in place of the requirements of rulemaking as intended \ by the APA. There are other key terms left undefined, such as perennial, yet used in the n: proposed rule; their meaning and impact too are left unclear. For example, the references to floodplains and riparian areas may be a means by which the Agencies can impose unnecessary Federal oversight over state and local land use decisions and many non-Federal projects. (p. 2 – 3)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act. Based on the feedback received from public comments, the agencies have removed key terms such as "uplands" and "shallow subsurface hydrologic connection" from the rule language. The agencies have refined other terms as proposed to simplify them and more clearly articulate what these terms represent and their role on defining "waters of the US". See the preamble for more information on the revisions made to the final rule.**

United States Senate (Doc. #1378)

13.336 We also take issue with EPA's reckless disregard for the science that will apparently underpin this ruling. The report, titled *Connectivity of Streams and Wetlands to Downstream Wafers: A Review and Synthesis of the Scientific Evidence*, has not been finalized, and Science Advisory Board peer review for the report is not yet complete. For EPA to propose a rule without the supposed foundational, scientific document firmly in place both violates the spirit of the Administrative Procedure Act, as well as OMB and agency circulars. It is our belief that EPA should withdraw this proposed ruling until such time as the Science Advisory Board completes its review of the Report and the Report is finalized. Failure to do so puts the legitimacy of the Report, and thus, the underlying

science of the rule, in doubt, and creates the impression that the EPA intends to finalize this rule on its own whims, rather than on the validity of the science. (p. 1 – 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding the Connectivity Report.

United States Senate, Committee on Environment and Public Works (Doc. #4907)

13.337 Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.[201] In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing. (p. 1 – 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act. See section 13.1 for information on the Connectivity Report. See section 11.1 for information on RFA/SBREAFA in compendium 11.

United States Senate (Doc. #15083)

13.338 Bias Factor #5: EPA's Social Media Advocacy in Favor of the Proposed "Waters of the United States" Rule Prejudices the Rulemaking Process.

EPA staff are asking the public to influence the agency's view of the proposed "waters of the United States" rule. In fact, the Twitter account for EPA's Office of Water is now essentially a lobbyist for the proposed rule. A few months ago, EPA established a website called "Ditch the Myth," which declares that the proposed rule "clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources."[202] The agency has now gone so far as to solicit others to seek to influence EPA regarding the proposed rule, urging social media users to "show their

[201] See Nancy Stoner, Input Critical lo Rule on Waters of the U. S., EPA Connect (March 25,20 1 4) ("In large part, it
was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), http://blog.epa.gov/epaconnectl2140/ 03linput-critical-to-rule-on-waters-of-the-u-s
[202] DITCH THE MYTH, http://www2 .epa.gov/uswaters/ditch-myth.

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support for clean water and the agency's proposal to protect it."[203] These actions raise serious questions about compliance with the Anti-Lobbying Act.[204]

The integrity of the rulemaking process is in jeopardy, if not already tainted. EPA's social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking. Why should any landowner believe that EPA will seriously and meaningfully examine adverse comments regarding the proposed rule's impact on ditches, for example, when the agency has already pronounced that the proposed rule "reduces regulation of ditches"?[205] Why should state officials believe that their concerns with the proposed rule will be fully considered, when EPA has already determined that the proposed rule "fully preserves and respects the effective federal-state partnership . . . under the Clean Water Act"?[206]

EPA's social media advocacy is a firm indicator that adverse comments will receive scant attention during the rulemaking period. We question whether the "waters of the United States" rulemaking can be conducted in accordance with the Administrative Procedure Act and its objective that agencies "benefit from the expertise and input of the parties who file comments with regard to [a] proposed rule" and "maintain a flexible and open minded attitude towards its own rules"?[207]

We are dismayed that the Administration has failed to adhere to its impartial obligations under the law. Moreover, this bias has been reflected in comments from NWs as well. Based on similar statements from groups such as Organizing for Action, Natural Resources Defense Council, and Clean Water Action, it is as though the Administration and its environmentalist allies are of one mindset, eager to paint the proposed rules critics as anything other than concerned citizens.

At the same time, although the above groups are entitled to have a misguided and flawed perspective on the proposed "waters of the United States" rule, the Administration owes the American people a higher level of discourse. To date, however, this rulemaking has been plagued by administrative bias and prejudicial grandstanding. It is therefore incumbent on EPA and Corps to reverse course, withdraw the proposed rule, and commit to working more cooperatively with interested stakeholders in future regulatory proceedings. (p. 4 – 5)

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[203] U.S. Environmental Protection Agency, *Water Headlines for the Week of September 9, 2014*, http://water.epa.gov/aboutow/ownews/waterheadineay-6-2014-Issue.cfm

[204] See 18 U.S.C. 8 191 3 (prohibiting the use of appropriated federal funds for the "personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation").

[205] See DITCH THE MYTH, supra note 1 1.

[206] See id.

[207] McCIouth Steel Prod. Corp. v. Thomas, 838 F.2d 13 17, 1325 @.C. Cir. 1988) (interpreting 5 U.S.C. i 553; internal quotations omitted). See aha Letter from Waters Advocacy Coalition to EPA Administrator Gina McCarthy and Secretary of the Army John M. McHugh re: Proposed Rule to Define Waters of the United States" (Sept. 29,2014) ("The [Administrative Procedure Act] does not allow [EPA and the Corps] to keep altering the regulatory landscape throughout the r d d i n g process, Indeed, the public cannot lx expected to provide meaningful comment on a moving target."), available at http://www.fb.org/tmp/uploads/wacletter092914.pdf.

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Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act.**

The Anti-Lobbying Act does not prohibit the agencies from seeking input from the public on a rulemaking or restrict the agencies from educating or informing the public on a rulemaking under development – i.e., the types of activities described by the commenter. As noted in a recent Comptroller General opinion, "agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials" – e.g. persuasive statements in "individual social security statements mailed to over 140 million Americans," and letters "encouraging prosecutors to work with legislators to update local marijuana laws". B-325248, U.S. Comp. Gen., Sept. 9, 2014. See also B-319075, U.S. Comp. Gen., April 23, 2010, and B-304715, U.S. Comp. Gen., April 27, 2005.

13.3.2. Executive Order 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Summary of Comments on Executive Orders 12866 and 13563

The comments in this section address the Agency's compliance with Executive Order 12866 - Regulatory Planning and Review and Executive Order 13563 - Improving Regulation and Regulatory Review. A number of the commenters expressed concern that the regulatory process established by the agencies violated or were not consistent with the two Executive Orders. Commenters challenged the overall transparency of the rulemaking process and expressed concern that the language and definitions used in the proposed rule are ambiguous and create confusion over regulatory authority. These concerns led many to interpret the rule as an expansion of federal jurisdiction with the agencies' interpretation of the Clean Water Act (CWA). A number of the commenters also indicated that the rule was missing a Retrospective review plan per EO 13563. Ultimately, commenters requested the agencies extend, re-propose, stay, or suspend the rulemaking process.

Agencies' Summary Response to Comments on Executive Orders 12866 and 13563

Executive Order 12866 - Regulatory Planning and Review – directs agencies to submit significant regulatory actions to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) for review. Executive Order 13563- Improving Regulation and Regulatory Review- directs agencies to provide timely online access to the rulemaking docket for proposed and final rules, along with any relevant scientific and technical findings, on regulations.gov, and to afford the public the opportunity to comment on proposed regulations through the Internet.

The agencies have fully complied with both of these Executive Orders. The proposed rule was submitted to the Office of Management and Budget, and as discussed in more detail in Compendium 11, the agencies conducted an analysis of indirect costs and benefits of the rule.

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Rulemaking Process and Public Outreach

The proposed rule was published in the Federal Register on April 21, 2014 and provided a 90-day comment period. The 90-day comment period was expected to close on July 21, 2014; however on June 24, 2014, EPA issued an extension through October 20, 2014. On October 14, 2014, EPA issued an additional extension for comment, through November 14, 2014. In addition to the extended comment period, the agencies launched a robust outreach effort during April, May and June, holding discussions in multiple states around the country and gathering input from stakeholders to shape the final rule. The public meetings were announced on the agencies' website as well as through mass email distributions to known stakeholders. Ultimately, the agencies convened over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others to provide an enhanced opportunity to provide input on the proposed rule.

The public outreach and consultation process for this rulemaking enhanced the development of the final rule as it allowed the agencies to hear from landowners, business people, farmers, scientists, energy companies, conservationists, states and local governments, and others who have valuable experience, clear perspectives, and important information. The final rule was developed after addressing and, as appropriate, incorporating comments from the public outreach efforts. The docket provides a detailed list of the outreach efforts conducted during this rulemaking process.

Assessing the Impact of the Clean Water Rule:

The final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. While many commenters assert that the rule broadens the scope of waters that would be covered under the Clean Water Act, the rule does nothing more than revise a definition, and does not itself regulate or impose any compliance burden on any entity. The rule does not include any waters that historically have not been covered under the Clean Water Act and places important qualifiers on some existing categories. In fact, the rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court. Waters that have never been protected remain outside the scope of the Clean Water Act. As a result, the rule is deregulatory because fewer waters will fit within the definition and, thus, fewer waters will trigger regulatory requirements set out in other CWA regulations.

The final rule does not establish regulatory requirements and, therefore, does not impose direct costs on any entity. Instead, it is a definitional rule that clarifies the scope of "waters of the United States." Therefore, regulatory impact analysis is not needed for this rule. However, in compliance with EPA's guidance on Executive Order 12866, the EPA and the Corps prepared an analysis of the potential costs and benefits associated with this action to better understand the incremental costs and benefits that may result from any change in the number of positive

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jurisdictional determinations[208] associated with CWA programs relying on the definition of "waters of the United States." This analysis is contained in ''Economic Analysis of the EPA-Army Rule Clean Water Rule" (Docket Id No EPA-HQ-OW-2011-0880).

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, the EPA and the Corps submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action.

Executive Order 13563 directs agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned" and to "develop . . . a preliminary plan, . . . under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." It does not direct agencies to include a retrospective review plan in each rule is issues. Information on EPA's retrospective reviews can be found at: http://yosemite.epa.gov/opei/RuleGate.nsf/.

Specific Comments

Northern Counties Land Use Coordinating Board (Doc. #3317)

13.339 EPA analysis under Executive Orders 12866 and 13563 as reflected in the April 21 Federal Register appear superficial and inconsistent with the intent of these Executive Orders. E.O. 12866 states at Section 1(b)S: "... each agency shall consider incentives for innovation, consistency, predictability, the cost of enforcement and compliance(to the government, regulated entities, and the public), flexibility, distributive impacts and equity." Given the NCLUCB region's landscape, demography, and economy, it would be helpful to review a disparate impact analysis consistent with the distributive impact and equity mandate in E.O. 12866. The local governments and small businesses in this region are frequently regulated entities under federal and state water regulations due to the scale of our wetland resources. Our roads, housing developments, small business expansions, and public works projects are confronted with significant transaction costs associated with temporal, multi-jurisdictional, and hydrologic complexity.

The EPA's assertion that "the proposed rule will not have a significant economic impact on a substantial number of small entities" underlines the need for a more thorough analysis of distributive impacts and equity. (p. 2)

Agency Response: See the summary response and the Regulatory Flexibility Act response in Compendium 11.1.

[208] A "positive jurisdictional determination" is a decision to assert CWA jurisdiction over a particular water. The alternative is a "negative jurisdictional determination" which is a decision not to assert CWA jurisdiction over a particular water. It is important to note that the purpose of the economic analysis is not to estimate the change in the numbers of waters subject to jurisdiction.

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13.340 The publication: "Economic Analysis of Proposed Revised Definition of Waters of the United States" written to comply with E.O. 12866 appears to contradict assertions from the Federal Registry. For example, the Federal Registry at page 22220 states: "The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations." While in the Economic Analysis, EPA analysts state that the potential regulation of "other waters" which are not now regulated would expand federal jurisdiction under the Clean Water Act. The Economic Analysis also suggests that "Benefits may also be realized from *more comprehensive enforcement efforts* that could result from the proposed rule." (p. 10)

Agency Response: **As explained in the Agencies' Economic Analysis, there are two potential ways of viewing the "baseline" for evaluating the impacts of this rule. When determining waters covered by the CWA today, the agencies are making jurisdictional determinations consistent with the law, existing regulations and policy, and the Supreme Court rulings in 2001 and 2006. This scope of waters covered by the CWA today is considerably smaller than the scope of waters historically covered prior to the 2001 and 2006 Supreme Court decisions. Based on the reduction in the scope of CWA jurisdiction, the agencies conclude that the new rule would impose no additional costs when compared to historic application of the regulation it replaces.**

For purposes of its economic analysis, however, the agencies evaluated costs and benefits associated with the difference in jurisdictional determinations between the new rule and current field practice, which is based on the 2008 EPA and Corps jurisdiction guidance. This policy guidance has been implemented by the agencies since 2008 and reflects the Supreme Court decisions that limited assertion of CWA jurisdiction for some types of waters. Compared to this baseline, the agencies anticipate the new rule will result in an increase in the number of positive jurisdictional determinations and an associated increase in both costs and benefits that derive from the implementation of CWA programs.

13.341 In an op-ed article posted on March 25, 2014, EPA Administrator Gina McCarthy illustrates this same internal contradiction by stating: "Our proposed rule will not add to or expand the scope of waters historically protected under the Clean Water Act" and "we're proposing a Clean Water Act rule that clarifies which waters are protected- *with an eye toward those critical waters upstream."*(italics added) As an organization that represents eight upstream counties, it is difficult to interpret these two statements as anything but self-contradictory.

A ninety day extension of the comment period would give federal regulators the opportunity to resolve this apparent contradiction and assist members of the regulated community, both private and public, to better understand the breadth of jurisdiction proposed therein. The time extension may even assist federal regulators in achieving one of the General Principles of Regulation cited in E.O. 13563: to ... " promote predictability and reduce uncertainty" in proposed regulations. (p. 2 – 3)

Agency Response: **See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).**

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

13.342 Executive Orders 12291 and 12866 require EPA to prepare a Regulatory Impact (RI), cost-benefit analysis which describes all alternatives, including No Action, for those Major Federal Actions under consideration. The RI analysis is to include demonstration of the net aggregate benefit of each alternative(s) and how such analyses were coordinated with local and state governments. Please provide the RI analysis your agency performed for each Kansas County affected by the proposed WOTUS Rule, along with a summary of how EPA has worked with local Kansans in preparing the WOTUS Rule. (p. 1)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

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

13.343 (…) Based upon our review of the above-referenced documents and our assessment of the impact the Proposed Rule may have on Douglas County if implemented in its current form, Douglas County respectfully requests that the EPA and United States Army Corps of Engineers (USACE) (collectively "Agencies"): (1) stay the current rulemaking process until the scientific assessment is final and the credibility of the Connectivity Report is established and the Agencies have the necessary scientific and technical foundation for the Proposed Rule; (2) stay the rulemaking process until the EPA's Economic Analysis is revised and the EPA is able to conduct a complete cost-benefit study; then (3) revise the Proposed Rule based upon the findings and recommendations of the Connectivity Report and Economic Analysis and the comments submitted by stakeholders, and finally; (4) conduct a negotiated rulemaking process. (p. 3)

Agency Response: See section 13.1 summary response for more information regarding the Connectivity Report. See Compendium 11 for response to comments regarding cost/benefit analysis.

13.344 The Proposed Rule is Not Ripe for Public Comment and Finalization

1) A Final and Valid Connectivity Report is Necessary to Justify the Proposed Rule

The EPA has stated that it would conduct an exhaustive and peer reviewed scientific literature review to evaluate connectivity between various surface hydrologic features and downstream Traditional Navigable Waters (TNWs) prior to development of the Proposed Rule. However, the Agencies are on the path to finalizing the Proposed Rule while the Connectivity Report currently remains in draft form. Requesting comments on the Proposed Rule before the Connectivity Report is final is problematic. The purpose of the Connectivity Report should be to provide the science and technical foundation for the Proposed Rule. The Connectivity Report is a compilation of independent peer-reviewed scientific literature that, when finalized, is intended to provide the scientific justification for the Agencies' interpretation of when waters are subject to CWA jurisdiction. The chartered Science Advisory Board (SAB) is currently conducting quality reviews of its peer review reports on the Connectivity Report and is deliberating on the adequacy of the scientific and technical basis of the Proposed Rule. Any final regulatory action related to

CWA jurisdiction must be based upon a complete and validated version of the Connectivity Report.

There are significant issues with the current draft Connectivity Report that requires the Agencies' attention before continuing with the rulemaking process. First, the Connectivity Report does not evaluate connectivity in a regulatory context, i.e., what connections are sufficient to be considered a "significant nexus". The Connectivity Report fails to establish any scientific basis for determining the existence of a "significant nexus," and thus fails to provide a scientific basis for any rule defining federal jurisdiction. Instead, the report identifies only the presence of connections, without considering the significance of those connections. Second, the Connectivity Report does not address how the Agencies plan to conduct case-by-case reviews for determining jurisdiction of water bodies located outside floodplains. Finally, the Connectivity Report ignores the law—that the Supreme Court has rejected that the idea that a "significant nexus" is established by any hydrological connection. The report does not identify how the existing connectivity literature will guide the Agencies in determining and justifying the idea of a "significant nexus" and therefore the expansion of the scope of their jurisdiction under the CWA. According to law established by recent decisions by the Supreme Court, the CWA regulates navigable water and certain other waters with a "significant nexus" to navigable waters. All other water must be left to the states to regulate. Douglas County respectfully requests that the Agencies follow the proper course of action to ensure that the Proposed Rule is based upon a valid scientific and technical foundation: (1) revise the Connectivity Report based upon the comments and concerns expressed by Douglas County and other stakeholders; (2) finalize the Connectivity Report; (3) revise the Proposed Rule accordingly pursuant to the findings and recommendations in the Connectivity Report; and (4) reissue the Proposed Rule for public comment. Following this expanded process will allow stakeholders to submit informed comments based on the best and most current available information. *See Executive Order 12866, Regulatory Planning and Review*, September 30, 1993 and *Executive Order 13563, Improving Regulation and Regulatory Review*, January 19, 2011 (agency should seek the involvement of State, local, and tribal officials and should afford the public a meaningful opportunity to comment). (p. 3 – 4)

<u>Agency Response:</u> See section 13.1 summary response for information regarding the Connectivity Report. For additional information on the final Connectivity Report and how this information was considered in the development of today's rule, please see Compendium 9.

13.345 2) The Economic Analysis Does Not Conform to Executive Order 13563

<u>Agency Response:</u> The CWA regulates "navigable waters," defined as "waters of the United States." 33 U.S.C. §§1344, 1362(7). The CWA was enacted pursuant to Congress' authority to regulate interstate commerce under Article 1, section 8 of the Constitution. As a result, regulatory agencies violate the Constitution when their enforcement of the act extends beyond the regulation of interstate commerce. Congress did not intend for the CWA to cover all waters. When it enacted the CWA, Congress explicitly "recogniz[ed], preserv[ed], and protect[ed]" the States' primary authority and responsibility over local land and water resources. 33 U.S.C.

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§1251(b). Overreaching interpretations of the CWA "result in a significant impingement of the States' traditional and primary power over land and water use." Rapanos, 547 U.S. at 738 (quoting SWANCC, 531 U.S. at 174). Executive Order 13563 (EO 13563) includes several key instructions to Federal Agencies, including requirements that they should propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and should tailor regulation to impose the least burden on society. In doing so, EO 13563 requires that the Agencies use the best available techniques to quantify costs and benefits as accurately as possible. While Douglas County appreciates the willingness of the EPA offices to participate in teleconference calls to discuss the Proposed Rule, we must stress that information sharing does not equate to meaningful consultation. The Agencies should pursue an authentic partnership with the states representatives and local communities. (p. 4)

"The agencies have carefully tailored this rule based on the legal strictures of the statute and the governing caselaw. With regard to the comment that the agencies failed to tailor the regulation to be least burdensome on society, it misapprehends the nature of this rule, which is definitional only; any burdens are imposed by the Act and permitting regulations under it. In any case, the agencies have evaluated indirect costs associated with this rule and the rule is justified in ensuring that the regulations are consistent with the statute, available science and the caselaw.

13.346 (…) The inclusion of this additional cost in the Economic Analysis is a necessary component for a complete review of the Proposed Rule to ensure the Proposed Rule is not impeding standard public safety operations. Moreover, more information is required in the Economic Analysis to allow local units of governments such as Douglas County to determine actual objective impacts to MS4s and public rights-of-ways. The current draft Economic Analysis does not provide enough information wherein Douglas County can conclude that the Proposed Rule will not fiscally limit it from conducting standard operating procedures to construct and repair infrastructure to protect the public. Stakeholders cannot provide meaningful comment on the Proposed Rule without being afforded the opportunity to review and comment on a comprehensive Economic Analysis prior to the finalization of the Proposed Rule. (p. 9 – 10)

<u>Agency Response:</u> See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

<u>Douglas County's Request to Expand the Rulemaking Process</u>

13.347 Douglas County respectfully requests that the Agencies follow the proper course of action to ensure that the Proposed Rule is based upon a valid scientific assessment and the Proposed Rule is enacted lawfully: (1) revise the Connectivity Report based upon the comments and concerns expressed by Douglas County and other stakeholders; (2) finalize the Connectivity Report; (3) revise the Proposed Rule accordingly pursuant to the findings and recommendations in the Connectivity Report; and (4) reissue the Proposed Rule for public comment. Following this expanded process will allow stakeholders to submit informed comments based on the best and most current available information.

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1) Revise and Validate the Connectivity Report

The Connectivity Report is the scientific foundation the Agencies are required to have to justify the need for the Proposed Rule. However, to date, the EPA has identified only the presence of connections between stream, wetlands and downstream waters. Douglas County requests further study by EPA on specific literature references and with assistance from the SAB Panel for the Peer Review of the Connectivity Report to identify the strength of connectivity impacts. Further, connections should be evaluated to the degree that when altered, they significantly affect downstream waters. For example, an ephemeral tributary can transport sediment to downstream waters, but if the receiving TNW is the South Platte River and the tributary, in combination with other tributaries, transports an insignificant quantity of sediment, it does not appear consistent with the U.S. Supreme Court's rulings to capture those ephemeral tributaries into the scope of WOUS.

By proceeding with the rulemaking process before obtaining a final validated Connectivity Report, the Agencies are effectively jumping ahead to the final rule and are undermining the importance of the scientific assessment and rulemaking process. The Agencies are avoiding making the suggested changes in the Connectivity Report by publishing the rule before the report is final. Moreover, the Agencies are undermining the rulemaking process. By pushing forward with the rulemaking before the Connectivity Report is finalized, the Agencies are asserting that the rule, as-is, is a final decision, despite the fact that the rule may be based on unsound science. Finally, if enacted into law, the Proposed Rule will have the effect of establishing categorical federal jurisdiction over all tributary systems, riparian areas, and floodplains. Without the scientific basis, technical foundation, and costs-benefit analysis in place to support the Proposed Rule, the Agencies are acting arbitrarily and capricious in asserting such categorical jurisdiction. (p. 12 – 13)

<u>Agency Response:</u> See section 13.1 summary response for information regarding the Connectivity Report.

13.348 The Agencies' and Stakeholders will Benefit from a Negotiated Rulemaking Process

As the Agencies are aware, the Proposed Rule is not widely supported and the Agencies have been subject to great criticism and, in some cases, resentment. Under the typical rulemaking process under the Administrative Procedure Act, agencies write a rule, publish the rule, accept comments from the public, then adopt the rule as they see fit. In Douglas County's opinion, rules produced in this way often lack the support of concerned parties, which can hamper their effectiveness.

Negotiated rulemaking is a realistic alternative to this adversarial administrative process. The negotiated rulemaking process allows affected interests to have greater control over the content of agency rules while ensuring fairness and balanced participation to all involved. The negotiated process also permits agencies to obtain a more accurate understanding of the impacts to interested parties, costs and benefits of rule, and alternatives than if the agencies are left to digest voluminous records of testimonial and documentary evidence presented in adversarial hearings.

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Rules drafted by negotiation have been found to be more pragmatic and more easily implemented at an earlier date, thus providing the public with the benefits of the rule while minimizing the negative impact of a poorly conceived or drafted regulation. *See, Environmental Protections Agency's Policy on Alternative Dispute Resolution*, 65 FR 81858 December 18, 2000. Douglas County asks that the Agencies consider conducting a negotiated rulemaking process for the next revised draft of the Proposed Rule. This process will allow representatives of all interests that will be affected by the rule, including, but not limited to, the rulemaking agency, the regulated entities, public-interest groups, and concerned individuals to sit at a table and craft creative solutions to the problem that led to the Agencies determination that a rule is needed. (p. 15 – 16)

Agency Response: **The negotiated rulemaking process is used as a pre-proposal mechanism to develop a rule. It is most effective when affected parties have conflicting positions on what provisions should be in a rule and where a negotiated process could lead to consensus language for the rule. The process for developing this rule included pre-proposal opportunities for affected parties to provide input to the agencies (for detailed information see the sections on 13.2.5 on Federalism, 13.2.6 on Tribal Consultation, and 11.1 on RFA/SBREFA in compendium 11). Since the rule has been proposed and the Agencies have received over one million comments, it would be inappropriate to ignore all of those comments to restart the rulemaking through a negotiated rulemaking process.**

Beaver County Commission (Doc. #9667)

13.349 Issue 5: Failure to comply with Executive Orders 12866 (1993) and 13563 (2011)

References: FR page 22188, column 1. This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

FR page 22189, column 1. ... the agencies request comment on alternate approaches to determining whether "other waters" are similarly situated and have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas.

FR page 22189, column 1. In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify, which "other waters" should be considered similarly situated for purposes of a case-specific significant nexus determination.

FR page 22189, column 2. The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.

FR page 22189, column 2. ... the agencies also request comment on determining which waters should be determined non-jurisdictional.

FR page 22189, column 2. The agencies seek comment on how inconclusiveness of the science relates to the use of case specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly

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situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.

FR page 22189, column 2. The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.

FR page 22190, column 1. This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment

Discussion: Executive Orders 12866 Regulatory Planning and Review (1993) and 13563 Improving Regulation and Regulatory Review (2011) require that the federal regulatory system ensure, among other things, regulations that are consistent, written in plain language, and easy to understand. The proposed rule fails on all counts.

The stated purpose of this proposed rule, as evidenced by its title, is to define the "Waters of the United States" under the Clean Water Act, and as stated elsewhere (see above references), to increase clarity as to the scope of "waters of the United States". As has already been addressed, above, that term does not need to be defined. The CWA and the Supreme Court have already very adequately provided a definition. However, the proposed rule goes on to request comments that address so many other issues, and in such a self-referential and circular manner, that the proposed rule becomes nearly impossible to understand.

The Agencies have not published a proposed rule, but rather a request for the public to do the Agencies' own work. Rather than publish a proposed rule that presents definitions of terms and alternatives to those definitions in a consistent and easy to understand manner for the public to analyze and evaluate, the Agencies have created a rule that goes back and forth between confusing definitions scattered throughout the document and soliciting additional comments about definitions of terms that are not found anywhere near the request for comments. (See Issue 1 above, "bait and switch" discussion).

In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited, above) are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda.

Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission

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creep", which is enabled by not complying with the Executive Orders directives on regulatory planning.

Recommendation: Withdraw the proposed rule. It is inappropriate and in violation of Executive Orders on regulatory planning. (p. 10 – 12)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

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

13.350 SW Quay, as a governmental subdivision of the state of New Mexico, did not receive notice of impending rulemaking by EPA/COE per the following Executive Orders 12866 and 13132 or the Clean Water Act requiring federal agencies to cooperate with state and local agencies. (p. 3)

Agency Response: The agencies conducted extensive outreach and fully complied with the executive orders. See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

Water Advocacy Coalition (Doc. #17921.1)

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

1. The agencies have not complied with E.O. 13563 (Improving Regulation and Regulatory Review).

The proposed rule fails to comply with Executive Order No. 13,563, titled "Improving Regulation and Regulatory Review" (E.O. 13,563). 76 Fed. Reg. 3,821 (Jan 21, 2011). That order provides: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It adds that regulatory agencies must (1) base their requirements on the best available science, (2) promote predictability and reduce uncertainty, and (3) propose or adopt regulatory requirements only upon a reasoned determination that their benefits justify their costs. See E.O. 13563 §§ 2, 5. Also, the President has commanded the agencies to tailor their regulations to impose the least burden on society, consistent with obtaining its regulatory objectives, taking into account the costs of cumulative regulations, and to identify and assess available alternatives to direct regulation. See id. § 1(b).

In drafting the proposed rule to define "waters of the United States," it appears that the agencies chose to ignore or avoid their obligations under E.O. 13563. Specifically, as noted in section V.B., the proposed rule is not supported by the science. And fundamentally, as noted throughout these comments, the proposed rule will not provide predictability or reduce uncertainty. Moreover, there is no evidence that the agencies made a reasoned determination that the proposed rule's environmental benefits (if any) will justify its jobs, development, and consumer cost burdens. To the contrary, as explained in section V.C. above, the agencies' Economic Analysis fails to provide a reasonable assessment of the proposed rule's costs and benefits, and grossly

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underestimates the rule's impacts. Moreover, it is clear that the agencies have not tailored the proposed rule to impose the least burden on society, taking into account the cost of cumulative regulations affecting stakeholders. Ultimately, the proposed rule is riddled with ambiguities and prospective implementation problems. The agencies have not crafted a revised definition of "waters of the United States" that "imposes the least burden on society" as required by E.O. 13563. (p. 96)

Agency Response: **See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). For information on cost/benefit analysis, see Compendium 11.**

Also, the Rule does nothing more than revise a definition, it does not itself regulate or impose any compliance burden on any entity. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.

With regard to the comment that the agencies failed to tailor the regulation to be least burdensome on society, it misapprehends the nature of this rule, which is definitional only; any burdens are imposed by the Act and permitting regulations under it. In any case, the agencies have evaluated indirect costs associated with this rule and the rule is justified in ensuring that the regulations are consistent with the statute, available science and the caselaw.

13.352 2. The rulemaking does not comply with E.O. 12866 (Regulatory Planning and Review).

The proposed rule fails to comply with Executive Order No. 12,866 of September 30, 1993, titled "Regulatory Planning and Review" (E.O. 12,866). 58 Fed. Reg. 51,735. Pursuant to E.O. 12866, each agency "shall identify and assess available alternatives to direct regulation" and "alternative forms of regulation." E.O. 12,866 at §§ 1(b)(3), 1(b)(8). An agency also has a duty to "assess both the costs and benefits of the intended regulation" and "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Id. § 1(b)(6). Moreover, E.O. 12,866 requires an agency to base its regulatory decisions "on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation." Id. § 1(b)(7). The EO requires an agency to tailor its regulations "to impose the least burden on society." Id. § 1(b)(11). As discussed in section V.C., the Economic Analysis for the proposed rule is cursory and grossly underestimates the impacts of the proposed rule.[209] As Professor Sunding's review demonstrates, the Economic Analysis is not based on the best reasonably obtainable economic information. The agencies have not provided a true, comprehensive

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

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analysis of the burdens that this proposed rule will impose on the regulated public. And, as explained in the GEI Report, the rule is not supported by the best reasonably obtainable scientific information.

Finally, E.O. 12866 requires an agency to "draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." Id. § 1(b)(12). As discussed throughout these comments, the language of the proposed regulation is anything but clear. To the contrary, it is vague and ambiguous, and invites litigation arising from such uncertainty. In sum, the agencies have not complied with E.O. 12866 for this proposed rulemaking, and should withdraw and revise the rule to address these concerns. (p. 95 – 96)

Agency Response: **See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). See summary response on cost/benefit and the Economic Analysis in Compendium 11.**

National Association of Home Builders (Doc. #19540)

13.353 c. The Agencies Failed to Comply with Executive Order 12,866.

The proposed rule fails to comply with Executive Order (E.O.) 12,866, entitled "Regulatory Planning and Review,"[210] which lays out the basic processes and considerations for federal rulemakings. Pursuant to E.O. 12866, each agency is to identify and assess available alternatives to direct regulation and alternative forms of regulation to reduce costs and burdens. Agencies must also assess the costs and benefits of proposed regulations and only adopt those whose benefits justify their costs. Importantly, E.O. 12866 also requires agencies to base regulatory decisions "on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation."[211]

Unfortunately, the proposal falls short on all counts. EPA's Economic Analysis for the proposed rule, for example, is cursory, grossly underestimates the costs, and is not based on the best reasonably obtainable economic information. Likewise, as discussed in Section IX., the proposed rule is not based on the best reasonably obtainable scientific information. Equally troubling, despite the Order's clear directive that agencies' avoid undue interference with state, local, and tribal governments, the proposal meddles with the federal/state balance and confuses the question of which entity ultimately has authority over any given water.

E.O. 12866 also requires each agency to "draft its regulations to be simple and easy to understand, with the goal of minimizing the potential uncertainty and litigation arising from such uncertainty."[212] As highlighted throughout these comments, the language of the proposed rule is far from clear. It is vague and ambiguous and invites litigation arising from the substantial uncertainty and agency deference.

[210] 58 Fed. Reg. 51,735 (Sept. 30, 1993).
[211] Id. § 1(b)(7).
[212] Id. § 1(b)(12).

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The Agencies have not complied with E.O. 12866 and must withdraw and revise the proposed rule to meet its requirements. (p. 159)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). For information on cost/benefit, see the summary response on and the Economic Analysis in Compendium 11.

Lyman-Richey Corporation (Doc. #14420)

13.354 As President Clinton made clear in Executive Order 12866, "The American people deserve a regulatory system that works for them, not against them[.]" The Order also demands: "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives … ."[213] The Agencies have failed in this regard, in part, because they have improperly circumvented their duties under the RFA, as amended. As discussed above, the Proposed Rule's categorical treatment of various waters results in a massive burden shift from the regulator to the regulated community. Whereas previously the Agencies would have had to prove that waters were jurisdictional before requiring or enforcing a permit, the Proposed Rule will now require members of the regulated community to prove their way out of a permit requirement. These and other stifling burdens imposed by the Proposed Rule have been ignored. Absent a proper RFA analysis, the Proposed Rule will remain legally and factually deficient.[214] (p. 10 – 11)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). For information on cost/benefit, see the summary response on and the Economic Analysis in Compendium 11.

Also, the Rule does nothing more than revise a definition, it does not itself regulate or impose any compliance burden on any entity.

National Lime Association (Doc. #14428)

13.355 E. The Proposed Rule's Ambiguity and Deficiencies Deprive the Public of a Meaningful Opportunity to Comment.

(…) As discussed in detail above, the rule as currently proposed is ambiguous and significantly deficient in setting forth many, much-needed details in its regulatory text. Given the Agencies' stated objectives for this rulemaking, however, NLA assumes that the Agencies will not only agree with the concerns expressed in these comments, but will also agree with and undertake to make the revisions we have recommended. However, even if the Agencies were to make some or all of the recommendations NLA

[213] Id., Section 1(b)(11).
[214] Compare letter April 9, 2014 from members of the Senate Committee on Environment and Public Works, urging the agencies to conduct a proper RFA analysis. (Exhibit E)

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recommends, it remains to be seen exactly how significant the changes would be when compared with the current proposal, and how the revised regulatory text would be worded. Under such circumstances, it is questionable whether the public will, in fact, have been given a meaningful opportunity to comment on the proposed rule. In NLA's opinion, because of the significant ambiguity of the current proposed rule and its many deficiencies, the answer at the present time has to be "No."

As we have stated throughout these comments, the proposed rule needs to be withdraw, rewritten and re-proposed. Doing so is the only way for the Agencies to ensure that the public has, indeed, been given the requisite meaningful opportunity to review and comment on the significant revisions to the proposed rule which are clearly needed. (p. 19)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

National Federation of Independent Business (Doc. #1653)

13.356 Finally, we believe granting an extension is consistent with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," signed on January 18, 2011. In particular, this executive order calls for "an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings." We believe the information in the NFIB Legal Center's FOIA request fits the criteria for technical findings. (p. 2)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

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

13.357 In addition to this proposed rule, the agencies promulgated an associated rule interpretation in a manner that may allow important elements to slip under the radar in terms of analysis. The agencies should fully comply with Executive Order 12866 and prepare a regulatory impact analysis for all significant regulatory actions. (p. 2)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). For additional information cost/benefit analysis see the comment response on Economics in compendium 11.

George Washington University Regulatory Studies Center (Doc. #13563)

13.358 Planning for Retrospective Review

The Agencies have failed to incorporate a retrospective review plan into their rule pursuant to presidential executive order and sound policy. (p. 10)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

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13.359 (…) The Agencies' Economic Analysis attempts to evaluate the impact of the proposed rule on affirmative assertions of jurisdiction using a baseline of 2009 – 2010 field practices.[215] But nowhere in this document, nor in the proposed rule itself, do the Agencies outline a plan of retrospective review or for evaluating the outcomes of any expansion or increase in jurisdictional coverage of CWA regulations brought about by their undefined process of establishing significant nexus. (p. 13)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). For additional information cost/benefit analysis see the comment response on Economics in compendium 11.

13.360 (…) Given the Agencies' stated goals of increasing transparency, predictability and consistency, each one should be linked with specific measures going forward.

Measurement Criteria & Measuring Linkages

In order to measure the success of this proposed rule, over time, following implementation, it is necessary for the Agencies to define what constitutes success. Thus, defining metrics of success is an important element of this rule. Any stated metrics of success should be linked to the problems identified, and they should demonstrate that the proposed standards actually accomplish the stated end goal. Regrettably, the Agencies do not outline a plan for retrospective review post promulgation; rather, as quoted above, they state that "the purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient."[216]

Throughout the proposed rule and its economic analysis[217] the Agencies list a number of new outputs, or direct and measurable effects of the proposed rule. These effects (positive and negative), along with our recommended metrics for assessing them, are listed below:

- Decreases in number of floods and flood damages[218]
    - *Metric:* Changes in the number and/or severity of floods per year and accompanying changes in monetary values of flooding damages.
- Increases in jurisdictional determinations[219]
    - *Metric*: Number of jurisdictional determinations and area under jurisdiction.
- Changes in litigation surrounding definitions and jurisdictional determinations.[220]
    - *Metric*: Agency and private expenditures on relevant litigation matters; number of staff involved in litigation matters.

[215] Economic Analysis at page 2 and 12.
[216] 79 FR 22190
[217] EPA and USACE (2014). "Economic Analysis of Proposed Revised Definition of Waters of the United States."
[218] Economic Analysis at page 9
[219] Economic Analysis at page 12
[220] Economic Analysis at page 18

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- Effects on CWA program applications
  - *Metric*: Reduction/increase in the number of permits sought under the various CWA permits, not just section 404
- Indeterminate changes in the private cost of obtaining a permit[221]
  - *Metric*: Average permit cost, total permit cost
- Increased administrative costs[222]
  - *Metric*: Agency expenditure on administrative expense; number of staff involved in administrative process.

These practical metrics could help the Agencies conduct a meaningful retrospective review. The Agencies also list a number of more general yet still quantifiable expected outcomes, which are listed below, along with some example metrics for the Agencies' use:

- Reinforcement of ecosystem services and water quality[223]
  - *Metric*: Changes in affected fish and shellfish populations; changes in water contamination levels.
- Better transparency, predictability, consistency, effectiveness, and efficiency
- Improved level of certainty for investors.[224]
  - *Metric*: Amount of relevant investment undertaken controlling for economic conditions.

The metrics above are not exhaustive and are meant to be heuristic only. The following section, *Information Collection*, provides recommendations to the Agencies on how to best collect the data necessary to use these metrics. The Agencies should consult with the Office of Management and Budget (OMB) to formulate a plan of retrospective review that aligns with the purposes of their rule defining the Waters of the United States. (p. 14 – 15)

<u>Agency Response:</u> See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

13.361 Timeframe

Since the Agencies have not included a plan of retrospective review in this proposed rule, it follows that there is no timeframe for such an evaluation in it at this moment.

The Agencies' Economic Analysis does use a baseline of 2009 – 2010 from which data was collected on assertions of jurisdiction. The data were then loaded into models to

[221] Economic Analysis at page 14
[222] Economic Analysis at page 18
[223] Economic Analysis at page 8
[224] Economic Analysis at page 10

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predict future assertions of jurisdiction, say, over "other waters." The Agencies may want to solicit further comment on what baseline or baselines should be used post promulgation. Given the resort, over the past, to interim guidances and now invalidated rules, multiple baselines may be useful to policy-makers in the future who need to evaluate alternative regulatory regimes and their impact on regulated entities.

In any final rule including such a "lookback" plan, the Agencies should identify a timeframe for such a review and indicate, with sufficient specificity, how soon after implementation it will begin to measure the progress of its stated metrics. That said, data collection should begin immediately at the inception date of the rule with a view toward ensuring accurate evaluations of definitional impacts on the assertion of jurisdiction by the Agencies, in the field, and reducing reliance on modeling. Monitoring of these metrics should occur throughout the implementation period and for several years afterward.

Recommendation

The Agencies should include a plan of retrospective review as outlined in these comments above. (p. 16 - 17)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

13.362 Conclusion

These comments are offered to assist the Agencies in attaining their stated goal of "Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations" consistent with the rule of law, private property rights, and due regard for prior notice and due process. The following recommendations are intended to enhance the Agencies' final rule establishing definitions of Waters of the United States:

- Finally, the Agencies have failed to incorporate a retrospective review plan into their rule, pursuant to presidential executive order and sound policy. The Agencies should include in their final rule a plan for retrospective review to facilitate transparency, public accountability, and measurement of the success of their rule. This plan should identify how the Agencies will measure the effects of their rule and a timeline for review. (p. 17)

Agency Response: See section 13.1.1 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). The agencies appreciate this commenter's suggestions about how the agencies could measure the effectiveness of this rule going forward. To the extent the commenter is asserting that the Executive Order directs EPA to develop a retrospective review plan in the rulemaking itself, this is incorrect. Rather the EO directs agencies to conduct a retrospective review of existing regulations, not new ones as they are promulgated.

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13.3.3. Paperwork Reduction Act

Summary of Paperwork Reduction Act Comments

The comments in this section address the Paperwork Reduction Act. One commenter expressed concern that the agencies misrepresented the impacts of the proposed rule on paperwork collection. The commenter expressed concern that the action will increase paperwork and be a burden to the public. The other comment in this section suggests that the agencies collected key metrics data (e.g., environmental and administrative cost data) after completion of the final rule.

Agencies' Summary Response to Paperwork Reduction Act Comments

The Paperwork Reduction Act (PRA) was enacted to minimize the paperwork burden for individuals; small businesses; educational and nonprofit institutions; Federal contractors; State, local and tribal governments; and other persons resulting from the collection of information by or for the federal government. The Act generally provides that every federal agency must obtain approval from the Office of Management and Budget (OMB) before using identical questions to collect information from 10 or more persons.

This rulemaking will not impose any information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq See, 5 CFR 1320.3(b). It is important to note that, under the PRA, the meaning of the term "paperwork" is limited. It applies only to information required to be provided to the federal government. This rule does not impose an information collection, because it does not require any entity to "generate, maintain or provide" information to the Agencies. In other words, the rulemaking does not impose a collection of information that triggers the PRA. Specifically, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR). If EPA collects information when it conducts a retrospective review of this rule, the PRA may be triggered at that time.

In development of this final rule the agencies have collected new data and information from comments provided during the rulemaking process. Thus, the agencies do not currently plan to collect additional data that would trigger the need for an ICR and approval from OMB.

Specific Comments

Uintah County, Utah (Doc. #12720)

13.363 IV. Related Acts of Congress, Executive Orders, and Agency Initiatives

> **B. Paperwork Reduction Act -** The Agencies have misrepresented the impacts of the proposed rule on paperwork collection. The Agencies are representing that the proposed rule change will not impose any information collection burden. The Agencies also assert that there is no new approval or application processes required as a result of this rule.
>
> Perhaps this is simply a function of bureaucratic jargon, but it is entirely unlikely that this rule won't cause more paperwork. While the County agrees that the exact wording of the

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proposed rule doesn't require additional paperwork, the implementation of those definitions will require significant new paperwork. The Agencies admit as much on page 22198, when they acknowledge a case-specific analysis will be required for the significant nexus determination.

It seems most likely that the Agencies have yet to determine exactly what the impact of the new rule will be with respect to new paperwork. Clearly, the definition changes will result in more paperwork if for no other reason than the number of waters of the US could increase greatly. The Agencies may be trying to separate the proposed rule from the implementing manuals, handbooks and policies.

In either event, the statement in the proposed rule will be a burden to the common citizen. (p. 5)

Agency Response: See section 13.2.3 summary response for information regarding the Paperwork Reduction Act.

George Washington University Regulatory Studies Center (Doc. #13563)

13.364 Information Collection

Consistent with the requirements of the Paperwork Reduction Act, the Agencies should commit to collecting the information, or analyzing the raw data and information already collected, needed to measure the rule's success. Two distinct types of necessary information are available for a retrospective review of this rule: environmental data and administrative data. A third type is compliance costs of the regulated community in seeking permits, though this information is generally less accessible to the Agencies. The Agencies should consider collecting these data to better measure the effects of their rule.

As previously mentioned, specific environmental effects of the proposed rule include a reduction in flooding and reinforcement of ecosystem services. Measurement of flood incidence damages already occurs through the Federal Emergency Management Agency (FEMA). FEMA measures significant flood events, which are flooding events with at least 1,500 losses paid by the National Flood Insurance Program (NFIP).[225]FEMA also measures all policy and claim statistics by calendar year.[226] The Agencies may utilize future FEMA and NFIP statistics to determine if, in retrospect, there was indeed less incidence of flooding following enactment of the proposed rule.

Reinforcement of ecosystem services is a broad outcome and is thus difficult to measure precisely. However, selection of proxy variables allows for benchmarking and tracking of changing outcomes. Two suggested proxy variables are fish and/or shellfish populations and water contamination level. Although these statistics are not tracked at the national level, the Agencies can aggregate various local data sets to the extent necessary.

The second type of information the Agencies should consider collecting is administrative cost data. As previously mentioned, the proposed rule will affect permit application costs,

[225] Federal Emergency Management Agency, "Significant Flood Events." http://www.fema.gov/significant-flood-events.Updated August 31, 2014.
[226] Federal Emergency Management Agency. "Statistics by Calendar Year." https://www.fema.gov/statistics-calendar-year

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and the Agencies will bear new administrative costs to process these applications. The Corps Cost Engineering and Resource Management Offices as well as the EPA Inspector General and Resource Management Offices should track changes in these costs. In addition, these offices should coordinate with their legal and counselor's offices to track litigation expenses arising from jurisdictional changes and other unforeseen issues associated with the proposed rule. (p. 15 – 16)

Agency Response: **See section 13.2.3 summary response for information regarding the Paperwork Reduction Act.**

13.3.4. Unfunded Mandates Reform Act

Summary of Unfunded Mandates Reform Act Comments

A number of commenters stated that the rule would create a significant regulatory and financial burden resulting in an unfunded mandate for state and local governments. In addition, several commenters expressed that the proposal was not evaluated according to UMRA and explicitly recommended that the proposed rule be withdrawn, vetted with stakeholders and evaluated in a manner consistent with the UMRA. Finally, a number of commenters indicated that EPA failed to conduct impact analyses to assess the direct and indirect costs or savings this rule may have on state, local, and county governments, as required by Unfunded Mandate reform Act (UMRA).

Agencies' Summary Response to Unfunded Mandates Reform Act Comments

This action does not contain an unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. Specifically, UMRA is triggered by the imposition of a "Federal mandate" that may result in the expenditure of funds by State, local, or tribal governments, in the aggregate, or by the private sector of $154 million or more in any one year. A "Federal mandate" is defined under UMRA as a provision of a Federal statute or regulation that would "impose an enforceable duty on State, local, or tribal governments, or the private sector." This action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments. Rather, those enforceable duties are imposed by the CWA and existing CWA regulations. The definition of "waters of the United States" applies broadly to CWA programs. It does not itself directly regulate or impose any compliance burden on any entity. Entities whose actions impact waters of the U.S. are subject to legal obligations imposed by the Clean Water Act and existing implementing regulations. The rule does not alter those obligations.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538) for state, local, or tribal governments or the private sector. And, it does not directly regulate or affect any entity. Therefore, it is not subject to the requirements of sections 202 and 205 of UMRA.

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In addition, the agencies determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. The proposed definition of "waters of the United States" applies broadly to CWA programs. Any compliance requirements applicable to actions impacting that water will be imposed by existing federal regulatory requirements, not this rule.

Thus, this rule does not significantly affect small governments. Similarly, the entities affected by existing CWA programs are not limited to small governments. Thus, the rule does not uniquely affect small governments. Because the rule does not significantly or uniquely affect small governments, it is not subject to the Small Government Agency Plan requirements of section 203 of UMRA.

Specific Comments

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

13.365 On page 6 of the QAD, EPA claims the economic benefit of the Rule to range from $390 - $510 Million, while citing costs that range from $160 - $278 M. As I know you are aware, the Unfunded Mandates Act[227] (UMA) requires EPA to conduct impact analyses to the budget of individual local governments through published analysis before Federal Rules are proposed. Please provide this Committee with all UMA-related economic studies your agency is required to produce for each of the 105 Kansas counties and all Kansas rivers, streams and/or tributaries potentially affected by the proposed WOTUS rule. (p. 2)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates. For information for economic analysis, see compendium 11.

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

13.366 In Page 6 of the Q&A Document EPA cites the economic benefit ($390 - $510 M) of the WOTUS Rule to be "about double the potential costs" ($160M - $278M). The Unfunded Mandates Act (UMA) requires EPA to conduct impact analyses to the budgets of individual local governments through published analysis before proposed Rules. Specifically, EPA is required to prepare a county-by-county analysis of the direct and indirect costs or savings the proposed WOTUS Rule might have across our State - and by virtue of the values espoused in the Q&A Document, it appears your agency may have done so. Please provide this Committee with electronic and hard copies of the analysis required by UMA. Similarly, we would like to receive the UMA requirements presented in the context of all Kansas Rivers, streams and/or tributaries affected by the proposed WOTUS Rule. (p. 1)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates. For information for economic analysis, see compendium 11.

[227] 2 USC §§1501(7)(B).

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Illinois House of Representatives (Doc. #7978)

13.367 There is significant concern that additional federal revenue or assistance in the future to help meet the cost of this rule will not be forthcoming. Expansion of federal jurisdiction under the Clean Water Act will in fact be an unfunded mandate on the public and private sectors. Much of the anticipated cost of this rule would be financed from state and municipal resources and will divert limited resources from other essential public services. (p. 2)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates.

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

13.368 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),[228] 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."[229] 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. (p. 40)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates.

Federal Water Quality Coalition (Doc. #15822)

13.369 C. The Proposed Rule Fails to Comply with the Unfunded Mandates Control Act.

The agencies also certified that: "This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector."171 According to the agencies, the 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.

As noted above, the proposed rule will require state, local, and tribal governments to take actions due to the expansion of jurisdiction, just as it will require small businesses, landowners, and the entire regulated community to take actions. The failure to consider local government impacts is another reason the agencies must withdraw the rule and issue a reproposal. (p. 61)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates.

[228] 2 U.S.C. 1531-1538.
[229] 79 Fed. Reg. 22,220 (April 21, 2014).

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North Dakota Soybean Growers Association (Doc. #14121)

13.370 The preamble to the proposal states that "this proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA)" [230] for state, local or tribal governments or for 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." In light of the wide variety of impacts on state and local governments, which will be imposed directly, the agencies have no valid basis to avoid meeting their obligations under UMRA. (p. 6)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates.

The Mosaic Company (Doc. #14640)

13.371 3.4 Distribution of Impacts Federal guidance documents establish that evaluating the distribution of impacts is an important component of an economic analysis. Most prominently, The Unfunded Mandates Reform Act of 1995 (UMRA) requires an examination of the potential disproportionate impacts on state, local, and tribal governments; urban or rural or other types of communities; or particular segments of the private sector. OMB Best Practices require that when distributional effects are thought to be important, the analysis should include their magnitude, likelihood, and incidence of effects on particular groups. The EPA Study does not address the distribution of compliance costs associated with incremental Section 404 permits required under proposed CWA jurisdiction on the private sector. Because the EPA Study projects the incremental increase in permits for the United States as a whole, the fact that certain regions may be characterized by higher or lower degrees of isolated wetlands and other waters was not taken into consideration.[231] Projecting the incremental impact acreage based on the hydrologic, development and industry characteristics of each state or region, the study would provide at a minimum, a discussion about the likely distribution of incremental Section 404 compliance costs across affected private industry. In addition, because state jurisdiction is required to be at least as inclusive as federal jurisdiction, states with the highest incidence of impact and the least inclusive jurisdiction will bear a disproportionate share of costs to state regulatory agencies. (p. 50)

Agency Response: See section 13.2.4 summary response for information regarding Unfunded Mandates. For information on cost/benefit and the Economic Analysis in Compendium 11.

Airports Council International – North America (Doc. #16370)

13.372 The Proposed Rule's extension of jurisdiction into natural and/or manmade intermittent streams, some ditches and previously unregulated wetlands carries significant regulatory and financial burden and is akin to an unfunded mandate to an industry that is already heavily regulated. (p. 7)

[230] 2 U.S.C. 1531---1538.

[231] While Exhibit 31 to the EPA Study purports to report incremental wetland (acres) and stream (feet) mitigation in each state, the estimates are determined by allocating the national estimates of incremental impacted acreage to individual states in proportion to the number of positive JDs for wetland aquatic resources in FY 2009-10.

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Agency Response: **For information on streams and ditches, see comment responses for Tributary in compendium 8, and ditches in compendium 6.**

13.373 V. Conclusion

Based on the information herein, it is highly likely that the Proposed Rule will result in the expenditure of funds by state, local, or tribal governments (SLTG), in the aggregate, or by the private sector of $100 million or more in any one year. We are requesting that the Proposed Rule be vetted with stakeholders and evaluated in a manner consistent with the Unfunded Mandates Reform Act. As such, prior to final rulemaking the Agency should:

- Prepare a written statement that includes:
  - the legal authority for the rule,
  - a cost-benefit assessment,
  - a description of the macro-economic effects, and
  - a summary of SLTG concerns and how they were addressed.
- Consider a reasonable number of regulatory alternatives and select the least costly, least burdensome, or most cost-effective option that achieves the objectives of the Proposed Rule, or explain why the Agency did not make such a choice.
  - Consult with elected officers of SLTG (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of proposed rules containing significant federal intergovernmental mandates. (p. 8)

Agency Response: **See section 13.2.4 summary response for information regarding Unfunded Mandates. For additional information on costs/benefits, see the economic analysis in compendium 11.**

13.3.5. Executive Order 13132: Federalism

Summary of Federalism Comments

The comments received assert that the rule expands federal authority and diminishes state authority. Commenters also expressed that the agencies have not complied with the EO for Federalism, threatening the Federal-State partnership for implementation of the CWA's cooperative federalism. A number of commenters disagreed with the agencies' finding that the Federalism E.O. did not apply.

Some comments indicated that neither States, as co-regulators, nor local government entities were provided a meaningful opportunity to participate in the formulation of the draft rule or the review of EPA's scientific rationale. Commenters stated that the Corps should have participated in the consultation process for this joint-agency rule and requested that the rule be withdrawn while agencies initiate a process of state and local engagement.

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A number of commenters stated that the agencies' cost analysis contradicts the notion that there are no federalism concerns or that the agencies have failed to properly assess the impacts of this rule on state and local government implementation programs. Commenters also expressed concerns that the direct and indirect costs of this rule create a significant impact on state, local, and county governments. Several commenters expressed the opinion that an act of Congress would be necessary in order for the rule's changes to take effect.

Agency Summary Response to Federalism Comments

Federalism Finding

The Agencies do not agree with commenters that this rule triggers Executive Order 13132. Agencies have determined that this rule does not have federalism implications as set out in Executive Order 13132. Under the Executive Order, a rule has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." E.O. 13132, section 1. Generally, if a rule imposes substantial compliance costs (unless it is expressly required by statute or there are federal funds available to cover the Stage or local compliance costs) or the rule preempts state or local law, it will have federalism implications. This rule does not impose any direct compliance costs or preempt State or local laws. This rule only revises a definition, it does not itself regulate or impose any direct impacts or quantifiable compliance burden on any entity. Entities whose actions impact waters of the U.S. are subject to legal obligations imposed by the Clean Water Act and existing implementing regulations. The rule does not alter those obligations. As to preemption, section 510 of the Clean Water Act expressly preserves States' authority to impose more stringent requirements and nothing in this rule affects that authority reserved to States. As explained in the Agency's Economic Analysis, this rule narrows jurisdiction as compared with current regulations, but for information purposes the agencies have prepared an Economic Analysis that projects some areas that were not jurisdictional may be found so under the rule. Regardless, even if the rule did expand the scope of the CWA, that does not have federalism implications because it does not have a substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The responsibility to issue permits rests with the Corps, unless a State wishes to assume the permitting program under section 404(g); therefore the rule imposes no administrative burdens on the States or local governments. Moreover, States remain free to regulate, or not, any waters covered by the rule and while States and their subdivisions are subject to the permitting requirements of the CWA to the same extent as private parties (see CWA 313), the mere duty to comply with this requirement does not itself have federalism implications (and in any case derives from the statute, not this rule). Accordingly, Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to this action. Accordingly, Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to this action.

Consultation

Even though this rule does not have federalism implications such that EO 13132 applies, in keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to

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

For this rule State and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key state and local government organizations (i.e. the Big 10), the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous State and local government organizations.

Early in the rulemaking process, in the fall and winter of 2011, EPA held two in-person meetings and two phone calls with entities representing state and local governments. In addition, the Agencies held many calls and meetings with state and local governments and their associations, in preparation for the development of a proposed rule. Organizations involved included the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of States. Additionally, the National Association of Clean Water Agencies and the Association of Clean Water Administrators were invited to participate.

Similar to the outreach conducted prior to the development of the rule, the agencies committed themselves to providing a transparent, comprehensive, and effective process for taking public comment on the proposed rule. As part of this outreach, EPA held a meeting on May 13, 2014, to seek technical input on the proposed rule from the largest national representative organizations for State and Local governments. During this process the Agencies also extended their focused outreach to include a series of meetings with the Local Government Advisory Committee, and the Environmental Council of States in conjunction with the Association of Clean Water Administrators and the Association of State Wetland Managers. In addition to engaging these key organizations, the agencies sought additional feedback on the proposed rule through broader public outreach to state and local government organizations during the public comment period.

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Report of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880). This document is available in the docket for this rule.] The agencies will continue to work closely with the States to implement the final rule.

State Authority

This rule recognizes the unique role of states related to water quantity and as confirmed by section 101(g) of the CWA. The rule is consistent with Congressional policy not to supersede, abrogate, or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction, and neither does it affect the policy of Congress that nothing in the CWA shall be

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construed to supersede or abrogate rights to quantities of water which have been established by any state.

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

The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See Final Report of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

Specific Comments

State of Idaho (Doc. #9834)

13.374 Consultation:

> Idaho believes EPA and the Corps failed to adequately consult with the states prior to development of the Proposed Rule. Effective consultation could have addressed many of Idaho's concerns and avoided much of the confusion that now exists. EPA and the Corps' failure to include the states in the formulation process effectively missed an opportunity to build consensus with the primary implementing entities and prevent controversy.
>
> As a result, there now is an even greater need, and opportunity, to enter into sustained dialogue and consultation with the states to revise the Proposed Rule. Such consultation should treat the states as co-regulators, separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.
>
> To facilitate consultation and sustained dialogue with Idaho and other states, a state-federal workgroup should be established between EPA, the Corps and the states to revise the Proposed Rule. Although it is unlikely such a workgroup would reach a consensus on every issue, it would facilitate the dialogue, collaboration and relationship-building needed to create a more workable and effective rule. One productive example of such an approach is the workgroup EPA established with the Environmental Council of the States and the Association of Clean Water Administrators to discuss revisions to the National

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Pollutant Discharge Elimination System (NPDES) electronic reporting rule. Again, the purpose of such workgroups is not necessarily to reach consensus but rather to provide state and federal participants a meaningful and timely opportunity to discuss and resolve their needs and concerns. (p. 1 – 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. No intent to change current practices. The Agencies appreciate the suggestion of developing a state-based advisory board to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.

13.375 Idaho recognizes further discussion between the states and federal agencies is needed to develop the specifics of such measures and the process for applying them, particularly with the variation in hydrologic and geologic conditions existing across the nation. As such, Idaho urges EPA and the Corps to utilize a state-federal workgroup to identify and develop specific, quantifiable measure(s) for determining "significance" consistent with the rebuttable presumption concept. (p. 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

The Agencies appreciate the suggestion of developing a state-based advisory board to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.

13.376 Idaho urges EPA and the Corps to work with a state-federal workgroup to determine a reasonable process for making jurisdictional determinations involving "other waters" and provide remedies in those situations where the permitting agency fails to make a determination. (p. 3)

Agency Response: **The agencies intend to continue working with states to address implementation issues associated with the final rule. For additional information on the approach to "other waters", see compendium 4.**

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

13.377 State Sovereignty

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Each state can establish regulations for water bodies within their borders that are not "waters of the U.S.," which is to say those waters related to navigability, interstate commerce, and the federal government's scope of powers. As the extent of "waters of the U.S." is expanded, the regulatory control reserved solely to the states is diminished and, potentially, becomes nonexistent. This is not consistent with the CWA's stated purpose of recognizing, preserving, and protecting the "primary responsibilities and rights of the States…to plan the development and use…of land and water resources…." SWANCC, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)).

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Within the bounds of the federal government's enumerated powers, there is the concept of "cooperative federalism," which is a term used to describe those spheres where federal and state authorities share a degree of regulatory authority over a particular area of law.[232] Under this construct, the federal government establishes a minimum level of regulation and the state assumes responsibility for administration of the federal program to standards at least at the federally-set floor; beyond that states may also implement stricter regulations. For instance, the CWA limits states to issuing permits for "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction. 33 U.S.C. § 1344(g)(1) (emphasis supplied). The parenthetical carves out an exception, apparently reserving those specified waters for federal jurisdiction; however, if that is the case, it also seems that if the term "navigable waters" is amended by the proposed rule, the cooperative intent is thwarted as the term "navigable waters" encompasses a much wider subset of waters, infringing on and at least partially obliterating the jurisdiction of the states. The proposed rule offers little cooperation; rather, it expands federal jurisdiction and marks no limit as to the waters the CWA may reach, leaving uncertainty as to what the states will be left to regulate. (p. 78 – 79)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.**

By its terms, the CWA reaches all "waters of the United States" and the agencies are defining the term consistent with the statute and caselaw. In any event, as discussed above, nothing in this rule carves out or affects states' ability to regulate their waters. The fact that federal statute and state authorities may regulate the same waters is not new, and this rule does nothing to change the longstanding ability of states to regulate coterminous with the federal statute, or more broadly.

Energy Producing States Coalition (Doc. #11552)

13.378 Perhaps the most troubling aspect of this entire rulemaking process has been the process itself. In its rush to produce a rule, which did not meet basic consultation requirements with state co-regulators under the CWA's cooperative federalism model, the EPA's Science Advisory Board did not even finish its analysis of the proposal before it was submitted for interagency review. It is difficult to have confidence in the impartiality of a new, expansive regulatory process when new rules are issued before the EPA's own independent scientific body has completed its analysis. As the nonpartisan Western States Water Council has noted in public correspondence to you last spring, the states have been

[232] Robert L. Glicksman, Modern Federalism Issues and American Business: Article & Essay: Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy, 41 Wake Forest L. Rev. 719, 719 (2006).

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asking for a formal consolatory role in this rulemaking process since at least 2011.[233] Instead, this enormously consequential rule was sent to the Office of Management and Budget (OMB) for interagency review without input from states who are not just "the public" or "stakeholders", but co-regulators under the CWA. Much of the current apprehension, anxiety, and concern with this Byzantine proposal could likely have been avoided if substantive state input had been sought from the beginning rather than as an afterthought of a typical Washington-knows-best-regulatory mindset. (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study. For additional information on consultation, see sections 13.2.6 on Tribal Consultation and 11.1 on RFA/SBREFA in compendium 11.**

Lastly, Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

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

13.379 We have reviewed the proposed rule recently released by the environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) entitled Definition of Waters of the United States Under the Clean Water Act and respectfully request that it be withdrawn as the Agencies failed to complete any state consultations when developing this rule. As Senators of the State of Utah, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking would impinge upon state authority in water management. As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. In particular, based on the copy of the proposed rule, we are deeply concerned that the Agencies believe that this proposed rule does not have federalism implications and therefore does not need to comply with Executive Order 13132. To this assumption, we respectfully disagree. Under the Executive Order, federalism implications include substantial direct effects of the States, or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. By changing the definition of the Waters of the United States, the proposed rule will have a direct effect on the distribution of power and responsibilities among the various levels of government. Currently, there are many waters that are subject to state regulations only. This proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. (p. 1 – 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

13.380 Due to the fact that this rule attempts to regulate all waters, we urge you to withdraw the proposed rule until the requirements of Executive Order 1312 have been met. It is of the

[233] Phillip Ward, Chairman of the Western States Water Council. Comment letter, March 25, 2014. http://www.westgov.org/images/stories/WSWC_CWA_Rulemaking_Letter.pdf

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utmost importance that State and local governments be consulted while developing this rule. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

National Association of Conservation Districts (Doc. #12349)

13.381 Any attempt to clarify CWA jurisdiction should be subject to local input, in order to develop effective parameters, criteria, and standards that successfully meet specific local needs. No final ruling should be employed until EPA and USACE have successfully vetted and approved clear provisions that are predictable when applied on the local level.

Finally, NACD requests that a state-based advisory board be put in place to provide an avenue for local input, interpretation and implementation which would include Stage I permitting and appeals. NACD and its member soil and water conservation districts place high importance on the protection and enhancement of our nation's natural resources. The incorporation of local knowledge, heritage and passion during any rule- writing process will help ensure the rule is workable at the local level and successfully meets its intended goals. (p. 8 – 9)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

The Agencies appreciate the suggestion of developing a state-based advisory board to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.

Wisconsin Legislature (Doc. #14064)

13.382 In particular, based on the copy of the proposed rule, we are deeply concerned that the Agencies believe that this proposed rule does not have federalism implications and therefore do not need to comply with Executive Order 13132. I respectfully disagree.

Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

By changing the definition of "Waters of the United States," the proposed rule will have a direct effect on the distribution of power and responsibilities among the various levels of government. Currently, there are many waters that are subject to state regulation only. However, the proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. Given this expansion, we are at a loss to identify any water that would not be subject to federal regulation unless specifically exempted. Such an expansion in federal jurisdiction would fundamentally alter our ability to make decisions regarding the use of land within our borders. Due to the fact that States often regulate more waters than are encompassed by the current definition of "waters of the United States" it is not clear what benefit the expansion of federal authority is designed to achieve. It appears that the Agencies did not even consider existing State authorities when developing its proposed rule.

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Due to the fact that this rule attempts to regulate all waters, we urge you to withdraw the proposed rule until the requirements of Executive Order 13132 have been met. It is of the upmost importance that State and local governments be consulted while developing this rule. (p. 1 – 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

The commenter is incorrect that the rule will significantly expand jurisdiction, as explained in response to prior comments, and the rule would not cover any water that was not historically regulated under the statute prior to *SWANCC* and *Rapanos.* States vary significantly in the extent to which they protect their waters, and many states only regulate to the extent they are covered by the federal statute. The final rule covers those waters that warrant federal protection, for the reasons explained by the agencies in the record.

Wyoming House of Representatives (Doc. #14308)

13.383 Perhaps the most troubling aspect of this entire rule-making process has been the process itself. In its rush to produce a rule, which did not meet basic consultation requirements with state co-regulators under the CWA's cooperative federalism model, the EPA s Science Advisory Board did not even finish its analysis of the proposal before it was submitted for interagency review. It is difficult to have confidence in the impartiality of a new, expansive regulatory process when new rules are issued before the EPA's own independent scientific body has completed its analysis. As the nonpartisan Western States Water Council has noted in public correspondence to you last spring, the states have been asking for a formal consolatory role in this rule-making process since at least 2011.[234] Instead, this enormously consequential rule was sent to the Office of Management and Budget (OMB) for interagency review without input from states who are not just "the public" or "stakeholders", but co-regulators under the CWA. Much of the current apprehension, anxiety, and concern with this Byzantine proposal could likely have been avoided if substantive state input had been sought from the beginning rather than as an afterthought of a typical Washington-knows-best-regulatory mindset. Further, over 60 organizations have expressed their concerns that continued ad hoc regulatory interpretations and revisions in guidance documents - through the media and blog posts rather than the formal rule-making process - violate the spirit and letter of the Administrative Procedure Act by skirting public notification and input requirements.[235] Adding to this troubling record, I have been informed that the Administration's cost benefit analysis of the underlying proposal relied on 20-year old data that had not been adjusted for inflation and did not fully examine the wide-ranging implications of additional CW A compliance. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. See section 13.2.1 summary response for information

[234] Phillip Ward, Ch airman of the Western States Water Council. Comment letter, March 25, 2014. http://www. westgov.org/images/stories/WSWC _ CW A_ Rulemaking_ Letter. pdf
[235] Waters Advocacy Coalition Letter, September 29, 2014. http://www.fb.org/tmp/uploads/wacletter092914.pdf

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regarding the Administrative Procedure Act. See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

State of Oklahoma (Doc. #14625)

13.384 In addition to the cooperative federalism framework embodied in the CWA, the EPA and Corps of Engineers ("Agencies") surprisingly opted to forego the opportunity to engage in a meaningful, upfront consultation process with States as required by Executive Order ("E.O.") 13132. Specifically, E.O. 13132 requires a federalism summary impact statement that details the efforts made by the Agencies to involve and engage the States in promulgation of a draft rule prior to notice of the rule in the Federal Register. Instead of using E.O. 13132 as a legally mandated avenue to engage States in a thorough process of ensuring the greatest deference to State-led efforts, the Agencies rejected partnership and certified in the Federal Register notice that this rulemaking action "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 79 Fed. Reg. at 22,220. How a rulemaking focused on defining the boundary between Federal and State jurisdiction over water pollution control can have no substantial impact or effect on States and the distribution of power between various levels of government is beyond rational.

Regardless of the legal ramifications, the practical result of choosing the path of rejecting federalism consultation requirements is mass confusion among the very State partners that have worked with your Agencies for decades to accomplish all the water quality gains made thus far. Just as we have been partners and allies in the overall effort to restore the fishable, swimmable goals of the CWA the States and the Agencies could have been allies in the effort to clarify WOTUS jurisdiction to the benefit of all who implement the CWA's many facets. As it stands now, we've lost faith in the process and believe that the myriad flaws and points of confusion cannot be resolved satisfactorily through a series of public comment period extensions. The kind of input that our agencies and other State coregulators seek, not to mention deserve as a matter of mutual respect and as required by law, can only be accomplished through halting the current effort, rolling up our sleeves, and developing regulatory language through a meaningful exchange of ideas and drafts. Such a process has been employed by your Agencies in the past through numerous Federal-State working groups and other arrangements.

Choosing to charge ahead with the current proposal in a rush to finalize the WOTUS rule will undoubtedly lead to increased litigation and burdensome resource constraints on our agencies that could ultimately thwart the great water quality successes we have documented in Oklahoma. We are proud to be listed on EPA's website as having the second most water quality restoration success stories in the country, but we note that the overwhelming majority of those successes came through voluntary actions taken in partnership with our landowners and other watershed stakeholders. States, not the Federal government, are in the best position to coordinate with their local stakeholders to accomplish the goals of the CWA. (p. 2 – 3)

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Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

Western Governors Association (Doc. #14645)

13.385 As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of state waters. While we appreciate the outreach from EPA and the Corps since the release of the proposed rule, we note that the agencies did not engage the states in substantive consultation prior to the release. Extending the comment period would allow for meaningful consultation between your agencies and the states. This is particularly imperative because the SAB panel for the review of the EPA water body connectivity report includes no state representatives at all. That report was therefore developed without the regulatory expertise, scientific resources and on-the-ground knowledge possessed by state professionals.[236] (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

13.386 Prior to any intervention in state-run programs, federal agencies should consult with states in a meaningful way, and on a timely basis.

a. Predicate Involvement: Federal agencies should take into account state data and expertise in development and analysis of underlying science which serves as the legal basis for federal regulatory action. Accordingly, states merit greater representation on all relevant EPA Science Advisory Board (SAB) Committees and other panels advising the agency on scientific, technological, social and economic issues that inform its regulatory process.

b. Pre-Publication / Federal Decision-making Stage: Federal agencies should engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e. before such proposals are sent to the White House Office of Management and Budget for finalization).

c. Post-Publication / Pre-Finalization Stage: As they receive additional information from state agencies and non-governmental entities, Governors and other state officials should have the ability to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

d. Rule / Policy Implementation: Significant deference – as provided for by Congress in various enacting statutes (including the Clean Air Act, Clean Water

[236] EPA Science Advisory Board (SAB) membership listed online as of October 17, 2014.

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Act, Resource Conservation and Recovery Act, among others) -- should be granted to states in formulation of state plans designed to implement delegated programs. (p. 12 – 13)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

The members of the EPA Science Advisory Board are selected on the basis of their expertise, not their affiliation. The membership of the Board, however, does include scientists who are affiliated with state governments.

Although implementation issues are outside of the scope of this rule, see comment responses to other implementation questions in compendium 12.

State of Oklahoma (Doc. #14773)

13.387 Many of my concerns with the proposed WOTUS rule could have been avoided by meaningful consultation with the states during the formulation process. States serve as the co-regulators of the CWA, and it is disappointing a federal agency would not involve us in developing a landmark rule the states would be forced to implement. I urge the Agencies to pause all work on this proposal until such meaningful consultation is afforded, and then to reintroduce the proposed WOTUS rule once direct input from the states has been incorporated. (p. 3)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

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

13.388 The next steps taken by the Federal agencies must adhere more closely to cooperative Federalism and not render lip service to consultation with the States as required by Executive Order 13132. Whatever shape the proposed rule takes will have profound impact on the State agencies tasked with applying and administering the Clean Water Act on Kansas waters. Those implementing the rule should have a say in the scope of the rule. If the Federal agencies believe there are gaps in the protective coverage provided by State of Kansas authority, they need to express their concerns and intentions of solving those shortcomings with any proposed rule. Failing to do so leaves only speculative and insubstantial concerns, precisely contradicting Justice Kennedy's caution in establishing "significant nexus" for waters. (p. 6 – 7)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on significant nexus see compendium.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that but rather defines the scope of the Act based on the statute and caselaw.

The agencies utilize the significant nexus standard, as articulated by Justice Kennedy's opinion and informed by the unanimous opinion in *Riverside Bayview* and the plurality opinion in *Rapanos* which recognize that the Act and the agencies must draw lines "on this continuum to find the limit of 'waters,'" *Riverside Bayview* at 134, to interpret the scope of the statutory term "waters of the United States."

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While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute's goals, objectives and policies, the case law, and the agencies' technical expertise and experience when interpreting the terms of the CWA.

North Carolina Department of Environment and Natural Resources (Doc. #14984)

13.389 The proposed definition, if adopted, violates the cooperative federal-state framework mandated under the Clean Water Act and Executive Order 13121.

EPA has violated the cooperative federal-state framework of the Act and Executive Order 13 12 1. Section 101 (b) requires the Federal Agencies to work with the states on the formulation, not simply the implementation, of the Act's authority. States have a Congressionally-recognized interest in which waters in their jurisdiction are determined to be within federal control and the methods used to make that determination. Executive Order 1312- 1 requires Federal Agencies to consult with states when a proposed rule would have a "substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government." 64 Fed. Reg. 43255. Executive Order 13121 requires Federal Agencies to be "deferential to the states when taking action that affects the policymaking discretion of the States" and must take caution when states identify "uncertainties regarding the constitutional or statutory authority" of federal action. Id. at 43256.

States were not afforded a meaningful opportunity to participate in the formulation of the draft rule or review EPA's scientific rationale. Indeed, the science was not completely vetted or available at the time of publication. As indicated in the discussion above, the decision to equate connectivity with a significant nexus is not entirely one of science. Contrary to EPA's assertion and as discussed above, the proposed definition of WOTUS has significant implications for federalism, affects the states' traditional authority to regulate land and water use, impacts the federal-state framework under the Act, and is unlawful under the Act and the Constitution. (p. 6)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. See section 13.2.2 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563).

Nevada State Conservation Commission (Doc. #14998)

13.390 We further request that no additional action, modifications, or proposals be presented as proposed rules at least until a firm and final resolution has been reached on H.R. 5078, also known as the Waters of the United States Regulatory Overreach Protection Act of 2014, whether that be during this current Congress or during future Congresses. In the past, Congress has demonstrated strong opposition to past efforts of EPA and ACE to control all wet areas of the states. Past efforts to pass legislation to have the federal government control all non-navigable waters have also failed in past Congresses. (p. 1)

Agency Response: The pendency of legislation that would amend the Clean Water Act does not obviate the need, as expressed by numerous stakeholders and members

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of the Supreme Court, to undertake rulemaking to clarify the scope of waters of the U.S.

Arizona Department of Environmental Quality (Doc. #15096)

13.391 In April 2014, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) proposed a rule to redefine "waters of the United States" under the Clean Water Act (CWA), 79 Fed. Reg. 22,188 (Apr. 21, 2014). After its release, the Agencies reached out to States, the regulated community, and environmental groups in a series of meetings, speeches, and webinars seeking to explain the proposed rule and answer questions. The Agencies' belated efforts to outreach do not support an assertion that the Agencies sought public input.

Such efforts ignore the role States play as co-regulators under the Clean Water Act. The Clean Water Act is based on cooperative federalism. Under Section 303 of the Clean Water Act all States identify the designated uses of regulated waters within the State and the criteria to protect those uses. Under Section 401 of the Clean Water Act, all States review federal actions and certify whether that action will meet State water quality standards. Under Section 402 of the Clean Water Act, forty-six out of fifty States implement the NPDES permitting program. Under Section 404 of the Clean Water Act, two States implement the dredge and fill permitting program. In addition, States have their own statutes authorizing State water regulatory programs and defining waters of the State in some cases more broadly than the federal definition.

State regulators were not meaningfully consulted before the Agencies issued the proposed rule, and therefore were not afforded the opportunity to point out concerns in advance. We recognize that Agency representatives have expressed a willingness to make changes to the rule based on comments received during the comment period. We appreciate that willingness. However, our concerns relate to the legal rationale for the proposal and the implications of that rationale for State programs. Accordingly, we believe that the scope of changes necessary to respond to State concerns will be extensive. In such a situation, it is appropriate to withdraw or suspend a rulemaking and issue a supplemental proposal. This would allow the Agencies to consult with States before issuing a new proposal and receive public comment on new legal rationales and a revised jurisdictional scope. (p. 1)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.**

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that.

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

13.392 13. North Dakota requests that the WOTUS rule be withdrawn. At a minimum, the states must be consulted, the rule must be amended, and then the rule must be put out for a second round of comments.

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North Dakota believes the EPA and the Corps must withdraw the proposed rule. This rule was proposed before the final connectivity report was published, failing to give EPA and interested parties the chance to understand any science that may support the definitions. If the EPA and Corps insist on proposing new definitions, a new draft and a second round of comments is needed following outreach with the state co-regulators and affected agencies. While EPA did conduct hearings, webinars, and meetings on this rule, states should have been consulted prior to the rule's release to avoid instances of federal overreach and to gain an understanding of what water features are like in different regions. Further compounding this problem is that the Corps, an issuing agency of the rule did no outreach on this rulemaking process. The Corps has authority over determining what is federally jurisdictional. If this is the agency that is going to be issuing guidance and be on the ground during implementation, they need to hear from affected individuals, groups, and industries to fully understand the extent of the harm the rule as proposed could cause and how it can be made better in the future. A new draft appropriately considering the constraints of proximity to waterbodies specified in the plurality decision of Rapanos is needed.

EPA has admitted in regional and national conference calls and webinars that many mistakes were made in this rulemaking process. Reopening a draft for comments will help states, their constituents and industries know that EPA is listening to concerns and willing to work in a manner that will gel this rule right.

Furthermore, throughout the public comment period, the federal agencies have continually released new documents, blog posts, Q&A documents, and webinars, offering explanations of key terms and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this new information is inconsistent with material provided in the official rulemaking docket. These additions inhibit public comment as the agencies keep changing their story and adding new (and often conflicting) information as the comment period progressed.

For example, the term upland is not defined in the proposed rule, but is necessary when determining whether a ditch is exempt. Throughout the comment period, the agencies acknowledged that they do not have a proposed definition of upland. Now, a recent Q&A document, issued by the agencies or September 9, 2014, provides a new definition of upland: "Under the rule, 'upland' is any area that is not a wetland stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction." This new definition of upland is not included anywhere in the rulemaking docket. The public cannot adequately comment on a proposed rule if critical components continually change and are not posted in the Federal Register. (p. 13 - 14)

Agency Response: **The public comment period was extended twice to ensure sufficient time for receipt of public comments, including an extension that allowed for public comments to be received after the Science Advisory Board issued their final report on the EPA Draft Connectivity Report.**

The agencies recognize that the state and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or

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on the distribution of power and responsibilities among the various levels of government. The final rule does not restrict the states' efforts in developing or implementing statewide permits under CWA programs as a result of the rule. There was extensive outreach during the public comment period, including many stakeholder meetings with state agencies. The outreach sessions provided invaluable input for the agencies in the rulemaking process. The Corps attended as many outreach sessions as possible in consideration of their limited staff and resources. The Corps also read all comments that were posted to the public docket to ensure they understood the comments in order to provide input during the development of the final rule language.

The Corps is developing guidance specific to section 404 to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. EPA, Tribes, and states may also provide implementation guidance for CWA sections under their authority once the final rule is effective.

See the Technical Support Document for a summary of the legal basis for the final rule, including information on the Rapanos decision.

The agencies received many helpful comments in response to the proposed rule which led to changes in the final rule for improved clarity for the agencies and the regulated public. The term "upland" was removed from the final rule language in the ditch exclusions section in response to comments received. Many commenters were confused by the term "uplands" and did not feel the term had a common understanding. The ditch exclusions now focus on flow regime and on whether the ditch is excavated in or relocated a tributary.

The agencies posted to the docket all materials related to the rulemaking effort that would be open for public comment. Many of the documents released during the public comment period were intended to help respond to questions received about the proposed rule to provide additional information and explanations to the public. The additional information and materials are not themselves part of the final rule package.

National Association of State Departments of Agriculture (Doc. #15389)

13.393 In Executive Order 13132, the White House clearly directed federal agencies to consult with states early in the rulemaking process and give as much weight and deference as possible to state needs, priorities and concerns. For example, §2(i): "The national government should be deferential to the States when, taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government;" §3(c) (emphasis added): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable;" and §6(b): Federal agencies must consult with state and tribal officials ("early in the process of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not

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required by statute." (emphasis added) Promulgation of this proposed rule without complying with E.O. 13132's consultation criteria could threaten the future federal-state partnership for implementing the CWA. (p. 3)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

13.394 The process used to develop the proposed rule lacked any meaningful consultation with the states. The result is a rule that contains a considerable amount of uncertainty regarding the extent of the CWA's authority and the additional costs that will be associated with the implementation of federal regulations over an expanded universe of waters. Additionally, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) did not comply with the state consultation criteria in Executive Order 13132 (Aug. 10, 1999) regarding the formulation of policies that have federalism implications. The proposed rule infringes on states' rights to regulate water quality in surface waters with no rational connection to traditionally navigable waters - the touchstone of CWA jurisdiction.

EPA and the Corps attempt to justify the proposed rule by pointing to several perceived benefits and purposes. These include:

- Conformance with U.S. Supreme Court direction regarding the extent of CWA jurisdiction;
- Clarification of which water bodies are jurisdictional and which are not; and
- Cost savings that will be accrued to both the regulatory agencies and regulated entities as the result of a simplified process for determining jurisdiction.

In its current form, the proposed rule will not achieve any of these goals. What will be achieved is an expansion of federal interference into the states' ability to reasonably and efficiently regulate water quality on minor stream reaches and isolated waters where there is no meaningful connection to traditional navigable waters. This expansion of jurisdiction will not provide any increased protection or improved water quality in navigable waters because the ability to properly regulate activities on remote stream reaches already exists in many states, including Wyoming. It will, however, result in significant added implementation costs which have not been adequately evaluated and disclosed by EPA. We believe the rule should be withdrawn and reconsidered with more meaningful input from the states. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on costs/benefits see the economic analysis in compendium 11.

Indiana Department of Environmental Management (Doc. #16440)

13.395 2. The Agencies failed to adequately engage affected stakeholders.

IDEM and ISDA are disappointed in the development and rollout of the Proposed Rule. Executive Order 13132, Section 3(c), notes that "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States maximum administrative discretion possible." Section 3(d) requires agencies to consult

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with State and local officials in developing standards and where possible, defer to States. This is known as a federalism review. EPA and the Corps did not perform a federalism review, nor did they adequately engage the States, as co-regulators, in development of the Proposed Rule language. Only after the Proposed Rule was published did the U.S. EPA and the Corps hold meetings, conference calls and webinars to explain the intent of the rule. Even after those meetings, the intent and effect of the Proposed Rule was unclear with Agencies' staff frequently answering questions with, "We don't know" and "We'll have to figure that out." As an agency responsible for implementing Section 401 of the CWA, IDEM insists that states should have been consulted during the development of the Proposed Rule.

While we agree that in the wake of Rapanos v. United States there was a need to clarify the applicability of the CWA to certain waters, we contend that if the Agencies had conducted a federalism review and consulted with state and local officials, many of the misunderstandings regarding the intent of the proposal could have been avoided. The Proposed Rule must be withdrawn to comply with Executive Order 13132 and to allow the Agencies time to adequately engage affected stakeholders. (p. 2 - 3)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Office of the Governor, State of Utah (Doc. #16534)

13.396 A. Executive Order 13132

Despite the federalism implications of the rule, EPA and the Army have failed to consult with the states as required under Executive Order (EO) 13132. Failure to do so undermines the cooperative federalism at the heart of the CWA and ignores the substantial direct effects on state governments and the distribution of power and responsibilities at the federal, state, and local levels of government. (p. 15)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

New Mexico Environment Department (Doc. #16552)

13.397 No State or Local Consultations

Many of the Department's concerns arise from the Agencies' failure to consult with the states before promulgation and publication of the proposed rule, sidestepping the critical role that states playas co-regulators under the CWA. See Alexandra Dapolito Dunn and Meghan Boian, Postcards From the Edge: Perspectives to Reinvigorate Clean Water Act Cooperative Federalism, Journal of Energy and Environmental Law, 2013, 68-79; see also 33 U.S.c. § 1251(b) (2011) (Congress directs the EPA Administrator to consult with affected states in the exercise of his or her authority). Unfortunately, the lack of state engagement is evident. If consulted with and engaged prior to the proposed rule's release, the Department would be better situated to provide more robust and substantive comments. The time limit for submitting comments, initially 91 days and then extended to 182 days, provides an inadequate period for the State and its departments to develop comprehensive comments.

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The Department is further concerned that the Agencies have failed to fully evaluate state and local level implementation and the proposed rule's impact on existing state inspection and permitting programs. This concern is critical as it has direct impact on required staffing levels, legislative funding requests, and general agency planning.[237] Additionally, and most concerning to the Department, is the Agencies' failure to consult or engage State municipal and county land use and planning agencies. These local land use agencies are often the individuals explaining to the public the permits required for land use development and planning , yet the Department is unaware of any local land use agencies that have a clear understanding of the proposed rule's impacts including additional permitting requirements, additional staffing for permit reviews, and expansion of construction timelines.[238] (p. 10 – 11)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on costs/benefits see the economic analysis in compendium 11.**

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

State of Oklahoma et al. (Doc. #16560)

13.398 States are Central to Clean Water Success

It is noteworthy that the Federal Water Pollution Control Act has long recognized the importance of partnership between local, State and Federal governments going back to its inception in 1948 and continuing through the various amendments that have brought us to the CWA of today. The existence and need for a State-Federal partnership has been present in the statutory basis for this rule for over sixty years. The CWA's cooperative federalism framework was solidified in the 1972 reauthorization process, whereby Congress gave explicit authority for the States to act as co-regulators when implementing the CWA. Sections 101(b) and 101(g) of the CWA state that it is the policy of Congress to protect the rights of States in their effort to eliminate pollution and that States have the authority to allocate quantities of water within their boundaries, as well as underscoring that Federal agencies shall cooperate with them when solutions are developed.

In addition to the cooperative federalism framework embodied in the CWA, the EPA and Corps of Engineers ("Agencies") surprisingly opted to forego the opportunity to engage in a meaningful, upfront consultation process with States as required by Executive Order ("E.O.") 13132. Specifically, E.O. 13132 requires a federalism summary impact statement that details the efforts made by the Agencies to involve and engage the States

[237] The Agencies suggest only a 3% programmatic expansion , however the calculations are lacking in detail. See "Economic Analysis of Proposed Revised Definition of Waters ofthe United States" (March, 2014). Available at http://www2.epa.gov/uswaters/economic-analysis-proposed-revised-definition-waters-united-states.

[238] As the Court notes in Rapanos, the average applicant for a general "dredge and fill" permit spends 313 days to obtain the permit at a cost of $28,915.00, while the average applicant for an individual permit spends 788 days and $271,596.00 to obtain the permit. 547 U.S. at 721, citing Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002). Note the costs were from a 2002 survey. Inflation indices suggest that these costs would likely have increased 32% since 2002. See http://www.bls.gov/data/inflation_calculator.htm.

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in promulgation of a draft rule prior to notice of the rule in the Federal Register. Instead of using E.O. 13132 as a legally mandated avenue to engage States in a thorough process of ensuring the greatest deference to State-led efforts, the Agencies rejected partnership and certified in the Federal Register notice that this rulemaking action "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 79 Fed. Reg. at 22,220. How a rulemaking focused on defining the boundary between Federal and State jurisdiction over water pollution control can have no substantial impact or effect on States and the distribution of power between various levels of government is beyond rational.

Regardless of the legal ramifications, the practical result of choosing the path of rejecting federalism consultation requirements is mass confusion among the very State partners that have worked with your Agencies for decades to accomplish all the water quality gains made thus far. Just as we have been partners and allies in the overall effort to restore the fishable, swimmable goals of the CWA, the States and the Agencies could have been allies in the effort to clarify WOTUS jurisdiction to the benefit of all who implement the CWA's many facets. As it stands now, we've lost faith in the process and believe that the myriad flaws and points of confusion cannot be resolved satisfactorily through a series of public comment period extensions. The kind of input that our agencies and other State coregulators seek, not to mention deserve as a matter of mutual respect and as required by law, can only be accomplished through halting the current effort, rolling up our sleeves, and developing regulatory language through a meaningful exchange of ideas and drafts. Such a process has been employed by your Agencies in the past through numerous Federal-State working groups and other arrangements.

Choosing to charge ahead with the current proposal in a rush to finalize the WOTUS rule will undoubtedly lead to increased litigation and burdensome resource constraints on our agencies that could ultimately thwart the great water quality successes we have documented in Oklahoma. We are proud to be listed on EPA's website as having the second most water quality restoration success stories in the country, but we note that the overwhelming majority of those successes came through voluntary actions taken in partnership with our landowners and other watershed stakeholders. States, not the Federal government, are in the best position to coordinate with their local stakeholders to accomplish the goals of the CWA. (p. 1 – 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

13.399 II. Oklahoma concerns with rulemaking process

a. Co-regulators are not just stakeholders

The State of Oklahoma plays a significant role in ensuring effective implementation of the CWA. Our co-regulator status elevates the State of Oklahoma, and every other state, above the multitude of other stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts

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states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule. With regard to the proposed rule regarding CWA jurisdiction, the WOTUS rulemaking process undeniably excluded Oklahoma's CWA co-regulating agencies.

As stated in my testimony on behalf of WGA and WSWC, EPA and the Corps failed to follow Federalism consultation requirements under Executive Order 13132. Oklahoma believes this failure is a direct violation not only of a Presidential directive designed to maintain the proper balance between federal and state regulation of our citizens, but also of a specific Congressional mandate that shared Federalism guide the ultimate implementation of the CWA. In the proposed rule's preamble, EPA and the Corps downplay the rule's substantial effects on the relationship between the national government and states. On the contrary, the very architecture of the CWA relies upon a strong, cooperative relationship between the federal and state agencies charged with its implementation. Thus, it stands to reason that any rule designed to implement this law must also be based upon substantial cooperation between the federal and state governments.

From a more practical standpoint, there was no reason for EPA and the Corps to avoid formal and meaningful consultation with the states over the many years that have transpired since the agencies embarked upon this process. Erring on the side of caution and demonstrating a genuine desire to cooperate with the very state agencies that have labored to make CWA implementation a success over the past forty-plus-years, EPA and the Corps just as easily could have engaged in the more formal consultation process outlined by Executive Order 13 132. Oklahoma recognizes that this rule is one that EPA and the Corps must address at a national level; however, Section 3(b) of Executive Order 13 132 requires federal agencies to "consult with State and local officials to determine whether Federal objectives can be attained by other means." This is critical in the current situation given the significant effect this rule could have on the ability of Oklahoma and many other drought-stricken states to manage and allocate scarce water resources, not to mention the absolute necessity to do so at the State, regional and local levels. By skipping this critical step in the process, Oklahoma and many other states are left confused, disenfranchised, and scrambling within a 90-day period allotted for public comment to figure out how we will carry out our respective responsibilities on a mostly final rule. (p. 8)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on costs/benefits see the economic analysis in compendium 11.**

State of Idaho (Doc. #16597)

13.400 Consultation:

Idaho believes EPA and the Corps failed to adequately consult with the states prior to development of the Proposed Rule. Effective consultation could have addressed many of Idaho's concerns and avoided much of the confusion that now exists. EPA and the Corps' failure to include the states in the formulation process effectively missed an opportunity to build consensus with the primary implementing entities and prevent controversy.

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As a result, there now is an even greater need, and opportunity, to enter into sustained dialogue and consultation with the states to revise the Proposed Rule. Such consultation should treat the states as co-regulators, separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

To facilitate consultation and sustained dialogue with Idaho and other states, a state-federal workgroup should be established between EPA, the Corps and the states to revise the Proposed Rule. Although it is unlikely such a workgroup would reach a consensus on every issue, it would facilitate the dialogue, collaboration and relationship-building needed to create a more workable and effective rule. One productive example of such an approach is the workgroup EPA established with the Environmental Council of the States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System (NPDES) electronic reporting rule. Again, the purpose of such workgroups is not necessarily to reach consensus but rather to provide state and federal participants a meaningful and timely opportunity to discuss and resolve their needs and concerns. (p. 1 – 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

The Agencies appreciate the suggestion of developing a state-based advisory board to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.

Wyoming Association of Conservation Districts (Doc. #17348)

13.401 CONCLUSION

The Association requests the EPA and Army Corp withdraw the rule so that adequate state and local government consultation can occur. A real conversation at the individual state level between EPA, Army Corp, State agencies and local governments must occur, in order to have a collaborative informed dialogue and agreement on which waters appropriately fall under federal jurisdiction and which do not. (…) (p. 9)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Water Advocacy Coalition (Doc. #17921.1)

13.402 3. The agencies have not complied with E.O. 13132 (Federalism).

Executive Order 13,132 of August 4, 1999, titled "Federalism" (E.O. 13132), establishes requirements for policies that have "federalism implications," meaning "substantial direct effects on the States." 64 Fed. Reg. 43,255 (Aug. 10, 1999). The purpose of E.O. 13,132 is to ensure that, in formulating and implementing policies with federalism implications, agencies are guided by certain fundamental principles. For example, E.O. 13132 provides, "the national government should be deferential to the States when taking action that affects the policymaking discretion of the States." Id. § 2(i). In addition, "[w]ith

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respect to federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible." Id. § 3(c). E.O. 13132 requires federal agencies to consult with State and local officials on policies that have federalism implications and "determine whether Federal objectives can be attained by other means." Id. §§ 3(b), 6(a). Consultation must occur "early in the process of developing the proposed regulation." Id. § 6(b)(2).

In the preamble, the agencies state that the proposed rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 79 Fed. Reg. at 22,220. This is patently false. The proposed rule defines where federal jurisdiction stops and where State jurisdiction begins. It involves the reach of a statute administered, in part, by the States. Yet the States were not adequately consulted on the proposed rule as E.O. 13132 requires. Waiting until the public comment period to solicit State input does not allow for meaningful consideration of the States' views, as well as alternate ways the States may have for meeting federal objectives under the CWA. [239]Practically speaking, there was no reason for EPA and the Corps to avoid formal consultation with the States over the many years that the agencies have been in this rulemaking process. The agencies should withdraw the proposed rule and conduct the necessary consultation with States and local governments. (p. 96 – 97)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Iowa League of Cities (Doc. #18823)

13.403 The Iowa League of Cities' national organization, the National League of Cities (NLC) along with other groups, requested a rulemaking in hopes that the Environmental Protection Agency (EPA) would follow the Federalism consultation procedures required under Executive Order (EO) 13132. We do not agree that the impacts of the rule are only "indirect" and believe strongly a consultation process should have been followed. This process would help cities to better understand the Agency's rule and provide examples of how the rule will directly impact municipal storm-water systems.

Request for EPA Response: The EPA should conduct the consultation procedure outlined by E.O. 13132.

Request for EPA Response: Will the EPA release an interim rule to follow the federalism consultation process before a final rule? (p. 1)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

New York State Departments of Environmental Conservation (Doc. #18895)

13.404 Early Consultation with States for a Successful Rulemaking Process

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

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We recognize and appreciate that EPA and, to a lesser extent, the Army Corps, made some efforts to reach out to the states and regulated entities both before releasing the proposed rule and during the comment period. However, meaningful early consultation to identify the regulatory impacts to states and local governments did not occur. There is concern among the regulated community that the Waters of the United States regulation could result in amendments to already-approved permits, and/or make it more difficult and time consuming to obtain a future permit.

Under the proposed rule, we cannot determine its impact on existing or future projects since the normal processes for outreach and comment were not followed, including necessary consultation with the states and local governments. For example, the proposed rule could be easy to implement, with little change in existing DEC permitting activities. Alternatively, depending upon EPA/USACE interpretation of the regulation, it is also possible that the federal agencies could place new requirements on projects which could slow their implementation. If so, many initiatives, including the implementation of projects to restore areas affected by Superstorm Sandy could be affected. (p. 1 – 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

State of Louisiana Senate (Doc. #19119)

13.405 In particular, based on the copy of the proposed rule, I am deeply concerned that the Agencies believe that this proposed rule does not have federalism implications and therefore do not need to comply with Executive Order 13132. Under that Executive Order, federalism implications include "substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government."

By changing the definition of "Waters of the United States," the proposed rule will have a direct effect on the distribution of power and responsibilities among the various levels of government. Currently, there are many waters that are subject to state regulation only. However, the proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. Given this expansion, I am at a loss to identify any water that would not be subject to federal regulation unless specifically exempted. Such an expansion in federal jurisdiction would fundamentally alter our ability to make decisions regarding the use of land within our borders. Due to the fact that States often regulate more waters than arc encompassed by the current definition of "waters of the United States" it is not clear what benefit the expansion of federal authority is designed to achieve, It appears that the Agencies did not even consider existing State authorities when developing its proposed rule.

I urge you to withdraw the proposed rule until the requirements or Executive Order 13132 have been met. It is of the utmost importance that State and local governments be consulted while developing this rule. (p. 1)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

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State of Missouri (Doc. #19420)

13.406 Although I understand your interest in clarifying the definition of WOTUS, I also understand the concerns of those who are frustrated that they were left out of the rule development process despite the fact that they will be directly impacted by these rules. Under the CWA, Congress intended that the states bear primary responsibility to protect water resources. Unfortunately, the proposed rule could infringe upon that responsibility without extensive engagement, consultation and guidance from the states.

Missourians strongly value clean water, and our recent experience illustrates the need for engagement with entities and individuals who play important roles in carrying out this responsibility. Missouri's new water quality standards would provide additional CWA protection to over 90,000 miles of streams and 2,100 lakes in Missouri. These new standards were the result of a decadelong effort to thoroughly engage a diverse group of interested parties, including representatives of industry, agriculture, municipalities, and environmental organizations. Classifying Missouri's waters took considerable time and stakeholder engagement, and I am pleased with the outcome of this effort.

Missouri's process in classifying its waters provides an example of the engagement process EPA and the Corps should employ in developing a revised WOTUS rule. However, no such process has been employed to date, leaving significant concerns that the proposed rule could limit the primary role of the states in preserving water quality under the CWA. (p. 1)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

State of Alaska (Doc. #19465)

13.407 Failure to Consult with States. In contravention of federalism principles, CWA requirements, and Executive Order 13132, EPA and the Corps failed to embark on meaningful consultation with states in the promulgation of the proposed rule. (p. 5)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

13.408 B. EPA and the Corps have failed to adequately consult with the States in developing a proposed rule.

Contrary to Congress' CWA directive that EPA and the Corps consult and cooperate with the States in developing programs and comprehensive solutions to protect the nation's waters and to preserve the states' primary role in land and water resource management,[240] there has been no meaningful consultation with the states, certainly not with Alaska, in the development of the proposed rule. Writing such a fundamental rule that applies nationally is a very difficult task, and state regulators would bring valuable insight to promulgating a rule, given their regulatory authorities and knowledge of specific watersheds and state geomorphologic and hydrologic conditions. With this proposed rule, EPA and the Corps unilaterally acted to outline what they see as the bounds of their

[240] See, e.g., 33 U.S.C. § 1251(b) and (g), and 33 U.S.C. § 1252(a).

authority, without any consultation with the states on where it is appropriate to draw those lines. This is particularly disconcerting for the states, as Congress, in enacting the CWA, provided that the states should retain primary jurisdictional authority over state lands and water resources.

Additionally, EPA and the Corps fail to comply with EO 13132, which requires consultation on rulemakings that have federalism implications and which will have "substantial direct effects on the States."[241] Efforts to clarify the term "waters of the United States" clearly raise significant federalism issues. Consultation under the EO is further required in light of several other provisions, including the following:

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State and local governments have identified uncertainties regarding the constitutional or statutory authority of the national government."
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."

Thus, a procedural component of the larger 404 – and indeed, 402 – permitting regime like that in the proposed rule for determining jurisdictional lines implicates the substantial rights of the states, both from a Tenth Amendment Constitutional, as well as a CWA statutory perspective. Including the states with all other stakeholders and interested parties in the opportunity for public comment on a proposed rule is decidedly not the robust and meaningfully state-federal "consult and cooperate" partnership that Congress clearly had in mind when it enacted the CWA. Nor do a handful of teleconferences where EPA is only there to present its proposal and to answer questions, rather than collaborate on rulemaking, satisfy the consultation requirement. (p. 8 – 9)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For more information on state outreach see the national outreach summaries in the docket (Docket Id No EPA-HQ-OW-2011-0880).

Western Governors Association (Doc. #19654)

13.409 As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. While the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute substantive consultation. Western Governors strongly urge both EPA and the Corps to engage states as authentic partners in the management of Western waters.

States have federally-recognized authority to manage and allocate water within their boundaries. Section 101(g) of the Clean Water Act (CWA) expressly states that, "the

[241] Executive Order 13132, Section 1(a), Federalism (August 4, 1999).

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authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act." The Western States Water Council, in its March 10, 2014, correspondence to you both, delineates the areas of concern states have with this rulemaking process. Western Governors urge you to engage with us, individually and through the Western Governors' Association, to resolve these important concerns in advance of any further action on this issue. (p. 1)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Hinsdale Colorado Board of County Commissioners (Doc. #1768)

13.410 The Guidance Fails to Address Federalism Consultation and Preemption Issues. In addition to the rulemaking process outlined under the APA, there are additional procedures in place for consultation with state and local governments required during a rulemaking that were not applied if to the development of the Draft Guidance. Under "Executive Order 13132: Federalism," agencies are required to consult with state and local governments on regulations that will have significant impact. Such consultation can lead to better results, while strengthening the federal, state, and local government partnership in implementing the Clean Water Act. In the case of the Draft Guidance, consultation consistent with the Executive Order would have provided an opportunity to address significant concerns about the preemption of traditional state and. local government authority concerning the management of state waters. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Skamania County Board of Commissioners (Doc. #2469.1)

13.411 Proposed rule raises federalism concerns and could impose direct and indirect costs. Under Executive Order 13132-Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis-Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2013)-contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (Page 2). (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.

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Butler County, Pennsylvania (Doc. #6918)

13.412 The proposed rule raises federalism concerns discussed by the Rapanos Supreme Court as States and local governments have jurisdiction over land use and could be impacted by both direct and indirect costs. Although the proposed rule sets forth "that decisions concerning whether or not a water body is subject to the CWA have consequences for State, tribal and local governments," it fails to analyze tile specific impacts to state and local governments under federalism mandates. Specifically, under Executive Order 13132-Federalism, "federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs." Because the EPA and Corps self-determined their proposed definitional rule expansion would only impose indirect costs, the proposed rule stated federalism concerns were not triggered despite their own cost-benefits analysis "Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2013). " The economic analysis indicates there may be additional implementation costs for a number of CWA programs and cautions the data used and the assumptions relied upon by the Agencies in drafting the proposed rule analysis may be flawed. Furthermore, under the rule, the economic analysis failed to address additional waters currently not jurisdictional (with no permit submissions) which would become jurisdictional under the rule. This reasoning is flawed and fails to recognize a true accounting of direct impact costs or benefits. Consultation input strengthens federal, state and local government partnerships for CWA implementation and streamlining of expenses in any proposed projects. Given concerns raised by the EPA and Corps cost-benefits analysis, the definitional implementation expansion will have a direct effect and impact on state and local governments responsible for maintaining water quality. All State and local plans must comply with their federal counterparts and established regulatory mandates. Butler County's comprehensive land use plan as well as its County-Wide Waters/led Stormwater Management Plan (Act 167) has to consider the following laws (and any amendments) to protect natural resources: Agricultural Operations; Nutrient Management Act; The Clean Streams Law; Oil and Gas Act; Agricultural Area Security Law; Surface Mining Conservation & Reclamation Act; Noncoal Surface Mining Conservation & Reclamation Act; Coal Refuse Disposal Control Act; and The Bituminous Mine Subsidence & Land Conservation Act. Moreover, impact cost analysis on how the proposed definitional changes may impact the pesticide general permit program, including EPA and DEP spraying programs, to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts, drinking and other water delivery systems have not been considered. These issues directly impact states and local government budgets. Had the proposed rule complied with the Executive Order, an opportunity to address significant concerns over the preemption of traditional state and local government authority concerning management of state and local waters and land use would have been provided. Moreover, a direct impact cost analysis should have been included in tile proposed rule process. Usurping a State and local government's right to oversee land use within its jurisdiction clearly violates Constitutional federalism concepts and mandates. (p. 9)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.**

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Somerset County Commissioners, Somerset, Pennsylvania (Doc. #9734)

13.413 (…) Other civic leaders share my disappointment with the sequence and timing of the draft science report "Connectivity of Streams and Wetlands to Downstream Waters, Review and Synthesis of Scientific Evidence." Mainly when Executive Order 13132 Federalism requires Federal agencies to work with local governments on "proposed regulations" having direct compliance costs; yet, "we little people in the swamp" were denied a potential game-changing opportunity to review the local affect of its' fit into the next, "Waters of the US Rulemaking Process" and how it will be used on a scientific basis before the "Connectivity Report" was finalized. Nonetheless, these seem leaders expressed sincere appreciation for allowing input but are disappointed that local entities were not included earlier...the main reason a proposed rule should follow, not precede a draft science report. (p. 1)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

13.414 (…) Proper staffing for environmental as well as financial considerations require comments to be open 90 days... after release of the "Connectivity Report." (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

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

13.415 (…)Since exercise of federal jurisdiction implicates individual property rights under the Fifth Amendment of the United States Constitution, due process rights under the Fourteenth Amendment and issues of federalism (as set out in Section V, below), "desktop" rulings should never be regarded as sufficient to determine jurisdiction. (p. 4)

Agency Response: This comment appears to relate to the manner in which the Corps makes jurisdictional determinations; it is outside the scope of this rulemaking.

New Mexico Department of Agriculture (Doc. #13024)

13.416 Federalism (E.O. 13132) and Costs to State and Local Agencies

"This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, Executive Order 13132 does not apply to this action and local agencies should have been done at that level as well (79 FR22220)."

Since "[t]he main responsibility for water quality management resides with the States in the implementation of water quality standards, the administration of the NPDES... and the management of nonpoint sources of pollution,"[242] any change in jurisdiction will

[242] U.S.Environmental Protection Agency. "Overview of Impaired Waters and Total Maximum Daily Loads Program." http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm#section303.

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necessarily have an impact on the states. E.O. 13132 states that, "To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on state and local governments, and that is not required by statute.."[243] NMDA concludes that the Agencies ' analysis regarding E.O. 13132 was done incorrectly.

The Economic Analysis states there should be no substantial increase in costs to state agencies, in spite of a probable increase in jurisdiction. Under the section entitled "CWA Section 303 and 305," the document states, "EPA's position on these costs is that an expanded assertion of jurisdiction would not have an effect on annual expenditures ... for state agencies, including those responsible for state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads (TMDLs) for impaired waters."

NMDA does not agree that states will necessarily have capability in a form robust enough to comply with the expanded federal jurisdiction as proposed in this rule. Moreover, monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs. (p. 22)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.

Big Horn County Commissioners (Doc. #13599)

13.417 After careful review, Big Horn County feels the proposed rule has these deficiencies:

1) The proposed rule abandons cooperative federalism.

The principles of cooperative federalism dictate that control of land use decisions properly rests with state and local governments. As the Supreme Court recognized, "regulation of land use is perhaps the quintessential state activity. (p. 3)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

San Joaquin Tributaries Authority (Doc. #14992)

13.418 The Proposed Rule Violates the Requirements of Executive Order 13132

The EPA and Corps did not meet the requirements of Executive order 13132 in formulating the Proposed Rule. Executive Order 13132 requires Federal agencies to consult with state and local governments, as well as restrict the reach of their proposed rules, when adopting policies "that have federalism implications." The EPA and Corps

[243] Exec. Order No. 13132 - "Federalism." Signed August 4, 1999. Available at: https://www.federalregister.gov/articles/1999/08/10/99-20729/federalism.

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determined that the Proposed Rule does not have "federalism implications," and thus the requirements of Executive Order 13132 do not apply. (Federal Register, at 22220-22221.) In the alternative, however, the EPA and Corps maintain they have met their consultation obligations under Executive Order 13132. (ld., at 22221.)

The Proposed Rule has federalism implications. Executive Order 13132 states that a policy has "federalism implications" if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." (Executive Order 13132, at §1(a).) The Supreme Court recognized there are significant federalism implications involved in WOTUS matters. In determining which hydrologic features are under the jurisdiction of the CWA. The Supreme Court recognized that the EPA and the Corps' claims of federal jurisdiction over traditionally state-regulated resources would result in a significant impingement of the States' traditional and primary power over land and water use." (*SWANCC,* at 174, *quoting* 33 U.S.C. § 1251(b).)

In addition, as recognized in SWANCC and Rapanos, the expansion of EPA and Corps jurisdiction over hydrologic features has federalism implications because it results in the federal government placing additional burdens on states. For instance, under Section 303(d) of the CWA, the states must identify all WOTUS which do not meet or are not expected to meet federal water quality standards. (33 USC § I313(d)(l)(A).) When identifying these impaired WOTUS, the states must also determine the cause of impairment. (See EPA, *Chapter 4 -- EPA And State Responsibilities* (March 6, 2010) <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/dcc4.cfm> [as of Sept. 12, 2014].) The states must also submit to the EPA adequate documentation supporting the listing of waters. (ld.) Thus, the additional requirements of the Proposed Rule also trigger federalism issues.

Because the Proposed Rule is subject to the requirements of Executive Order 13132, EPA must engage in adequate consultation with the states. The EPA has not met its consultation requirements under Executive Order 13132. On June 11, 2014, the House Transportation and Infrastructure Committee subcommittee on Water Resources and Environment held a hearing at which top administrative officials from the EPA and Corps were interviewed about the Proposed Rule. At this interview, EPA and Corps officials admitted that no state had explicitly voiced its support for the Proposed Rule. (Committee on Transportation & Infrastructure, Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule (June 11,2014) <http://transportation.house.gov/calendar/eventsingle.aspx?EventID=378392> [as of Sept. 12, 2014] at 36:30 & 1:00:20 [hereinafter "Transportation & Infrastructure Hearing"].) At that hearing, the representative of the Western Governors Association, representing 19 western states, stated "the Western states, at least, are unanimous in their concern over the fact that the states were not adequately consulted in advance of this rule being proposed." (ld., at 2:25:45.) He noted, further, that the states were not involved in drafting the declaration and consultation requires more than allowing states to provide comment during the public comment period. (*Id.*) The EPA must consult meaningfully with the states to meet their obligation under Executive Order 13132, something, to this point, they have failed to do.

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Conclusion

The Irrigation Districts request the EPA decline to adopt the Proposed Rule. The Proposed Rule constitutes a significant expansion of jurisdiction that is not supported. In addition, the Proposed Rule does not provide clarity. The added confusion and expanded jurisdiction of the Proposed Rule are not offset by the limited additional certainty. The Proposed Rule has also failed to comply with the consultation requirement of Executive Order 13132. To the extent the EPA proceeds with the Proposed Rule, the Irrigation Districts urge the EPA to revise the Proposed Rule to ensure irrigation facilities and the operational facilities that support irrigation are expressly exempted from WOTUS jurisdiction. (p. 5 – 6)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

National Association of Counties (Doc. #15081)

13.419 President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments. We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[244] A federalism impact statement was not included with the proposed rule.

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[245] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[246] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[247] Even if the rule is determined not to impact state and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[248]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."249 While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue**

[244] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).
[245] U.S. Envtl. Prot. Agency, EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism, (November 2008).
[246] Id. at 6.
[247] Id. at 9.
[248] Id. at 11.
[249] 79 Fed.Reg. 22220.

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substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it. (p. 4 – 5)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

13.420 (…) 3. Complete a multiphase, rather than one-time, Federalism consultation process

4. Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation

5. Accept an ADR Negotiated Rulemaking process for the proposed rule: Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached. (p. 5)

Agency Response: The negotiated rulemaking process is used as a pre-proposal mechanism to develop a rule. It is most effective when affected parties have conflicting positions on what provisions should be in a rule and where a negotiated process could lead to consensus language for the rule. The process for developing this rule included pre-proposal opportunities for affected parties to provide input to the agencies (for detailed information see the sections on 13.2.5 on Federalism, 13.2.6 on Tribal Consultation, and 11.1 on RFA/SBREFA in compendium 11). Since the rule has been proposed and the Agencies have received over one million comments, it would be inappropriate to ignore all of those comments to restart the rulemaking through a negotiated rulemaking process.

Rio Grande Water Conservation District (Doc. #15124)

13.421 For all of the foregoing reasons, the RGWCD is strongly opposed to the promulgation of the proposed jurisdictional waters rule in its current form. We urge the EPA and Corps to withdraw the draft rule at the conclusion of the comment period and engage state and local governments and the agricultural community in meaningful conversation to develop a comprehensive regulatory framework that is clear and efficient, comports with federal law, and protects the Nation's waters without overly burdening agriculture, small businesses and other regulated groups. This course of action is particularly appropriate given the amount of opposition that has been levied against the proposed rule since its release, including the written request of 231 members of Congress to withdraw the rule and the bipartisan legislation, "Waters of the United States Regulatory Overreach Protection Act," H.R. 5078, that is currently before the Senate after having passed the House on September 9, 2014. (p. 9)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Sacramento County, California (Doc. #15518)

13.422 Concerns about Agency Consultation with State and Local Partners

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We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, we have concerns with the process used to create this proposal - specifically, whether impacted state and local groups were adequately consulted throughout the process.

- **Proposed rule raises federalism concerns and could impose direct and indirect costs.**

Under Executive Order 13132-Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis-*Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014)-contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation ..." (page 2). (p. 2 – 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.**

Lander County Commissioner (Doc. #15664)

13.423 (… The proposed Rule raises federalism concerns and could impose unfair and unduly burdensome direct and indirect costs on Lander County; (…) (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Eddy County Commissioners (Doc. #15665)

13.424 Proposed rule raises federalism concerns that could impose large costs. Executive order 13132- Federalism, federal agencies are required to work with state and local governments on proposed regulations that may or will have substantial direct compliance cost. Agencies have determined "Waters of US" as indirect costs and do not trigger federalism. Commissioners disagree and believe the proposed rule changes will have significant direct costs to our county. (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.**

San Bernardino County, California (Doc. #16489)

13.425 Duplication of State Regulation and Management: The DPW disagrees with the Agencies' opinion that Executive Order 13132 (concerning Federalism) does not apply to the proposed Rule. (p. 5)

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<u>Agency Response:</u> See section 13.2.5 summary response for information regarding Federalism.

13.426 V. Comment on the Proposed Rule and "Executive Order 13132 ("Federalism")

In should be noted that the proposed Rule asserts the following:

> "This action (proposed Rule) will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power responsibilities among the various levels of government. Thus, Executive Order 13132 (64 FR 43255, August 10, 1999) does not apply to his action." [250]

The DPW would assert that the proposed Rule does touch on federalism principles, because the proposed Rule focuses on developing a regulatory policy derived from SWANCC and Rapanos which examined CWA at its outer fringe. The Supreme Court, granted certiorari to hear these cases because they were concerned with federal over-reach which is central to federalism.

The DPW wishes to highlight several of the provisions of Executive Order 13132.

Section 1. Definitions. For purposes of this order:

> (a) “Policies that have federalism implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Section. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, agencies shall be guided by the following fundamental federalism principles:

> (a) Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.
>
> (i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.

Section. 3. Federalism Policymaking Criteria. In addition to adhering to the fundamental federalism principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

> (b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national

[250] Federal Register, at 22220 (E).

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significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

(d) When undertaking to formulate and implement policies that have federalism implications, agencies shall: (1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;

(2) where possible, defer to the States to establish standards; (3) in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority; and (4) where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards.

A. FEDERALISM AND STATE RESPONSE TO REGULATORY GAPS

The DPW is aware that many interest groups are wary of a CWA regulatory framework which excludes some surface waters from jurisdiction. These groups tend to resist efforts to limit the scope of protection will result. To answer these concerns the DPW asserts that a fundamental precept underlying both the SWANCC and Rapanos Decision is federalism.[251] Federalism underscores the responsibility and benefit of state management of resources. To this end, recent history clearly establishes that states respond adequately to "regulatory gaps" resulting from loss of federal CWA jurisdiction. The issue of "regulatory gaps" in CWA jurisdiction was first addressed in the years following the SWANCC decision. The invalidation of the MBR created some "gaps" in regulation of "other waters". While the response of the many States to SWANCC was not immediate, by 2004 most states had moved to fill regulatory gaps 2004.[252] As example, some states like California, issued guidelines wherein existing laws were interpreted to extend to "other waters" including isolated intrastate wetlands.[253]

[251] See, United States v. Alfonso D. Lopez, Jr., 514 U.S. 549, at 558 (1995), citing NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 37 (1937). In Lopez, the Court moved to invalidate the "Gun Free School Zone Act of 1990", identifying three broad categories of activity that Congress could regulate under the Commerce Clause: (1) The channels of interstate commerce, (2) The instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) Activities that substantially affect or substantially relate to interstate commerce. The Court continued the reproach of Commerce authority in United States v. Morrison, addressing the "Violence Against Women Act". 529 U.S. 598 (2000).

[252] See, Jon Kusler, Esq., The SWANCC Decision: State Regulation of Wetlands to Fill The Gap,., Association of State Wetland Managers, Inc., (03/04/2004.). Depending on state needs, "filling the gaps" took one of three forms (1) Extend water quality programs to explicitly include isolated and other wetlands (Indiana, Ohio), south Carolina, North Carolina); (2) Adopt limited legislation closing the gaps created by SWANCC (Approach taken by Wisconsin and Ohio, which already regulate some wetlands); and (3) Adopt new comprehensive wetland regulation (proposed bills introduced by Illinois). It should be noted that many states already had comprehensive wetlands statutes (Including: Minnesota, Michigan, Massachusetts, Rhode Island, Maine, New Hampshire, New York, New Jersey, Connecticut, Maryland, Virginia, Florida, Vermont, Pennsylvania and Oregon.)

[253] California State Water Resources Control Board, Guidance for Regulation of Discharges to "Isolated Waters" (June 25, 2004); Under the California Porter-Cologne Water Quality Control Act (Porter Cologne; Ca.

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After the Rapanos decision, the issue of "regulatory gaps" was again raised with respect to coverage and protection of remote tributaries and wetlands. Arguably, because the metrics behind the tiered evaluation process is complex, and the case-by-case structure of the federal §404 program is tantamount to a moving target, it might be reasoned that Rapanos complicates the ability of states to formulate a comprehensive program to resolve coverage gaps. However, as a practical matter these concerns are simply not warranted. Any complexity in the federal regulatory framework derives from the need to create a uniform, all-encompassing program that addresses the diverse hydrosphere in the many states, while complying with constitutional limitations via the commerce clause. Conversely, States have more limited hydro-diversity and are not bound by federal notions of limited government and enumerated powers. As such, States have broader authority under State constitutions, coupled with more experience in management and oversight of intra-state resources.

In California, the State's Department of Fish and Wildlife (CDFW) has exercised administrative authority over remote first order tributaries for decades. This regulatory framework includes tributaries to navigable waters, isolated intrastate dry-lakes and "other waters".[254] As such, jurisdictional regulation of tributaries within the State of California exceeds that coverage provided by the CWA even prior to the diminution of jurisdiction subsequent to SWANCC and Rapanos.

The hope of the DPW, in seeking to limit the scope federal jurisdiction, is to minimize assessment and permitting costs. Because these resources are already protected under state law, streamlining the process by limiting federal jurisdiction will allow the DPW to focus its time and resources on fulfilling its vital flood-control, stormwater management and public safety mission.

Again, the DPW appreciates the opportunity to comment on the proposed Rule and looks forward to working collaboratively with the USACE and EPA to achieve mutual goal of and predictable, consistent and streamlined regulatory framework. (p. 27 – 29)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Hot Springs County Commissioners (Doc. #16676)

13.427 After careful review, the Hot Springs County Commission has identified the following deficiencies with the proposed rule:

1) The proposed rule abandons cooperative federalism.

Section 101 (b) of the CWA reads that, "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and

Water Code, Div. 7, §13000 et seq.), discharges to wetlands and other "waters of the state" have been and remain subject to state regulation. On January 25, 2001, the Office of Chief Counsel of SWRCB released a legal memorandum confirming the State's jurisdiction over such waters. Under the program, local Regional Water Quality Control Boards (RWQCB), implement an administrative program covering isolated waters, wherein permittees must comply with "waste discharge requirements" (WDRs).

[254] See California Fish & Game Code §§1600-1602, regulating any lake or streambed resource include perennial, intermittent and ephemeral stream with a discernable bed and bank, including adjacent wetland and riparian areas.

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eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources... "

The EPA and the USACE have provided numerous briefings and conversations with state and local governments since the introduction of the proposed rule. However, these briefings have either been too broad for sufficient comment, or peppered with insinuation that the reviewers simply don't understand the rule's content.[255] Numerous commenters have stressed the point that the EPA and the Corps have failed in their obligation under the CWA and Executive Order 13132 to meaningfully engage the states in development of this rule.[256] The Hot Springs County Commission adds its voice to that growing chorus.

Recommendation: The Hot Springs County Commission requests that the EPA and the Corps immediately withdraw the proposed rule and begin a new and open process that includes Wyoming's expert agencies and county government in its development. The State of Wyoming several instances to create rules and management practices that help protect Wyoming's land and water, support economic growth, and recognize on-the-ground realities. The Hot Springs County Commission believes a rule clarifying jurisdiction of waters can be developed in a similar manner. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

Navajo County Board of Supervisors, Arizona (Doc. #19569)

13.428 The proposed rule raises federalism concerns and could impose direct and indirect costs.

Under Executive Order 13132 Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis: Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2014), contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (p. 2).

Since states, local governments and their agencies implement and enforce CWA programs, Navajo County believes that the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating

[255] *Letter from 24 United States Senators to the EPA*, October 23, 2014.

[256] "Western Governors strongly urge both the EPA and the Corps to engage states as authentic partners in the management of Western waters." Western Governors' Association Letter to the EPA, March 25,2014; and, " .. .consultation should treat states as co-regulators that are separate and apart from the general public . . ." Western States Water Council, Letter to the EPA, October 15,2014 among many others.

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that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (p. 2). (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.

Association of Clean water Administrators (Doc. #13069)

13.429 I. Lack of Consultation with States

Members of ACWA feel very strongly that states should have been consulted early on, as co-regulators, during the development of the Proposed Rule. It would have been very helpful for EPA and the Corps to have a detailed and nuanced understanding of how states currently implement the CWA before concluding that the Proposed Rule will only result in a change in jurisdiction of three percent (3%). As the primary entities responsible for carrying out the CWA, States are uniquely positioned to provide input on how the Proposed Rule would impact their current activities under the various CWA programs, and how the reach of jurisdiction may change dependent on their current authority under state law. The Proposed Rule also raises implementation issues and questions that vary from state to state, important considerations when developing a national rule of this breadth. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Georgia Municipal Association (Doc. #14527)

13.430 While the Environmental Protection Agency {EPA) and U.S. Army Corps of Engineers (Corps) have developed the proposed rule- Definition of the Waters of the United States Under the Clean Water Act- to provide clarity, GMA finds the rule very ambiguous and believes it will create more questions than answers. In particular, we are concerned about potentially farreaching unintended consequences if the rule is put into place as written, especially since state and local governments were not involved in the federal consultation process.[257] (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

County Commissioners Association of Pennsylvania (Doc. #14579)

13.431 A good regulation would engage state governments, local communities and affected industries as active partners in the regulatory decision-making process. Instead, the

[257] The National League of Cities (NLC) and other state and local government associations asked for a rulemaking on Waters of the U.S. in the hopes that a Federalism consultation as required under Executive Order 13132 would be undertaken. But, because the agencies have determined the proposed Waters of the U.S. rule does not trigger EO 13132 considerations, this process was omitted. If the Federalism consult process proceeded, many local government concerns could have been addressed prior to the proposed rule's publication. The EPA/Army Corps conducted a "voluntary" consultation with state and local government groups but they concluded the proposed rule will only have an indirect impact on state and local governments, therefore the Federalism requirements were not triggered. This means there will be no Federalism impact statement in the final rule, which would detail the extent to which the concerns of state and lo ca l officials have been met.

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proposed regulations seek to federalize many of the land use and community and economic development decisions that should be made by state officials and local communities. (p. 11)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Wyoming County Commissioners Association (Doc. #15434)

13.432 The proposed rule abandons cooperative federalism

Section 101(b) of the CWA reads that, "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

The EPA and the USACE have provided numerous briefings and conversations with state and local governments since the introduction of the proposed rule. However, these briefings have either been too broad for sufficient comment, or peppered with insinuation that the reviewers simply don't understand the rule's content.[258] Numerous commenters have stressed the point that the EPA and the Corps have failed in their obligation under the CWA and Executive Order 13132 to meaningfully engage the states in development of this rule.'[259] The WCCA adds its voice to that growing chorus.

Recommendation: The WCCA requests that the EPA and the Corps immediately withdraw the proposed rule and begin a new and open process that includes Wyoming's expert agencies and county government in its development. The State of Wyoming, counties, a federal land management agencies have worked cooperatively in several instances to create rules and management practices that help protect Wyoming's land and water, support economic growth, and recognize on-the-ground realities. The WCCA believes a rule clarifying jurisdiction of waters can be developed in a similar manner. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change. The agencies have no intent to change current practice.

Association of State Drinking Water Administrators (Doc. #15530)

13.433 Working with States as Co-Regulators: We strongly recommend that EPA and the Corps work closely with states, as co-regulators, in the final rulemaking. States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules. The various calls between

[258] *Letter from 24 United States Senators to the EPA*, October 23, 2014.

[259] "Western Governors strongly urge both the EPA and tile Corps to engage states as authentic partners in the management of Western waters." *Western Governors' Association Letter to the EPA*, March 25,2014; and, "...consultation should treat states as co-regulators that are separate and apart from the general public…" Western States Water Council, Letter to the EPA, October 15, 2014 among many others.

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states and EPA during the public comment period for the proposed rule were a great help in answering state questions about the proposed rule; but, owing to the complexity of the proposed rule, a wide array of scenarios across the country, and state implementation challenges, many questions remain. Therefore, we believe that ongoing and frequent communication with states will be critical to developing an effective final rule on this challenging subject matter. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

South Carolina Association of Counties (Doc. #15573)

13.434 Concerns about Agency Consultation with State and Local Governments

We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, we have concerns with the process used to create this proposal, and specifically whether impacted state and local governments were adequately consulted throughout the process.

SCAC and our member counties believe the EPA's proposed rule raises serious federalism concerns and will impose direct and indirect costs on local governments. Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. The agencies state in the proposed rule that the new definition does not trigger Federalism considerations. The EPA and Corps have previously expressed their opinions that the definition of "waters of the U.S." may impose only "indirect" costs. However, the agencies' cost-benefits analysis, Economic Analysis of Proposed Revised Definition of Waters of the U.S. published in March 2014, directly contradicts the notion that there are no federalism concerns. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.

The United States Conference of Mayors et al. (Doc. #15784)

13.435 3. Executive Order 13132: Federalism requires federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that a change in the definition of “waters of the U.S.” imposes only indirect costs, the agencies state that the proposed rule does not trigger Federalism considerations. We wholeheartedly disagree with this conclusion and are convinced there will be both direct and indirect costs for implementation.

Additionally, while EPA initiated a federalism consultation for its state and local partners in 2011, the process was prematurely shortened. In the 17 months between the initial Federalism consultation and the publication of the proposed rule, the agencies changed directions several times (regulations versus guidance). In those intervening months between the consultation and the publication of the proposed rule, the agencies failed to continue substantial discussions, thereby not fulfilling the intent of Executive Order 13132. (p. 3)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

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13.436 Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism to address local government concerns and issues of clarity and certainty. (p. 4)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Oklahoma Municipal League (Doc. #16526)

13.437 Executive Order 13132: Federalism requires federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. In view of the significant direct costs set out above, the Agencies should have complied with this mandate. Had they done so, they would have received valuable information about the rule's many problems. The Agencies would have had the opportunity to cure the defects before the proposal was released. (p. 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

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

13.438 Executive Order 13132: Federalism

Executive Order 13132 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 proposal and not proceed to revise the WOTUS definition until they can fully comply with Executive Order 13132. (p. 40)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Indiana Farm Bureau et al. (Doc. #14119)

13.439 We all agree that regulatory certainty and ease of implementation is important and necessary. However, we will not concede regulation to federal agencies which has not been authorized by Congress. It is incumbent upon the agencies to withdraw this rule proposal and start anew with a well-reasoned and deliberately developed proposal to clarify the regulatory reach of EPA and the Army Corps of Engineers. In arriving at this decision, we believe that the agencies should follow the road map established in HR 5078 by a bipartisan group in the House of Representatives. Only through open discussion with state and local governments and inclusion of the public within the process will the

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agencies be able to achieve the level of certainty and consensus that all deserve through the implementation of the Clean Water Act. (p. 4 – 5)

Agency Response: **As explained elsewhere, the agencies believe this rule is consistent with the statute, the caselaw, sounds science and respectfully disagrees that we should implement legislation that has not been enacted.**

John Deere & Company (Doc. #14136)

13.440 The Proposed Rules Fail to Assess the Impact that Greatly Expanded Federal Jurisdiction Will Have on the Cooperative Federalism Approach Embodied in the CWA Through changes to jurisdictional water definitions the agencies have expanded the geographical scope of their jurisdiction under the CWA at the expense of state involvement. The proposed rule fails to assess the impact this expanded jurisdiction will have on the cooperative federalism approach embodied in the CWA. This federal-state partnership has played a critical role for agriculture, and was intended by Congress to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[260]

For agriculture, a key element to this cooperative federalism is allowing states to individually tailor the means to meet clean water objectives.[261] As detailed in these comments, agricultural practices and activities vary greatly throughout the U.S. in response to soil conditions, weather, pests, and other factors. The best management practices used by farmers throughout the country vary between states and regions. The practices a farmer in the Northeast uses to grow and cultivate crops will vary significantly from those used in the Southwest. Input at the state level helps assure that the site specific nature of farming practices, the environment, available resources, and economic factors are all considered when developing plans to address non-point pollution. A nation-wide solution to nonpoint source pollution problems will not work for agriculture. (p. 12 – 13)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.**

Georgia Chamber of Commerce (Doc. #14430)

13.441 The Role of Congress

The Chamber supports the supremacy of Congress to make laws. It's the responsibility of Congress, not the administration, to define the scope of regulatory jurisdiction under the CWA.

The Chamber believes that ultimately Congress must take action to define more precisely what waters are covered under the Clean Water Act. The EPA and the Corps are encouraged to present Congress with appropriate amendments that they believe will clarify the issues preventing efficient and effective application of the existing CWA.

[260] 33 U.S.C. §1251(a) (2014).
[261] Alexandra Dapolito Dunn & Meghan Boian, Postcards from the Edge: Perspective to Reinvigorate Clean Water Act Cooperative Federalism, 4 Geo. Wash. J. Energy & Envtl. L. 68 (2013).

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Such an approach will allow Congress to rightfully consider these and other issues and determine what it considers to be appropriate limits to EPA's regulatory powers.

The Chamber was pleased to see bi-partisan support for H.R. 5078 - Waters of the United States Regulatory Overreach Protection Act of 2014. The 262 votes in support illustrate the widespread concern with EPA's proposed rulemaking and surely sends a strong signal from Congress that EPA must reconsider its current proposal.

The Chamber also recognizes the strong support of the Georgia Delegation in this vote and in their continuing endeavors to identify a better solution than that outlined in the current draft rule.

The Chamber's membership is willing to work with EPA and Congress to seek workable amendments to the existing CWA that address regulatory issues, as well as ensuring certainty for the regulated community and those businesses who may, for the first time, find their activities drawn into the scope of the CWA. (p. 8 – 9)

Agency Response: **This expression of support for legislation is outside the scope of this rulemaking.**

Connecticut Marine Trades Association (Doc. #14558)

13.442 CMTA joins with members of United States House of Representatives that as a representative body overwhelming passed the Waters of the United States Overreach Protection Act (H.R. 5078) with bipartisan support due in part to the significant impact this regulation would impose on small business and further hindering job creation nationwide. (p. 1)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

13.443 Given the lack of involvement of state and local governments, regulated parties and the environmental community in the initial crafting of the proposal, the misdirected efforts of the scientific community, and the polarization existing in the legislative arena, the Water Congress would recommend that the agencies follow a new path towards the goal line. In particular, the agencies should:

1. Hold the current proposal in abeyance;

2. Seek input on the proposal from state and local governments, including those state and local agencies responsible for water quality regulatory compliance and the provision of water supplies;

3. Assemble representatives of the NGO stakeholder community, including the agricultural, municipal, industrial, business, utility, special district and environmental interests, for purposes of identifying "key" concerns and narrowing the scope of disagreement. The first step in this process would be to "bundle" or categorize key concerns as found in the comments submitted to date, along with the preparation of a short but substantive response of the agencies thereto. Thought could be given to the establishment of a Federal Advisory Committee.

4. Seek input anew from the scientific community on the connection of different types of waters, taking into consideration as part of their charge the need to focus

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upon "water quality" impacts or relationships, the need to identify a "gradient" of impacts or relationships, and the need to consider the constraints on jurisdiction as identified by the Supreme Court. Seek input from the stakeholder community on the details of the scope of the charge.

5. Re-notice the proposal in a form which reflects the modifications resulting from the above process.

6. Establish a timeline to accomplish the above, with periodic updates provided to Congress as necessary. (p. 7 – 8)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

American Foundry Society (Doc. #15148)

13.444 IX. CONCLUSION

If the justification for finalizing this proposed rule relies on the need to provide certainty, clarity and predictability to the regulated public, the agencies have no choice but to withdraw the proposed rule and open a real dialog with the regulated community. The ambiguity that binds the inferences of broad connectivity between existing and new categories of waters of the U.S. is based on a report that was not fully vetted by the Scientific Advisory Board and was developed behind closed doors. Given the breadth and depth of the negative feedback and calls for the agencies to withdraw the current proposed rule, it is difficult to comprehend the agencies assertion that the rules is clear and understandable and will reduce regulatory burdens. 79 Fed. Reg. at 22192. (p. 10)

Agency Response: See section 13.2.5 summary response for information regarding Federalism See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study.

Federal Water Quality Coalition (Doc. #15822)

13.445 D. The Proposed Rule Fails to Comply with Executive Order 13121.

In the proposed rule, the agencies also certified that: "This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[262] As these comments have demonstrated, the proposed rule would have a significant effect on states' ability to regulate use of their lands and waters. Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." As a result, the agencies must fully comply with the "Fundamental Federalism Principles" of section 2 of the Order, which requires the agencies to "act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." Many

[262] 79 Fed. Reg. at 22,220.

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states have identified these uncertainties in the proposed rule.[263] The agencies also must comply with the "Federalism Policymaking Criteria" of section 3, which requires agencies to strictly adhere to constitutional principles and statutory authority, to provide states with maximum administrative discretion, and to rely on state policies to the maximum extent practicable. Finally, before issuing a proposal, the agencies must develop and provide "a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met."

To meet these requirements, the agencies must withdraw the rule and develop a new proposal. (p. 63)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Webber Land and Development Corporation (Doc. #10944)

13.446 I have reviewed the proposed rule recently released by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) entitled "Definition of 'Waters of the United States' Under the Clean Water Act" and I respectfully request that it be withdrawn as the Agencies failed to complete any state consultation when developing this rule.

As a local real estate developer, I am concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management. As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters.

In particular, based on the copy of the proposed rule, I am concerned that the Agencies believe that this proposed rule does not have federalism implications and therefore do not need to comply with Executive Order 13132. I respectfully disagree.

Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government".

By changing the definition of "Waters of the United States", the proposed rule will have a direct effect on the distribution of power and responsibilities among the various levels of government. Currently, there are many waters that are subject to state regulation only. However, the proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. Given this expansion, I am at a loss to

[263] See, e.g., October 23, 2014 comments filed by Kansas Governor Sam Brownback; October 8, 2014 comments filed by Pennsylvania's Department of Environmental Protection, Deputy Secretary for Water Management, Kelly Heffner; October 8, 2014 comments filed by the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina.

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identify any water that would not be subject to federal regulation unless specifically exempted. Such an expansion in federal jurisdiction would fundamentally alter our ability to make decisions regarding the use of land within our borders. Due to the fact that States often regulate more waters than are encompassed by the current definition of "waters of the United States" it is not clear what benefit the expansion of federal authority is designed to achieve. It appears that the Agencies did not even consider existing State authorities when developing its proposed rule.

Due to the fact that this rule attempts to regulate all waters, I urge you to withdraw the proposed rule until the requirements of Executive Order 13132 have been met. It is of the utmost importance that State and local governments be consulted while developing this rule. (p. 1 – 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism**

National Association of Home Builders (Doc. #19540)

13.447 d. The Agencies Failed to Comply with Executive Order 13132.

Executive Order (E.O.) 13132, entitled "Federalism," was issued by President Clinton in 1999 with the objective of guaranteeing the Constitution's division of governmental responsibilities between the federal government and the states. E.O. 13132 establishes requirements for policies that have "federalism implications," meaning those with "substantial direct effects on the States.[264] In short, E.O. 13132 requires federal agencies to consult with state and local officials on policies that have federalism implications and determine whether federal objectives can be attained by other means. Importantly, this consultation is to take place early in the process of developing the proposed regulation.

In an effort to subvert the requirements of E.O. 13132, the Agencies state that the proposed rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[265] This is simply not true. The proposed rule defines those waters subject to federal jurisdiction of the CWA. The statute is, in fact, co-administered by the states. It was the intent of Congress to preserve states' rights and responsibilities to jointly administer the Act with the federal agencies: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . ." The statute continues, "It is further policy of Congress that nothing in this [Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.'" With the proposed rule, the Agencies wrongfully interpret "waters of the United States" to include all intrastate and interstate waters, including ephemeral streams and isolated wetlands that may be dry a majority of the time, thereby disregarding congressional intent

[264] 64 Fed. Reg. at 43,255 (Aug. 10, 1999).
[265] 79 Fed. Reg. at 22,220.

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and undermining states' responsibilities and rights to control land and water resources within their borders.

Despite and in apparent disregard for the clear federalism implications, EPA and the Corps have proposed today's rule without sufficient consultation with the states as required under E.O. 13132. By expanding the definitions of "tributary," "adjacent waters," and "other waters," the federal Agencies will undoubtedly impinge upon state authority to manage their land and water resources, as many waters that were once within the purview of the states will now become federalized. As co-regulators of water resources, states must be fully consulted and engaged in any process that will affect the management of their waters. While EPA and the Corps have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute the substantive, collaborative consultation as require by E.O. 13132. In fact, EPA's idea of consultation consists of "three in-person meetings and two phone calls in the fall and winter of 2011.[266] A proposed rule of this magnitude and with obvious federalism implications demands more.

What is even more troubling is the fact that many states raised concerns about the process far before the rule was even published - in other words, while the Agencies had time to address them, but EPA and the Corps failed to act. Western states, in particular, voiced concerns that individual states would not have the opportunity to provide substantive feedback until after EPA and the Corps had developed a proposed rule and published it for public comment in the Federal Register.[267] The substantial differences in hydrology, geography, and legal frameworks in the West require significant consultation with each state to determine how the proposed rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs. It is not only Western states who believe consultation has been inadequate. The Association of Clean Water Administrators (ACWA), which has representatives from all fifty states, raised concerns that the Agencies did not adequately consulted with the states early on in the rulemaking process.[268]

EPA and the Corps have yet to adequately engage the states regarding state needs, perspectives, or expertise in developing the proposed rule. The Agencies should have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a proposed rule to OMB. It is exactly this end result that E.O. 13132 was designed to avoid. The Agencies must now withdraw the proposed rule

[266] 79 Fed. Reg. at 22,221.
[267] Letter from Western Governors' Association Chairman Gov. John Hickenlooper and Vice Chairman Gov. Brian Sandoval to the Hon. Gina McCarthy and the Hon. Jo-Ellen Darcy (March 25,2014), available at http://westgov.org/component/docan/doc_download/1794-clean-water-act-rulemaking?Itemid=53.
[268] Letter fiom Michael Fulton (ACWA President) to Mr. Ken Kopocis and Ms. Jo Ellen Darcy, Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HEOW-2011-0880 (Nov. 12,2014).

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and conduct the necessary collaboration and consultation with states as required by E.O. 13132. (p. 159 – 161)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

13.448 e. The Agencies Failed to Comply with Executive Order 13536.

The proposed rule fails to comply with Executive Order (E.O.) 13563, titled "Improving Regulation and Regulatory. That order states: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[269] It specifically calls for regulations to be cost effective and cost justified, transparent, coordinated, flexible and science driven, and largely instructs the agencies to comply with E.O. 12866, which was issued in 1993 and has historically provided the blueprint for agencies to follow when considering and adopting rules.

Further, recognizing the regulatory burdens suffered by small businesses and the need to reduce their impacts, President Obama simultaneously issued E.O. 13563 and the Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which directs the agencies to fully consider the needs of, and impacts of their actions on, small businesses. For example, the Memorandum states: "[each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." To do so, the Memorandum directs all federal agencies, when proposing new regulations, to include regulatory flexibilities for small businesses such as extended compliance dates, simplified reporting requirements, or even regulatory exemptions. Furthermore, the Memorandum states, "whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility to a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify this decision not to do so in the explanation that accompanies that proposed or final rule."[270]

Clearly, the Memorandum is intended to remind the federal agencies of their statutory obligations under the RFA and under E.O. 13563 to fully consider and afford regulatory flexibilities to small businesses. Moreover, the Memorandum goes a step further to mandate that whenever a federal agency fails to provide flexibility to small businesses under a proposed or final rule, it must justify why it did not do so. The Memorandum clearly recognizes the crucial role small businesses play in any future economic recovery and instructs all federal agencies to ensure their existing and future regulations are done in a cost-effective, innovative, and flexible manner so as not to stifle economic growth among small businesses.

[269] See E.O. 13,563 $9 2,5.
[270] 76 Fed. Reg. at 3,828 (Jan. 21,2011).

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In drafting the proposed rule to define "waters of the United States," however, it appears that the Agencies chose to ignore or avoid their obligations under E.O. 13563 and the Memorandum. Specifically, as noted in Section IX., the proposed rule is not supported by the science. And fundamentally, as noted throughout these comments, the proposed rule will not provide predictability or reduce uncertainty. Moreover, there is no evidence that the Agencies made a reasoned determination that the proposed rule's environmental benefits (if any) will justify its jobs, development, and consumer cost burdens. Additionally, it is clear that the Agencies have not tailored the proposed rule to impose the least burden on society nor have they taken into account the cost of cumulative regulations affecting stakeholders.

Equally problematic, there are no considerations for small businesses. A 2010 study funded by the U.S. Small Business Administration examined the proportional costs of federal regulations upon smaller firms (i.e., firms with 20 or fewer employees) as compared to larger firms.[271] The study found that these firms pay 40 percent more in compliance costs per employee than firms with more than 500 workers. The researchers found that this disproportionate compliance cost results from the fact that most federal environmental regulations impose identical recordkeeping, reporting, and compliance costs on all firms. , Smaller companies, including most home builders, cannot easily spread the compliance costs across a larger number of regulated activities and typically must rely on expensive outside professional consultants to help them demonstrate compliance with technical permitting and reporting requirements. Unfortunately, the proposed rule does nothing to alleviate these challenges and, in fact, will only make them worse. The proposed rule is riddled with ambiguities and prospective implementation problems. The Agencies have not crafted a revised definition of "waters of the United States" that "imposes the least burden on society" as required by E.O. 13563 or that adequately considers and minimizes impacts on small businesses. Such a result is unacceptable. (p. 161 – 163)

Agency Response: **See section 13.2.2 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563). With regard to the comment that the agencies failed to tailor the regulation to be least burdensome on society, it misapprehends the nature of this rule, which is definitional only; any burdens are imposed by the Act and permitting regulations under it. In any case, the agencies have evaluated indirect costs associated with this rule and the rule is justified in ensuring that the regulations are consistent with the statute, available science and the caselaw.**

13.449 f. The Agencies Violated the Federal Information Quality Act.

[271] Crain, N.V. and Crain, M.W., The Irnpact of Regulatory Costs on Small Firms, September 2010, at iv, retrieved On November 13,2014, from http://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%Regulatory%20Costs%on%20Small%20Firms%20(Full)_0.pdf.

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To ensure the consistent use of high quality data and information in government decision-making, federal information quality requirements were adopted by Congress in § 515 of the 2001 Treasury and General Government Appropriations Act.[272] The Information Quality Act (IQA) was supplemented by OMB's Information Quality Guidelines, which served as a model for each agency's implementing guidelines. Under OMB's Information Quality Guidelines, "influential information" (i.e., information having or likely to have important public policy or private sector impacts) must include sufficient "transparency" about data and methods such that the analytic results are "reproducible" by a qualified member of the public. Also, influential information concerning risks to human health, safety, or the environment must meet the new more stringent standard of quality from the 1996 Safe Drinking Water Act.[273]

Under this requirement, the Agencies are required to use only the "best available, peer reviewed science" and "best available methods."[274] For this reason, they must ensure that any technical or scientific studies or information used in developing any new regulation meets this data quality standard. Regrettably, much of the information the Agencies have used to support the rule and that has been disseminated before and after the proposed rule was published violates the IQA. Examples include:

The Connectivity Report is an incomplete draft and does not meet the "objectivity" definition. According to the IQA, federal agencies must ensure and maximize the objectivity of the information they disseminate. Objectivity refers to whether disseminated information is being presented in an "accurate, clear, complete, and unbiased manner."[275] The Agencies claim the proposed rule is supported by the Connectivity Report, which underscores the fact that the Report is indeed "influential scientific information."[276] Yet the Report is an incomplete draft and thus does not satisfy the objectivity requirement of the IQA. The Agencies should not have proposed the rule until the influential scientific basis supporting it was fully reviewed by the SAB and finalized.

The inclusion of all waters in the riparian area and floodplain as per se jurisdictional is not supported by the scientific literature. The discussion of riparian areas and floodplains in the draft Connectivity Report is biased and of limited utility.

Under the IQA, the information disseminated by any federal agencies must be presented in an "unbiased manner.[277] Additionally, the federal agencies are required to ensure and maximize the "utility" or the "usefulness of the information" they distribute. Unfortunately, the information pertaining to riparian areas and floodplains within the draft Connectivity Report is both biased and of little utility. Although the proposed rule would assert categorical jurisdiction over waters located within the riparian area or

[272] Information Quality Act of 2001, Pub. L. 106-554 (2001).
[273] 42 U.S.C. § 300g-1(b)(3)(A) and (B).
[274] See, e.g., U.S. Environmental Protection Agency, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-008 (October 2002) at 22..
[275] 67 Fed. Reg. at 8,459 (Feb. 22, 2002).
[276] Id. at 8,452.
[277] Id. at 8,459.

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floodplain of a (a)(lj through (5) water, the portion of the draft Connectivity Report addressing the impact of riparian areas and floodplains on downstream waters highlight findings from studies of riparian areas and floodplains, not necessarily wetlands or waters therein. Indeed, the authors of the draft Connectivity Report admit, "Although ample literature is available on riparian and floodplain wetlands . . . most papers on riparian areas and floodplains do not specify, whether the area is a wetland. . . This situation creates a dilemma, because limiting our literature review to papers that explicitly describe the area as a wetland would exclude a major portion of this body of literature and greatly restrict our discussion of wetland science. Alternatively, if we include papers that do not explicitly classify the area as a wetland, we could mistakenly incorporate results that are relevant only to upland riparian areas. Our response to this dilemma was to survey the riparian literature broadly and include any results and conclusions that we judged were pertinent to riparian/floodplain wetlands,"[278]

By claiming certain studies were pertinent to riparian/floodplain wetlands without the necessary data included in the original studies, the authors have biased this portion of the study. How did the authors of the Connectivity Report determine which studies were and were not pertinent? Indeed, "the fact that the use of original and supporting data and analytic results have been deemed 'defensible ' by peer-review procedures does not necessarily imply that the results are *transparent* and *replicable*[279]

Additionally, the conclusions the draft Connectivity Report authors reach about the importance of riparian and floodplain wetlands on downstream waters are of limited utility because these "findings" are based on studies that may or may not even have included wetlands. This is not useful information. Perhaps most egregious, however, is the fact that the authors of the Report misrepresent their findings in the Report's Summary of Major Conclusions & and the Agencies use this misinformation in the preamble of the proposed rule, stating, "The Report . . . concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas . . . have a strong influence on downstream waters."[280] In turn, they use this as support to include all waters (not just wetlands) located within the riparian area or floodplain of any (a)(1) through (5) as automatically jurisdictional. This is clearly not supported by the studies of riparian areas and floodplains included in the draft Connectivity Report.

The information the Agencies have disseminated regarding the non-riparian area and non-floodplain waters is contradictory.

Even if a water falls outside of the subjectively defined riparian area or floodplain, it can still meet the Agencies' definition of "neighboring" and, in turn, "adjacent" if it has a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection" to an (a)(1) through (5) water.[281] This assertion is problematic, in that the proposed rule is purported to be based on the conclusions of the draft Connectivity Report, yet the authors of the Report clearly state, "The literature we reviewed does not provide sufficient

[278] Draft Connectivity Report at 5-3,5-5 (emphasis added).
[279] 67 Fed. Reg. at 8,455.
[280] 79 Fed. Reg. at 22,196.
[281] Id. at 22,263.

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information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings [i.e., non-riparian area and non-floodplain waters].”[282] Adding to the contradiction, the Agencies cite verbatim the draft Connectivity Report statement regarding the lack of sufficient information to generalize about the impact of non-floodplain wetlands on downstream waters in Appendix A of the proposed rule.[283] By disseminating contradictory information, the Agencies have only added to the confusion surrounding the proposed rule. Indeed, this information is neither accurate nor clear and thereby violates the IQA.[284]

The supposed peer review of the draft Connectivity Report was hijacked.

The agency’s IQA guidelines typically require the use of the “best available science” that relies on “peer-reviewed studies with data collected by standard and accepted methods.” Under both OMB’s and EPA’s Information Quality Guidelines, information that has been subject to formal peer review is presumed to be of sufficient quality to meet the test of objectivity under the guidelines. This requirement bolsters EPA’s Peer Review Policy that generally requires independent peer review of all scientific or technical work products that are used to support a significant rulemaking such as establishing nationally-applicable definition of waters of the United States.

Unfortunately, although EPA assembled the SAB panel to review and provide input on the draft Connectivity Report, the limited scope of the panel’s review, EPA’s reluctance to revise its charge questions, and the Agency’s refusal to address the additional questions posed by Members of Congress only ensured that the peer review would not be credible. As a result, much, if not most, of the scientific, technical, and economic information being disseminated by the Agencies in this rulemaking proposal, including the draft Connectivity Report and Economic Analysis does not meet the information quality guidelines and has not been independently peer reviewed.

The Economic Analysis the Agencies use to support the proposed rule does not meet the “objectivity” requirement of the IQA and is of limited utility.

According to the IQA, “‘objectivity’ involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.”[285] Unfortunately, the information disseminated in the Economic Analysis is biased and far from objective. First, EPA only reviewed how the proposed rule would change jurisdiction and costs associated with the “other waters” category relative to current regulatory policy. In an exercise, the Corps performed a sample review of project files from the Corps’ Operation and Maintenance Business Information Link Regulatory Module (ORM2) database’s “isolated waters” category. The Agencies did not do a similar sample review to determine how jurisdiction might change

[282] Draft Connectivity Report at 1-10, 1-11.
[283] 79 Fed. Reg. at 22,225.
[284] See 67 Fed. Reg. at 8,459 (Information disseminated by any federal agency must be “presented in an accurate, clear, complete, and unbiased manner”).
[285] Id. at 8,459.

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for other jurisdictional categories of waters (i.e., "tributaries" or "adjacent waters," as newly and broadly defined). The economic impacts associated with these categorically jurisdictional waters are omitted from EPA's analysis. Second, EPA biased the analysis by using an incorrect baseline to estimate the economic impacts of the proposed rule. In the preamble, the Agencies claim that because "this proposed rule is narrower than that under the existing regulations . . . fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations," and "[a]s a consequence , this action . . . will not have a significant adverse economic impact on a substantial number of small entities . . ."[286] The "existing regulations" that the Agencies reference here is the 1986 rule defining "waters of the United States."[287]2 Yet, in EPA's Economic Analysis, the Agencies assess the regulation with respect to current practice under the 2008 Rapanos Guidance and determine the rule will increase CWA jurisdiction by approximately 3%. The Agencies' claims in the preamble and the Economic Analysis contradict one another. The proper baseline from which to assess the proposed rule's economic impact, as guidance from OMB's Office of Information and Regulatory Affairs (OIRA) substantiates, is that of current practice. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis and states that "[t]he baseline should be the best assessment of the way the world would look absent the proposed action."[288] The 1986 regulation has been abrogated by both SWANCC and Rapanos and is no longer in use. Indeed, the Agencies are currently operating under guidance issued in December 2008, which sought to bring jurisdictional determinations in line with these cases.[289] By using the 1986 regulation as the baseline to certify the proposed rule will not have a significant economic impact on a substantial number of small entities grossly underestimate the costs associated with the proposed rule. Third, EPA biased the economic analysis of CWA Section 404 costs by relying on permitting cost data that are nearly 20 years old and not adjusted for inflation. It likewise has provided incomplete information, as EPA admits that the costs of time delays and avoiding and minimizing impacts is not included. Ultimately, the biased nature and the use of incomplete data in the Economic Analysis fail to render it useful in supporting the proposed rule. In a review of EPA's Economic Analysis of the proposed rule, Dr. David Sunding highlighted the limited utility of the study, stating, "the errors and omissions in EPA's study are so severe as to render it virtually meaningless."[290]

The Agencies have disseminated off the record information in the form of blog posts and Q & A's that add to the confusion surrounding the proposed rule and are of limited utility.

During the public comment period, the Agencies have published official agency blog posts and posted multiple Q and A's about the proposed rule. This information has, at times, been at odds with the information in the proposed rule itself, has been revised

[286] 79 Fed. Reg. at 22,220.
[287] 51 Fed. Reg. at 41,206.
[288] Office of Management and Budget, Circular A-4, Subject: Regulatory Analysis (September 17, 2003) at 15, available at http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf
[289] See 2008 Rapanos Guidance.
[290] Sunding Review of EPA's Economic Analysis at 2.

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without explanation, or has provided new statements and definitions regarding the scope of jurisdiction under the CWA that are not included in the rulemaking documents.

For example, following the release of USGS maps developed for the EPA and depicting the extent of perennial, intermittent, and ephemeral streams across the United States,[291] Tom Reynolds, EPA Associate Administrator of the Office of Public Affairs, stated in a blog post entitled "Mapping the Truth," "EPA has never and is not now relying on maps to determine jurisdiction under the Clean Water Act . . . While these maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or ever."[292] And yet, the preamble of the proposed rule states that "tributary connection[s] may be traced using . . . U.S. Geological Survey maps . . ."[293] These two statements are in direct conflict with one another, leaving the public and the regulated community unclear as to how EPA and Corps use existing USGS maps to help determine CWA jurisdiction.

In another official EPA blog post, Nancy Stoner, then Acting Assistant Administrator for the Office of Water, originally wrote, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations." Now, without any indication or notice that the June 30 Q & A document has been revised, the blog post no longer contains that statement. Have the Agencies changed their position on grandfathering? Will existing jurisdictional determinations be grandfathered or will they not be? In September 2014, EPA posted a Q & A about the proposed rule on its website. In the document, EPA defines "upland" and stresses that MS4s and green infrastructure features are not waters of the United Yet, none of this information is included in the proposed rule itself. What then is the utility of this document? Indeed, it carries no regulatory clout.

Ultimately, by making available blog posts and Q and A documents that contradict language in the proposed rule itself, change without notice or explanation, and add critical new information regarding the scope of CWA jurisdiction, the Agencies have disseminated information that does not paint an "accurate, clear, [and] complete" picture as required by the IQA. What's more, if these are intended to be influential pieces of information regarding CWA jurisdiction, they will be of limited utility unless included in the proposed rule.

The collection and evaluation of data is the cornerstone to developing and implementing any meaningful and legitimate regulation. Likewise, those data must be of sufficient quality and transparency that the public can provide meaningful input and comment during the rulemaking process. In fact, the Obama Administration has taken great strides to improve the transparency quality and legitimacy of the data and information upon which regulations are based.

[291] See http://science.house.gov/epa-maps-state-2013#overlay-context
[292] Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), available at http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/
[293] 79 Fed. Reg. at 22,202.

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Unfortunately for the proposed rule, the Agencies have failed on all counts. Because of the significant and persistent violations of the IQA, the entire rulemaking is in jeopardy. These countless failings must be corrected before the Agencies contemplate any final rule. (p. 163 – 168)

Agency Response: **See section 13.4 for information on Other Federal Laws.**

The Information Quality Act (IQA), sometimes referred to as the Data Quality Act, was enacted in 2000 and directed the Director of the Office of Management and Budget (OMB) to issue guidelines providing policy and procedural guidance to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by Federal agencies. Each Federal agency was then required to issue its own guidelines modeled after those issued by OMB. OMB published its flexible, government-wide guidelines on February 22, 2002. EPA issued its Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (Guidelines) in October 2002, to provide non-binding policy and procedural guidance to achieve the purposes of the IQA. Under the Guidelines, EPA ensures and maximizes the quality of information it disseminates by implementing well established policies and procedures within the Agency as appropriate to the information. The Agencies have fully complied with the IQA.

The Agencies disagree with the commenter's suggestion that the draft Connectivity Report is incomplete, biased, contradictory, or lacking in transparency. The Agencies also disagree with the commenter's suggestion that the Connectivity Report was not subjected to adequate peer review. For information about how EPA ensured the quality of the Connectivity Report, including information about the peer review process, see EPA's responses to comments in Compendium 9.

With respect to the commenter's concerns about the Economic Analysis, see response to comments in compendium 11 – 11.3.1. The Agencies do not believe the Economic Analysis failed to consider economic impacts of the proposed rule associated with categories of waters from the Corps' Operation and Maintenance Business Information Link Regulatory Module (ORM2) database. The ORM2 database is a collection of jurisdictional determinations the Corps has made typically in response to landowner requests. The database does not assess the jurisdiction of waters nationwide. As explained in the Economic Analysis, ORM2 records may be placed into three groups: streams (ORM2 categories of traditionally navigable waters, relatively permanent waters, and non-relatively permanent waters), wetlands (associated with the various above categories of streams), and other waters. Of the jurisdictional determinations in that database, approximately 68% are categorized as streams, 27% are categorized as wetlands, and 6% are categorized as other waters. To provide a conservative impact estimate, the Agencies assumed only for the purpose of that analysis that under the rule 100% of the jurisdictional determinations for streams and wetlands would be positive.

The Agencies disagree with the commenter's assertion that the Economic Analysis used an incorrect baseline to estimate economic impacts. For more information

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about the Economic Analysis, the baseline used to estimate economic impacts, costs associated with CWA Section 404, see EPA's responses in Compendium 11.

The Agencies further disagree with the commenter's suggestion that EPA's Associate Administrator of the Office of Public Affairs made statements concerning maps that contradict language in the preamble of the proposed rule. Maps are one tool that may help improve our understanding of our nation's waters. Jurisdictional determinations informed by site-specific features, and are typically made on a case-by-case basis based on a request from a permit applicant or landowner. For more information about maps, see EPA's responses in Compendium 9.

With regard to the commenter's suggestions concerning EPA blog posts and question-and-answer documents, this information was intended to provide further clarification. To help inform the public regarding the proposed rule, during the public comment period the EPA had taken steps to translate the legal language and scientific principles of the proposed rule into easier-to-understand communications documents. This is a common practice for any major regulatory action taken by the EPA or any other federal agency. Such documents were used to help explain the proposed rule to the regulated public but did not substitute for it. Jurisdictional determinations are being made now under existing Corps and EPA regulations and guidance, and applicable case law, not under the proposed rule. Upon issuing the final rule, the agencies' regulations and guidance, the Act, and applicable case law will continue to provide the legally binding criteria for CWA jurisdiction. For more information about definitions in the rule, see EPA's responses to comments in Compendium 9.

American Petroleum Institute (Doc. #15115)

13.450 As if those two challenges were not enough, throughout the comment period, the Agencies have continued to offer different and conflicting jurisdictional interpretations – often without calling attention to the changes or uploading them into the rulemaking docket. While the economic analysis accompanying the release of the Proposed Rule clearly indicated an increase in jurisdiction, blogs and statements by key EPA administrators have begun to claim the Proposed Rule would actually be a decrease in jurisdiction. They have never once explained how this could be true, and it is impossible to reconcile that statement with the facts contained in this report. A supposed example of "enforcement challenges" that the Rule was intended to address has been removed without explanation as to what has changed. Additionally, the Q&A document posted on EPA's website has changed in several wholly inconsistent ways between June and September. Stakeholders have been placed in the position where they not only need to monitor the docket, but also to track blog posts and ad hoc statements for definitions of regulatory terms that may change without notice at any time. (p. 51)

Agency Response: **For information on economic analysis see compendium 11.**

13.451 2.2 EPA's changing and often conflicting analyses of jurisdiction under the Proposed Rule precluded stakeholders from developing accurate, quantifiable alternative economic impact assessments.

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Throughout the rulemaking process, EPA has used a number of different analyses which create a moving target for commenters:

- In March 2014, the Agencies' original impact analysis entered into the rulemaking docket estimated that "the proposed rule increases overall jurisdiction under the CWA by 2.7 percent."[294]
- In June 2014, an EPA blog entry noted that "[T]he rule protects fewer waters than prior to the Supreme Court cases."[295] The economic impact analysis was not amended, nor did the blog explain how both the increase predicted in the rulemaking docket and the blog entry could both be true.
- In July 2014, EPA Administrator Gina McCarthy noted that, "EPA feels confident that, under this proposal, fewer waters will be jurisdictional than under President Reagan."[296] Again, the economic impact analysis was not amended, nor did the blog explain how both the increase predicted in the rulemaking docket and the blog entry could both be true.
- In September 2014, the Agencies' Q&A document used a wholly different calculation to support "the proposed rule reflects a substantial reduction in waters protected by the CWA [when compared to the Agencies' existing regulations]."[297]

Another example of the lack of consistency and clarity concerns the Agencies' Q&A document originally released on June 30, 2014 and linked to in a blog by Nancy Stoner admitted to or provided notice for revising the Q&A document, the blog now links to a new Q&A document containing abbreviated information and revised responses. Table 2-2 illustrates the confusion caused by some of these pivotal, conflicting, and unexplained changes.

Table 2-1 Illustrating Key Changes in the Agencies' June and September Q&A Documents

Topic	June Q&A	September Q&A	Resulting Question
Under the heading "The Proposed Rule does NOT mean that previous decisions about jurisdictions will have to be revisited."	"Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not review existing valid determinations."	The entire section has vanished – including the statement about existing jurisdictional determinations	Have the Agencies changed positions on revising previous determinations?
Ordinary High Water Mark (OHWM)	"Features that flow extremely rarely would not exhibit these characteristics and would not be jurisdictional."	"Water features that don't flow frequently enough or with enough volume to exhibit these characteristics would not be jurisdictional."	Different meanings, possibly not accurate with other interpretations of the rule. Have the Agencies changed their position?

[294] EPA and the Corps, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 12 (March 2014), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-003.
[295] Nancy Stoner blog entry, "Setting the Record Straight on Waters of the U.S." (June 30, 2014).
[296] Remarks of Gina McCarthy at Agricultural Business Council of Kansas City on Clean Water Proposal (July 10, 2014), available at http://go.usa.gov/xmvh.
[297] Sept. Q&A at 3.

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Concerning the first topic in Table 2-2 - notwithstanding the EPA' remarkable assertion that the Proposed Rule will result in fewer jurisdictional waters than before the Supreme Court cases - and even with an influx new jurisdictional determinations to be made based on the detailed provisions of the Proposed Rule, the Agencies assert that the Proposed Rule will result in a 2.7 percent increase in jurisdictional waters strictly based on a database of jurisdictional determinations made after the Supreme Court cases means that a number of previous jurisdictional determinations will be reversed.

The Agencies' estimate of increased jurisdiction under the Proposed Rule directly contradicts the Agencies' deleted Q&A response that all previous jurisdictional determinations, including determinations of no jurisdiction, will be honored. Yet landowners have already made land use decisions based on those determinations of no jurisdiction. To now require these landowners to reverse their land use decisions and effect environmental restoration would be burdensome, unreasonable, and unfair. The Agencies should explicitly state that no previous jurisdictional determinations will be reversed under the Proposed Rule and that existing land use decisions based on prior jurisdictional determinations will not be overruled by the Agencies.

Concerning the second topic in Table 2-2, the Corps issued in August 2014 its comprehensive guidance on the definition of ordinary high water mark.[298] The late example of the Agencies' inconsistency and moving target for critical definitions necessary for proper understanding and implementation of the Proposed Rule. This guidance should have been issued prior to the Proposed Rule and the Proposed Rule's definition of OHWM based upon it. Moreover, the descriptive language in the Agencies' Q&A such as "features that flow extremely rarely," and "waters that don't flow frequently enough or with enough volume," are so nebulous, case-specific, and lacking in context, that they are essentially meaningless. (p. 52 – 55)

Agency Response: **For information on economic analysis see compendium 11.**

Illinois Coal Association (Doc. #15517)

13.452 B. The Proposed Rule is a significant impingement on States' traditional and primary power over land and water use, and thus raises serious federalism questions.

Expanding federal jurisdiction from navigable to isolated waters would mark a serious encroachment upon traditional powers of the states, and runs afoul of basic constitutional limits on federal power. Indeed, the Supreme Court has long been wary of agency interpretations that would infringe upon the states' "traditional and primary power over land and water use." See e.g., *SWANCC*, 531 U.S. at 174, citing *Hess v. Port Authority Trans Hudson Corporation*, 513 U. S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). As highlighted by Justice Rehnquist in SWANCC, federal courts view agency actions through the lens of a "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." 531 U.S. at 173. This concern over, and respect for,

[298] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/west_mt_finalsupp_aug 2014.pdf and http://acwc.sdp.sirsi.net/client/search/asset/1036026

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federalism "is heightened where the administrative interpretation alters the federal/state framework by permitting federal encroachment upon a traditional state power." Id., citing United States v. Bass, 404 U. S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). This altering of the federal-state framework due to an encroachment upon a traditional state power (i.e., regulation of non-navigable, isolated state waters) is precisely what would result from the Proposed Rule if adopted as written. The federal judiciary's clear preference for avoiding such an outcome should send a strong signal to the Agencies about how the Proposal would likely viewed on appeal. Indeed, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Id., quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Col1Str. Trades Council*, 485 U. S. 568, 575 (1988). The result of this Proposal would be "plainly contrary to the intent of Congress." (p. 16 – 17)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

13.453 b. Lack of Compliance with Executive Order 13,132 (EO) dated August 4, 1999, entitled "Federalism."

The purpose of this EO is to ensure that rulemakings and policies with "…substantial, direct effects on states…"[299] are steered by specific basic standards, including being deferential to the States when taking action that affects the policymaking discretion of process, with State and local officials on policies that have federalism implications.

In the preamble[300], the agencies indicate the proposed rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." However, PACA, as well as the Pennsylvania Department of Environmental Protection, strongly disagrees. (See comments submitted by Kelly Jean Heffner, Deputy Secretary, Office of Water Management, PA Department of Environmental Protection.)

The proposed rule should be withdrawn, and the agencies should consult with all States prior to re-proposing.

c. Transparency is missing in the proposed rulemaking. President Obama stated to the nation his desire for his Administration to be open and transparent--encouraging the public, state, and local participation in the creation of policy and instructing agencies to take steps to ensure that the government is transparent, participatory, and collaborative.[301] Yet EPA and the Corps did not solicit public participation in the development of the

[299] 64 FR 43255.
[300] 79 FR 22220.
[301] Memorandum by President Barack Obama on Transparency and Open Government to the Heads of Executive Departments and Agencies (Jan. 21, 2009), found at: http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

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proposed rule. If the Agencies were truly interested in crafting a rule in a transparent manner, they would have reached out to identify stakeholder concerns prior to developing a proposed rule. Instead, outreach was conducted on a rule that was first developed within the two Agencies. Furthermore, in response to ongoing public outcry, the Agencies merely state over and over that this proposed rule is not broadening the scope of jurisdictional waters. (p. 2 – 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Nebraska Cattlemen (Doc. #13018)

13.454 b. The proposed rule unlawfully expands the scope of federal agency jurisdiction under the CWA through the use of broad and ambiguous terminology; by improper application of the "significant nexus" test for determining CWA jurisdiction according to Rapanos v. United States, 547 U.S. 715 (2006); by usurping the cooperative federalism tenants laid out in the CWA; and through the illegal regulation of groundwater.

i. Unlawful expansion of federal agency jurisdiction under CWA through the use of broad and ambiguous terminology.

As discussed in detail in Section I. there are countless terms and phrases within the proposed rule that are not adequately defined or defined at all. What this provides to EPA is practically limitless authority to assert jurisdiction over thousands, if not millions, of new water features and land uses creating only more confusion for farmers and ranchers. Two additional overly broad terms include "tributary" and "adjacent."

The proposed rule, under the claim of clarifying CWA jurisdiction, is determining, for the first time, that the following will always be jurisdictional:

- All "tributaries", including any water (wetlands, lakes, and ponds) that contribute flow, either directly or through another water, to downstream traditional navigable waters, interstate waters, or territorial waters.
- All waters "adjacent" to such tributaries. "Adjacent" is broadly defined to include all waters located within the "riparian area" or "floodplain" of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

The proposed rule does codify existing policies and categorically exempt areas from federal CWA jurisdiction in a specific listing of the policies and areas. However, the net effect of the proposed rule is that never before regulated smaller and more remote upstream bodies of water will fall with certainty within federal CWA jurisdiction. It is the position of Nebraska Cattlemen that the proposed rule has expanded the jurisdiction of the CWA to waters that the Supreme Court has ruled are beyond its scope.

Nebraska is comprised of over 77,000 square miles of area with over 92 percent of that area used for agricultural purposes. From west to east, the State moves from low precipitation high plains to higher precipitation grasslands in the east. There are an infinite number of scenarios that call for good judgment in determining whether or not a particular water body is or should be subject to federal CWA jurisdiction. This rule would impose a blanket jurisdictional determination over thousands of acres of private

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property. The effect would be to impose illegal and unnecessary property restrictions and uncertainty as to what that actually means to a farmer or rancher.

Much of the cause for unlawful expansion of jurisdiction is due to the broad scope of definitions contained in the proposed rule. The definition of "tributary" is overly broad. As proposed, the definition is a land feature which has two banks, a bed and a high water mark. The land feature does not lose its tributary status if there are man-made breaks (bridges, culverts, etc.) so long as the bed and bank can be identified upstream and downstream of the break. And, a tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).

In direct contradiction to this definition the proposed rule also states, a tributary need not even have two banks, a bed and a high water mark if the water feature contributes flow directly or through another water to a traditionally navigable water. (Proposed rule at 22241). The definition also goes on to include isolated water features that might somehow be connected through groundwater to a traditionally navigable water. Lastly, EPA has entirely excluded any consideration of flow or impact to traditionally navigable waters, by including in the definition of tributaries intermittent and ephemeral streams. (Proposed rule at 22206). Clearly the plain sense reading of the definition of tributary is virtually limitless in its jurisdictional application.

There are many examples in Nebraska of waterways that have a bed and bank and a high water mark but only run during precipitation events. And, unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Many rarely, if ever, have flow that actually reaches a flowing stream. This is especially true in the more arid western part of the state. Also, there are thousands of miles of "ditches" in Nebraska constructed either as part of public and private roadways or are on the land for various reasons to help direct water flow during storms or wet periods. To include these features as being subject to federal jurisdiction is unlawful and will have little or no positive impact on water quality.

The Supreme Court has clearly articulated there is a limit to CWA jurisdictional authority. This limit is the commerce clause, the term navigable and a finding of "significance" in impact to traditionally navigable waters. See SWANCC v. Army Corps of Engineers, 531 U.S. 159 (2001). In SWANCC the Court pointed out the authority of the "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute." Id. at 172.

"[It] is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Id.

Furthermore, when making determinations of what waters are jurisdictional for purposes of the CWA outside the scope of traditionally navigable waters the Supreme Court has always indicated that not just any tenuous connection will suffice. "It is the significant nexus…that informed our reading of the CWA." *SWANCC v. Army Corps of Engineers*,

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531 U.S. 159, 167 (2001). This ""significant nexus" [or degree of impact of a connection] to waters that are or were navigable in fact or that could reasonably be so made" is required. *Rapanos v. Army Corps of Engineers*, 547 U.S. 715, 759 (2006).

Not only would "tributaries" be categorically subject to federal CWA jurisdiction but also any "adjacent" waters will be automatically jurisdictional as well. Adjacent waters include "neighboring" waters to tributaries. Neighboring waters are those that are located within a "riparian area" or "floodplains" or waters with a surface or shallow subsurface connection. In Nebraska, there are many areas that are flat and the state has many miles of rivers and streams. Therefore, many of Nebraska's rivers and streams have extensive riparian and floodplain areas. Looking at the plain meaning of these definitions, Nebraska Cattlemen have deep concerns that many areas of the state will be categorically defined as jurisdictional waters. If enacted as proposed, the interpretation of these definitions will be immensely important. The literal interpretation would be that a tributary (which is merely a discernible bed, bank and high water mark) and all of the adjacent riparian areas and floodplains would be under CWA jurisdiction.

Again, this interpretation of "adjacent" runs afoul of the CWA and Supreme Court rulings which does not allow EPA to assert jurisdiction over every open water in a floodplain and riparian area if they are isolated and do not have a significant connection to traditionally navigable waters. Justice Kennedy in his concurring opinion in Rapanos stated "…the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statutes does not extend so far." *Rapanos v. Army Corps of Engineers*, 547 U.S. 715, 778 (2006).

EPA should withdraw the proposed rule and re-propose the rule with definition of tributary and adjacent that is in line with the CWA and Supreme Court case law. Nebraska Cattlemen comment that these definitions should be narrowed to require that there is water flow present in a tributary at least a majority of the time to trigger jurisdiction. Or, provide some test that allows for the field personnel to exclude tributaries that only rarely contribute to the water quality of the identified traditionally navigable water. Nebraska can provide many examples of tributaries that, even at their glory, do not contribute to water quality impacts of any navigable water. (p. 8 – 11)

<u>Agency Response:</u> See section 13.2.5 summary response for information regarding Federalism. For information on adjacent waters and tributary, see the comment responses in compendiums 3 and 8 respectively.

Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

13.455 iii. Unlawful expansion of federal agency jurisdiction by usurping the cooperative federalism tenants laid out in the CWA.

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

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Clearly, states have an important and congressionally recognized role to play in water quality regulation. Unfortunately, EPA's proposed rule unlawfully expands their authority by obliterating this federal-state partnership and claiming all waters as subject to federal agency jurisdiction. As discussed previously, the proposed rule makes federal agency jurisdiction over waters for purposes of the CWA limitless. This violates the text and spirit of the CWA itself. If Congress intended for the federal government to regulate all waters under the CWA why would it have included language such as that above?

To further articulate this point Nebraska Cattlemen would like to point out a serious concern that the attempt to fix the §404 problem creates many more problems under other sections of the CWA. If enacted as proposed, the definition of "waters of the United States" would affect the scope of all provisions of the CWA that use the term. This would include the §402 National Pollutant Discharge Elimination System (NPDES) permit program; the §303 water quality standards and total maximum daily load programs; the §401 state water quality certification process; and the §311 oil spill program. As noted earlier, the Existing Guidance (the model for this rule) was limited on its face to §404 determinations and had no practical impact on the other sections listed above. By essentially overlaying the Existing Guidance (as modified by the proposed rule) on these other sections, EPA will create significant cost, confusion, increase unnecessary bureaucracy, infringe on state programs, and expose agricultural producers to new liability.

The reason that there is a difference in use and application of the same definition in the CWA is easily explained. Other than the §404 program and the §311 oil spill program, the CWA is essentially administered by the states with delegated programs. All but a handful of states have CWA programs delegated to them. In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has been delegated all CWA programs other than §404 and §311 since the mid-1970s. In order to have an approved program, EPA must determine the state's laws are consistent with the CWA. That would include an evaluation of the state equivalent definition of water bodies covered. In Nebraska, the definition of "waters of the state" is found in Neb. Rev. Stat. §81-1502(21) which was reviewed and approved by EPA. The wording of that definition is not identical to the wording of the definition of "waters of the United States" in the CWA. In fact, the wording is quite different. Wisely, Congress allowed states to craft their programs to be the most fitting to the state so long as the provisions were at least as stringent as the federal counterpart. The concept was one of "cooperative federalism" in which the federal government sets the broad goals and individual states reach the goals in a manner most appropriate for its citizens and based on its physical characteristics.

As a result, NDEQ has administered the §401, §402 and §303 programs using its unique "waters of the state" definition for nearly forty years. NDEQ has applied that definition to literally thousands of permitting decisions without ever once referring to the Existing Guidance. During those forty years, NDEQ's decisions have been overseen by the EPA and have been in accordance with the CWA. For agriculture in Nebraska, there is an understanding of what a "water of the state" is and is not based on four decades of interpretation by NDEQ. Also, to Nebraska Cattlemen best knowledge, EPA in administering §311 does not utilize the Existing Guidance document itself but advises producers to decide if a spill could "reasonably be expected" to reach water (EPA SPCC

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Fact Sheet: Information for Farmers, January 2014). However, the imposition of the proposed rule would create uncertainty, expansion of jurisdiction, and exposure to new liability for Nebraska producers. In addition, the federal encroachment of what is now a state delegated program runs counter to the concept of "cooperative federalism" which is a tenet of federal environmental programs.

Currently, the §402 program most impacts Nebraska agriculture in permit requirements for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by NDEQ since that time. NDEQ's program is to observe an operation to determine if waste or runoff has the potential to impact waters of the state. If there is a potential to impact water quality then the producer must either change the operation to avoid the potential impact or control the waste and runoff such that it will not impact water quality. Many producers, especially small producers, have been able to modify their operation or construct mitigating landscape features (water diverting berms or waterways, for example) to avoid impacting waters of the state. Likewise, producers have been constructing livestock waste control facilities under state permits. These are state construction standards for engineered facilities to handle all waste and it is common to use land application of waste as part of the operation. All decisions on these program features have relied on the state definition of regulated water bodies for forty years. In addition, many producers have gone through the NPDES permitting process and are currently operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water.

Again, this will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program infringes states' rights and runs counter to the concept of "cooperative federalism". (p. 12 – 14)

<u>Agency Response:</u> The commenter explains how the State has used the same definitions of waters of the state for several decades. The federal regulations in effect since 1986, however, have a broader scope than this regulation. It has only been since 2001 and the SWANCC discussion, and subsequently Rapanos in 2006, that uncertainty has existed as to the scope of federal jurisdiction. Because states with permitting authority under section 402 must define waters at least as broadly as the federal program, the longstanding definition in the State should have been broader than under the new regulation. Regarding the concerns about this definition applying to all programs, there is only one definition of waters of the

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United States, and it applies to all sections of the statute whose scope is tied to this term.

13.456 In Nebraska, farmers and ranchers have rarely been subject to NPDES permits other than the livestock program (and the recent pesticide permits which will be discussed later). The expansion of the definition to categorically include tributaries and waters adjacent to tributaries takes in many new types of waters and land features. It is an additional concern that the Interpretive Rule treatment of "normal farming" activities does not apply to sections other than §404. That creates a question mark and added confusion over what differences there would be between §404 and the rest of the Act as it relates to the farming exemptions. Many of the questions that have long ago been answered or understood will now be at issue again. For example, if a farmer or rancher incidentally deposits fertilizer into a ditch or ephemeral stream we know that most likely we are not dealing with a "point source discharge to waters of the United States" because the area has not been deemed jurisdictional and this normal farming activity would be exempt under the Act. With the proposed change, this same incident could occur in a categorically determined jurisdictional area and not be considered "normal farming" activity. This increased confusion and uncertainty is not necessary. Again, the Nebraska definition of waters of the state is in place and has been implemented for forty years in a rational fashion. There is no problem that needs to be fixed in Nebraska.

The recent need to establish a process to obtain coverage for pesticide applications "on or near" water creates another point of potential turmoil if the proposed rule is adopted. The National Cotton Council decision caused much confusion on how states would issue permits for application of pesticides on or near water bodies. NDEQ developed and issued a General Permit with cooperation from the Region VII office of EPA. The General Permit is appropriate for Nebraska's varying conditions. It may not, however, cover all of the expansion of categorical federal jurisdiction and "other waters" as contemplated in the proposed rule. Nebraska Cattlemen is directly impacted by this issue and comment that the State has adequately addressed any concern here.

In summary, an expansion of CWA jurisdiction and an overlay of §404 decision-making process to §402 is not only unlawful, it does not make sense. The State of Nebraska has developed a surface water discharge permitting system that is now built on forty years of implementation. Do not fix what is not broken. Do not expose producers to liability and uncertainty by drastically changing the NPDES program with an unlawful expanded federal definition.

NDEQ has also administered the §401 and §303 programs since delegation in the 1970s. The impact on §401 will be an increase in the number of certifications that the State will need to issue because there will be more federal actions to trigger certification needs. This may add more bureaucracy, time, and red tape to the existing process. Nebraska Cattlemen comment that this increase in the resources of state government will raise the NDEQ's budget and potentially state taxes.

The §303 program will be impacted by the increased number of water bodies subject to water quality standards. The NDEQ has been monitoring and assessing water bodies for forty years based on its interpretation of the state definition of waters of the state. EPA has approved the state program and, thus, has approved the definition. The addition of

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more water bodies will add to the state burden without additional resources which will lead to the need for more state resources. In addition, the water bodies that are subject to state assessment will also need to be evaluated to determine if they meet an assigned beneficial use. If the beneficial use is not being met, the water body may be impaired and need to be listed on the §303(d) list of impaired water bodies. That would trigger the requirement that a total maximum daily load (TMDL) be prepared which lays out "reasonable assurances" to bring the water body out of impaired status.

Nebraska Cattlemen comment that additional TMDLs will put additional burdens on producers. If EPA's expanded jurisdictional reach is realized under the propose rule, TMDLs may be written that include reasonable assurances that incorporate regulatory controls over newly defined CWA waters. Under the "other waters" definition, there could be entire watersheds that are subject to TMDLs. Nebraska Cattlemen comments that it is an unwarranted reach of regulatory authority beyond the intent of the CWA or the holdings of the Supreme Court.

The federal encroachment into the §303 process is another illustration of the erosion of cooperative federalism. NDEQ has developed a successful model of a voluntary process whereby priority watersheds can be protected using state, local, and federal resources to leverage private investment. There have been very successful efforts in Nebraska and around the country that are collaborative watershed projects using state, local, federal, and private (agricultural producers and land owner) resources. If these same efforts had been under a mandatory regulatory program, the results would have been much less successful. In fact, an unintended consequence of this proposed rule would be to create a disincentive for producers to install conservation measures at their operations. Why install conservation terraces if there is a question as to how that land feature will be viewed under the new rule? Why would a producer voluntarily try new conservation practices if they would raise the jurisdictional issue and potentially require a permit?

Another significant concern of Nebraska Cattlemen is the effect of the proposed rule on the §311 oil spill program. Due to the expanded jurisdiction to include tributaries and water adjacent to tributaries and other waters, there will be more instances of the need to prepare a Spill Prevention, Control, and Countermeasures Plan (SPCC) plan. Currently, the EPA Fact Sheet advises producers to determine if a spill would "reasonably" reach water to decide if the operation needs a plan. With the blanket categories of jurisdictional waters that would be subject to CWA jurisdiction, that rule of thumb would surely change. Many producers would have to assume that they would need a SPCC plan since the jurisdictional question would be so far reaching and unpredictable. Nebraska Cattlemen comment that this change will place an additional burden on producers and create additional liability exposure without additional benefits to water quality.

Any change to the interpretation of "waters of the United States" should focus only on §404 where many problems currently exist. The other sections of the Act are largely administered by the states and no business case has been made for a need to change this area of the Act. In addition, without any limit to federal jurisdiction under the proposed rule EPA has also illegally usurped the federalism principles laid out in the CWA and should withdraw the proposed rule and re-propose a rule that takes in to account states' rights. (p. 14 – 16)

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Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on economic analysis see compendium 11.**

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

Moreover, the rule does not affect the "normal farming" exemptions and the interpretive rule was withdrawn at Congressional direction.

North Dakota Soybean Growers Association (Doc. #14121)

13.457 Executive Order 13132 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 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 with the rule-development process. (p. 6)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Western Growers Association (Doc. #14130)

13.458 B. Proposed Rule has not Adequately Involved the States

Western Growers also believes that the proposed rule should be withdrawn since the EPA and Corps have failed to properly engage and consult with state and local authorities in constructing this proposal. When Congress passed the Clean Water Act in the early 1970's, they clearly envisioned an active cooperation between the states and the federal government.[302] Commenting on this aspect of the law the Supreme Court wrote: "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: to 'restore and maintain the chemical, physical, and biological integrity of the nation's waters.'"[303]

The Clean Water Act is replete with this vision of federalism. In creating the Act, Congress made federal money available to states contingent upon the creation of a regulatory 1 scheme that is at least as stringent as the federal minimum standards, although states may / tailor water quality criteria to local needs, implement their own pollutant discharge elimination systems, and enforce their own administrative rules.[304] In section 303, the law provides states with the primary responsibility to establish, periodically review, and revise water quality standards, and the EPA only has a review

[302] Id.
[303] Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251).
[304] See 33 U.S.C. §§ 1251-1887

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function.[305] This strong federalism structure even extends into section 402 where states also may assume primary enforcement and administration of the National Pollutant Discharge Elimination System ("NPDES") program for discharges of pollutants other than dredged or fill material.[306]

It is clear from the statute, and reinforced in numerous court rulings, that Congress wrote the Clean Water Act with federalism foremost in its mind. Unfortunately, in constructing this proposed "waters of the United States" rule EPA and the Corps seem to have ignored these most basic principles of state and local government involvement. In fact, numerous states have written that they have not been involved in the formation of this rule and object to this rule moving forward without EPA and Corps reopening the rulemaking process to ensure their input is more directly heard. In testimony before the Senate Interior Appropriations Committee, the bipartisan Western Governors Association commented on this issue writing:

> WGA is concerned that states were insufficiently consulted in the development of this proposal and played no role in the creation of the rule, which has such major implications for states. Congress intended that the states and EPA would implement the CWA in partnership, delegating authority to the states to administer the law as coregulators with EPA. Accordingly, WGA encourages congressional direction to EPA to engage the states in the creation of rulemaking, guidance, or studies that threaten to redefine the roles and jurisdiction of the states. State water managers should have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the Clean Water Act or similar statutes.[307]

Western Growers agrees with this position and argues that the states cannot be effectively engaged unless this rule is abandoned and the process is re-initiated with state and local authorities engaged in the formative development of these definitions. (p. 8 – 9)

Agency Response: See section 13.2.5 summary response for information regarding Federalism.

Tennessee Farm Bureau Federation (Doc. #14978)

13.459 In this proposed rule, where is the cooperative federalism Congress envisioned between the Agencies and the state of Tennessee? We do not find it in this proposal. Congress said: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." (33 U.S.C. 3 1251(b)). This proposal seeks to regulate land use throughout the state and water resources that belong under the jurisdiction of Tennessee's Water Quality Control Act of 1977. Tennessee's water quality statute says: "Recognizing

[305] 33 U.S.C. § 1313
[306] 33 U.S.C. §§1311(b)(2), 1342
[307] Western Governors' Association, Testimony of James D. Ogsbury, Executive Director to U.S. Senate Comm. on Appropriations, Subcomm. on Interior, Environment, and Related Agencies
May 23, 2014, page 3.

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that the waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state ...." (TCA 69-3-102(a)). What does this mean under this proposed rule? Based on this proposed rule, where does Tennessee have full jurisdiction over state waters and more importantly over the land use that could affect those waters? We cannot find that distinction between waters of the U.S. and waters of Tennessee. (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that.**

National Alliance of Forest Owners (Doc. #15247)

13.460 A. SWANCC and Rapanos Narrowed the Scope of Jurisdiction by Invalidating Attempts to Assert Jurisdiction Based on Migratory Bird Use and the "Any Hydrological Connection" Theory.

In the CWA, Congress defined "navigable waters" as simply the "waters of the United States."7 In SWANCC, the Supreme Court held that the Corps could not assert jurisdiction over an isolated pond based on the pond's use as migratory bird habitat. The Court reasoned that, although "navigable waters" does include at least some waters not traditionally deemed to be "navigable," it does not include non-navigable, isolated, intrastate waters. Allowing federal jurisdiction over an isolated pond based solely on the presence of migratory birds fails to give effect to the term "navigable" in the CWA's jurisdictional provision and also raises "significant constitutional and federalism questions."[308] (p. 4)

Agency Response: **The rule conforms the agencies' regulations to the SWANCC decision.**

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

13.461 Proposed rule raises federalism concerns and could impose direct and indirect costs. Under Executive Order 13132-Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis - Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2014)-contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the "waters of the U.S." definitional change docs have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (Page 2). (p. 2 – 3)

[308] 531 U.S. at 172, 164.

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Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on costs/benefits see compendium 11.**

Western States Water Council (Doc. #9842)

13.462 The WSWC's prior correspondence with EPA and the Corps expressed repeated concerns about the lack of significant state consultation in the development of the rule before its publication for public comment. While the WSWC remains concerned about the lack of state consultation in the rule's development, it has since participated in a series of calls with EPA and the Corps after the rule's publication for public comment. The WSWC appreciates your agencies' willingness to speak with the WSWC about the rule during these calls. The WSWC also appreciates the efforts of EPA Region 8 Administrator Sham McGrath and Region 8 Senior Advisor Joan Card in facilitating these discussions.

Nevertheless, there is still a significant need and opportunity for continued, sustained dialogue and consultation with the states in their revision and implementation of the rule, particularly on a state-by-state basis. Such consultation should treat states as co-regulators that are separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

One way to facilitate continued dialogue and consultation with the states would be to establish a state-federal workgroup between EPA, the Corps, and the states as your agencies work to revise and implement the rule. Although such a workgroup would be unlikely to reach a consensus on every issue, it would help facilitate the types of dialogue, collaboration, and relationship-building needed to create a more workable and effective rule. One possible model could be the workgroup EPA established with the Environmental Council of States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System electronic reporting rule. Consensus is not necessarily sought but individual state participants discuss their individual views with the federal agencies. The WSWC would welcome the opportunity to help develop and participate in a similar workgroup to review the CWA rule. (p. 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. The Agencies appreciate the suggestion of developing a state-federal workgroup to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.**

Western States Water Council (Doc. #11165)

13.463 Lastly, the Council reiterates its October 15 request for continued, sustained dialogue and consultation with the states in the revision and implementation of the rule, including any revisions undertaken in light of the SAB report. As the Council noted in its comments, the establishment of a state-federal workgroup between EPA, the Corps, and the states would be one way to facilitate the types of dialogue, collaboration, and relationship-building needed to create a workable and effective rule. (p. 2 – 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. The Agencies appreciate the suggestion of developing a state-**

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federal workgroup to provide local input on interpretation and implementation issues. Going forward, the Agencies will consider this suggestion.

Westlands Water District (Doc. #14414)

13.464 The states' traditional authority to regulate water is rooted in both constitutional and statutory principles. Under the equal footing doctrine, which is based on principles of federalism written into the Constitution, each state upon its admission to statehood, acquires sovereign rights and interests in navigable waters and underlying lands within its borders, subject to the federal government's paramount authority to regulate and control navigation. (PPL Montana, LCC v. Montana, __ U.S. __, 132 S.Ct. 1215, 1226-1228 (2012); Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-374 (1977); Shively v. Bowlby, 152 U.S. 1, 49-50 (1894); Pollard's Lessee v. Hagan, 44 U.S. 212, 224-229 (1845); Martin v. Waddell, 41 U.S. 367, 410 (1842).) As the Supreme Court has stated, "except where the reserved rights or navigation servitude of th United States are invoked, the State has total authority over its internal waters." (California v. United States, 438 U.S. 645, 662 (1978), citing United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 709 (1899).) Thus, the states retained "total authority" over their internal waters upon its admission to statehood, subject only to federal reserved rights and the federal navigation servitude. Thus, both the Constitution and the Clean Water Act make clear that the states have primary authority to regulate water in our federal system. This basic principle of federalism informs the meaning of sections 101(g) and 510, and indicates that the Act cannot be construed as a limitation or hindrance on the right of the states to authorize appropriation and use of water under their water rights systems. This basic principle is supported not only by the Clean Water Act but also by the doctrine of constitutional avoidance. This doctrine holds that congressional statutes should be construed to avoid constitutional difficulties, unless such construction is plainly contrary to the congressional intent. (Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Machinists v. Street, 367 U.S. 740, 749-750 (1961); Crowell v. Benson, 285 U.S. 22, 62 (1932).) (p. 17 – 18)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

CropLife America (Doc. #14630)

13.465 The Proposed Rule Fails to Adhere to Applicable Constitutional, Statutory and Judicial Constraints

Federalism Limitations: Congress intended the CWA to be implemented as a federal-state partnership with delegated states acting as co-regulators with EPA for many CWA program."[309] States have delegated authorities to administer many environmental statutes, including the Clean Water Act, Safe Drinking Water Act, Clean Air Act, Resource Conservation and Recovery Act, etc.[310] The degree of CWA delegation varies

[309] 33 U.S.C. 5 1251(b).
[310] Environmental Council of the States, States: Delegation by Environmental Act, http:l/www.ecos.orglsection/stateslenviroactlist (last visited Nov. 5,2014).

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by program but usually includes permitting, inspections, monitoring and enforcement, and often includes standards setting.[311] Counties and municipalities also have important responsibilities for local management of key aspects of the CWA. Delegated CWA programs, budgets, authorities and prerogatives all will be adversely affected by any changes to the regulations that govern which waters are federally jurisdictional.

Under Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), "[where an administrative interpretation of a statute invokes the outer limits of Congress's power we expect a clear indication that Congress intended that result. . . .This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."2' The Supreme Court has repeatedly characterized the regulation of land and water use as traditional state and local powers and the CWA gives no clear indication that Congress intended to intrude on this state and local authority.[312] Many of the features that the agencies seek to regulate under the proposed rule are local and intrastate waters and topographies rather than the "waters of the United States" that Congress charged EPA and the Corps with regulating under the CWA.

Rather than pursue the clarification of "waters of the U.S." jointly with state and local authorities and other important stakeholders, however, the rule was developed unilaterally by EPA and the Corps and would undermine traditional state and local authorities over land and water resources, affecting the ability of every state, county and municipality to enact policies regarding waters within their borders and efficiently allocate resources. This fails to meet the system of cooperative federalism under the CWA as interpreted by the Supreme Court and the requirements of Executive Order 13132, in which the White House clearly directed federal agencies to consult with states early in the rulemaking process and give as much weight and deference as possible to state needs, priorities and concerns.[313] (p. 9 – 10)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.**

13.466 Administrative Procedure Act Concerns: The Administrative Procedure Act (APA) requires federal agencies to conduct rulemakings in a transparent manner through public notice and comment, allowing stakeholders a realistic opportunity to participate.[314] Throughout this comment period, however, the agencies have engaged in ongoing "reinterpretations" of key definitions and controversial aspects of the proposed rule

[311] Environmental Council of the States, Clean Water Act: State Delegations, http:llwww.ecos.orglsection/~tateslenviroactlisstatesenviroactlistcw(laa st visited Nov. 5, 2014).
[312] See Rapanos v. United States, 547 U.S. 715, 738 (2006).
[313] Barack Obama, Preemption Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption.
[314] 5 U.S.C. §§ 551-59.

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through presentations, webinars, blogs,[315] a Questions and Answers document[316] and other ad hoc communications. Because these often include statements that are inconsistent with materials provided in the official rulemaking docket, such changes prevent stakeholders from clearly understanding what the official agency policy proposal is, especially when such statements are made by EPA without any indication of endorsement by the Corps. How is the public to comment when one or both of the agencies keep changing their positions? (p. 11)

The agencies adhered to the requirements established under APA and incorporated the information provided by our stakeholders as appropriate.

Agency Response: The agencies adhered to the requirements established under APA and incorporated the information provided by our stakeholders as appropriate. For more information, please see the full response in section 13.2.1 of this compendium.

Exxon Mobil Corporation (Doc. #15044)

13.467 The Clean Water Act provides a firm foundation for environmental protection of our Nation's water resources. The law reserves for the Federal government the authority to regulate waters used in interstate or foreign commerce -that is, "navigable waters," spelled out as "the waters of the United States, including the territorial seas." To suggest that waters lying outside Federal jurisdiction are automatically 'unprotected' and that 'clean water' can only be ensured by sweeping them in, is unfounded and lacks recognition of the role and achievements of the States in protecting their own waters. It undermines the principle of cooperative federalism designed into the Clean Water Act. Several States have already expressed concerns about this encroachment and about the lack of meaningful consultation prior to formulating the Proposed Rule. (p. 1 – 2)

Agency Response: See section 13.2.5 summary response for information regarding Federalism. Cooperative federalism is a hallmark of the Clean Water Act and this rule does nothing to change that. The agencies have no intent to change current practice.

Interstate Council on Water Policy (Doc. #15397)

13.468 We ask that you reconsider your agencies' conclusion that Executive Order 13132 ("Federalism") does not apply because any regulatory proposal to redefine or clarify the jurisdictional definition of "Waters of the United States" has direct and immediate consequences for the states. That jurisdictional interface requires compliance with Executive Order 13 132 and substantial consultation with the states and the interstate water organizations many have established to help plan and manage our water resources responsibly. (p. 1)

[315] Nancy Stoner, Acting Assistant Administrator for Water, Setting the Record Straight on Waters of the US (July 7, 2014), http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/.
[316] EPA and U.S. Army Corps of Engineers, Waters of the U.S. Proposal Questions and Answers (Sept. 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf.

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Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

Utility Water Act Group (Doc. #15016)

13.469 3. The Proposed Rule Violates Federalism Principles.

The CWA opens with a clear statement that states are to have "primary responsibilities" for reducing and preventing water pollution and protecting water resources within their

boundaries. CWA § 101(b), 33 U.S.C. § 1251(b). Congress' clear intent, as the Supreme Court has recognized, was to "'recognize, preserve and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources . . . ." SWANCC, 531 U.S. at 166-67 (citing CWA § 101(b)). The Proposed Rule's increase in the Agencies' jurisdiction would significantly expand the waters subject to federal regulation and thereby deprive the states of their primary role in water and land use and management, contrary to Congress' wishes. Moreover, the Proposed Rule could impose significant additional regulatory burdens on the states. See, e.g., supra pp. 13-15 (discussing states' need to develop "fishable, swimmable uses" for features that could qualify as WOTUS under the Proposed Rule and would not clearly fall under any of the Proposed Rule's exclusions).

The Agencies' failure to consider the impacts on states, and appropriately weigh federalism infringements, is exemplified in its conclusion that changing the WOTUS definition will have little to no effect on § 303 plans.[317] Contrary to the Agencies' assertion, states must invest considerable resources in developing CWA § 303(c) water quality standards, making use determinations, and setting water quality criteria. Moreover, if states must assign uses that waterbodies cannot achieve, see infra pp. 62-63 (discussing inability of states to set waste transport as a use), states may be forced to list impaired waters and then set TMDLs.[318]

The Agencies assert that the Proposed Rule's WOTUS definition, which includes broad per se jurisdictional categories, will make enforcement easier. 79 Fed. Reg. at 22,191 col. 1 (asserting that Proposed Rule will "reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions."). But the Agencies cannot use administrative convenience as a basis to disregard the federalism structure that underpins the Act and trump states' rights by imposing substantial additional burdens on states. (p. 44 – 45)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For information on indirect impact see the comment response for costs/benefits in compendium 11.**

Regulatory Environmental Group for Missouri (Doc. #16337)

13.470 Our comments follow:

[317] Economic Analysis at 6.
[318] See also Sunding Report at at 24-25.

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1. Re-open Public Stakeholder Process. REGFORM joins the rising chorus of those who believe the Proposed Rule requires additional discussion and analysis because it too broadly expands "navigable Waters of the U.S." jurisdiction to nearly all waters and ditches. This issue is far too important to NOT get right. As drafted, whether intended or not, the Proposed Rule will have an unnecessarily adverse impact on Missouri manufacturing, mining, academic institutions, utilities, municipalities and other land owning entities by vastly expanding the number of water bodies that will be defined as "Waters of the United States (WOTUS)."

While the Clean Water Act clearly authorizes federal jurisdiction over "navigable" waters and territorial seas, the Proposed Rule we believe extends the scope of federal control far beyond what either Congress intended or what the U.S. Supreme Court has ruled. The definitions of "floodplain," "wetlands," "tributaries," "significant nexus," and "riparian area" in particular are overly broad and vague. While we applaud EPA efforts to codify for the first time the definition of several key Clean Water Act terms, we simply do not fully agree with the proposed definitions. In our view, the new definitions, when applied to establish jurisdictional waters, will not provide the hoped for clarity or consistency in making accurate determinations. Instead these definitions will foster confusion, invite inconsistent approaches, increase the cost and difficulty of obtaining a permit, shift the regulatory burden to the Missouri Department of Natural Resources and other state, local and tribal Agencies resources.

Sweeping application of clean water programs on newly defined streams will force landowners, industries and local government to expend their limited resources to protect those waters with little or no additional environmental benefit. Our members will also see additional vulnerability to third party litigation and citizen suits since these groups will have expanded standing based on broader jurisdiction of the Proposed Rule.

The EPA and Army Corps should withdraw the Proposed Rule and reinstitute an expanded stakeholder process that fully addresses the thousands of comments on the inappropriate and illegal expansive impact of the Proposed Rule. The end result hopefully would be a more commonsense alternative that follows the statutory constructs of the Clean Water Act and Supreme Court decisions. (p. 1 – 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. For clarification of the definitions see the preamble for the final rule.**

Congress of the United States, Senate Committee on Environment and Public Works et al. (Doc. #16564)

13.471 In this letter, as the chairmen and ranking members of congressional committees and subcommittees charged with overseeing the federal government's compliance with the Clean Water Act and the Constitution, we wish to formally object to the proposed "waters of the United States" rule's disregard for federalism and the constitutional and statutory limitations on EPA's and the Corps' jurisdiction over "navigable waters." The proposed rule contemplates an extra-constitutional relationship between the federal government and the States in the regulation of local land-use matters. Thus, the proposed rule subverts the Constitution, Congress, as well as the Clean Water Act's promise to "recognize,

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preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[319]

EPA and the Corps must abandon the proposed "waters of the United States" rule if the Clean Water Act is to be administered consistent with federalism, the Constitution's limits on the federal government's Commerce Clause jurisdiction over "navigable waters," and the statutory limits contained in the Clean Water Act. We appreciate your review of these comments and the reasoning behind our recommendation to withdraw the proposed rule. (p. 1)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism.**

13.472 The Proposed "Waters of the United States" Rule Contravenes the Constitution's Federalism Structure and Provides No Limit to Federal Authority Under the Clean Water Act.

In considering the proper relationship between the federal government and the States, the Framers of the Constitution determined that federalism would serve as a guiding principle. The Framers' purpose was to guarantee that States and their citizens could control their own destiny, in contrast to a government in which local initiative might be impeded by an overbearing federal bureaucrat.[320]

James Madison expounded on this structural idea in The Federalist No. 45, observing that the powers "delegated by the proposed Constitution to the federal government, are few and defined," and "[t]hose which are to remain in the State governments are numerous and indefinite."[321] Whereas the federal government's powers were to be exercised primarily over matters concerning war, peace, and foreign commerce, the powers "reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and internal order, improvement, and prosperity of the state."' Thus, federalism "serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another," preserving the "integrity, dignity and residual sovereignty of the states."'

Importantly, federalism protects state sovereignty as well as individual liberty. "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[322] It "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[323]

[319] Federal Water Pollution Control Act $ 101 (b), 33 U.S.C. fi 125 l(b).
[320] *See Bond v. United States*, 13 1 S. Ct. 2355,2364 (201 1) (Federalism "allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.").
[321] THE FEDERALIST No. 45, at 311 (James Madison) (Easton Press 1979).
[322] *New York v. United States*, 505 U.S. 144, 181 (1 992) (internal quotations and citation omitted).
[323] Bond, 13 1 S. Ct. at 2364.

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Congress explicitly recognized federalism's importance when it enacted the Clean Water Act in 1972.[324] Congress likewise restricted the EPA's and Corps' authority by predicating Clean Water Act jurisdiction on the presence of "navigable waters," defined as "the waters of the United States, including the territorial seas."[325] Furthermore, because the Clean Water Act is a Commerce Clause enactment, EPA's and the Corps' administration of the law must be constrained and reflect effective bounds to federal regulatory authority.[326] Accordingly, the reach of the "waters of the United States" is inextricably tied to the statute's limiting term, "navigable waters," and "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."[327]

EPA and the Corps' proposed "waters of the United States" rule is irreconcilable with these principles. Under the proposed rule, virtually any parcel of land containing a water feature may be deemed a "water of the United States." Rather than preserve the prerogative of the States to manage purely local waterbodies, the proposed rule would centralize the regulation of streams, lakes, ponds, and ditches, As such, the proposed rule represents a dangerous effort by EPA and the Corps to achieve "a significant impingement of the States' traditional and primary power over land and water use."[328] (p. 1)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism. As explained in the preamble to the rule, the rule conforms to the Supreme Court's articulation of the limits of federal authority under the Clean Water act; it therefore is consistent with the commerce clause.**

13.473 B. The Proposed "Waters of the United States" Rule is a Grave Threat to Individual Liberty and Property Rights.

After examining the proposed rule's definitions for "tributary" and "adjacent waters," as well as the case-by-case standard for "other waters," one is hard pressed to identify any waterbody that would be beyond the reach of EPA and the Corps as "waters of the United States." The import of the proposed rule is clear: all water is national water (unless expressly exempted), and land with only a slight connection to a waterbody is within the regulatory purview of EPA and the Corps.

Federalism serves as an absolute bar to such an expansive proposal. The proposed rule's definitions "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." [329] Congress did not sanction this approach in the Clean Water Act, and the Constitution forbids it.

[324] See Federal Water Pollution Control Act 3 101@), 33 U.S.C. 8 125 1 (b).
[325] See 33 U.S.C. 5 1362(7).
[326] *See United States v. Morrison*, 529 U.S. 598, 608 (2000).
[327] Id. (internal quotations and citation omitted).
[328] Solid Waste Agency of Northern Cook County. USACE, 53 1 U.S. 159, 1 74 (200 1).
[329] *United States v . Lopez*, 514 U.S. 549, 567 (1995) (majority opinion).

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The proposed rule's contravention of federalism threatens individual liberty and property rights.[330] By providing EPA and the Corps with virtually unlimited authority under the Clean Water Act, it would force those who wish to build a home, expand a small business, or increase their crop production to obtain the blessing of the federal government. Landowners will have to decide whether to spend up to two years and $270,000 in a burdensome and uncertain permitting process,[331] or proceed without a federal permit and run the risk that EPA could seek fines of up to $187,500 per day for alleged Clean Water Act violations.[332] Stated differently, the proposed rule would "put the property rights of ordinary Americans entirely at the mercy of [EPA] employees.[333]

This disregard for federalism is unacceptable. EPA and the Corps flouted their duty to abide by the limits established by the Framers,[334] dubiously concluding that the proposed "waters of the United States" rule "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[335] The agencies' assertion is fundamentally at odds with the reality that the proposed rule sanctions the federal regulation of what rightly and legally must be considered purely local land and water features. We recommend that EPA and the Corps take heed of the following admonition: "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States."[336] As a matter of federalism and constitutional governance, the proposed rule must be abandoned. (p. 7 – 8)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism and other responses addressing consistency of the rule with the commerce clause of the constitution**

[330] See Bond, 13 1 S. Ct. at 2364 ("Federalism secures the freedom of the individual.") See a h Lynch v. Household, 405 U.S. 538,552 (1 972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.'" (citing J. Locke, Of Civil Government 82-85 (1 924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries * 138-140).
[331] See Rapanos v. United States, 547 U.S. 7 15, 72 1 (2006) (plurality opinion).
[332] See Letter from Senator David Vitter, et al. to Hon. Nancy Stoner, U.S. Environmental Protection Agency (April 1, 2014), available at http://www.epw.senate.gov/public/index.c?FuseAction=Files.View&FileStoreidbfdO-e563-449e-bb86-30e5eefeadgb.
[333] Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)
[334] *United States v. Lopez,* 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[It is the obligation of all officers of the Government to respect the constitutional design.").
[335] Proposed Rule, 79 Fed. Reg. at 22220-2222 1.
[336] Bond, 13 1 S. Ct. at 2366 (citations omitted).

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13.3.6. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175

Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000), agencies generally may not issue a regulation that has tribal implications:1) that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement; or 2) that preempts tribal law unless the agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

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

Summary Comments on Consultation and Coordination with Indian Tribal Governments

There were two comments regarding consultation and coordination with tribes, both of which expressed concern that EPA and USACE did not engage in meaningful government to government consultation consistent with the EPA Policy on Tribal Consultation and Coordination with Indian Tribes (2011). One of the commenters also indicated concern that the rule is overly broad and will infringe on the Tribe's sovereignty and ability to regulate its land and natural resources.

Agencies' Summary Response to Comments About Consultation and Coordination with Indian Tribal Governments Comments

Consultation

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

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

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input on the rulemaking throughout both the tribal consultation process and public comment period.

In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from three tribes during the initial consultation period.

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

Comments

The agencies received comments from the following Tribes and Tribal organizations during the development of the Clean Water Rule: Bridgeport Indian Colony, Ute Indian Tribe Uinah & Ouray Reservation, Pokagon Band of Potawatomi Indians, Swinomish Indian Tribal Community, Sealaska Corporation, Barona Band of Mission Indians, Chickaloon Native Village, Gila River Indian Community, Great Lakes Indian Fish and Wildlife Commission, Keweenaw Bay Indian Community, Lac Du Flambeau Band of Lake Superior, Chippewa Indians, Muckleshoot Indian Tribe, Navajo Nation, Pyramid Lake Paiute Tribe, Pueblo of Sandia, Quapaw Tribe of Oklahoma, Lake Superior Chippewa Indians, Curyung Tribal Council, San Carlos Apache Tribe, Sokaogon Chippewa Community, Southern Ute Indian Tribe Growth Fund, National Tribal Council, Arctic Slope Regional Corporation, Alaska Inter-Tribal Council, and Native Village of Nuiqsut.

The agencies have reviewed and responded to each tribal comment received, and these have been placed in the rule compendium according to the issue(s) raised. To assist tribes and members of the public in locating the responses to tribal comments not related to consultation, we have included below a summary chart of those tribal comments with references to the appropriate compendium.

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		Response to Comment Compendium Number																
Tribe/Tribal Organization	**Docket Number**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**15**	**16**	**17**
Sealaska Corporation	15356 (additional maps in duplicate 16671)	x			x			x	x				x	x	x			
Barona Band of Mission Indians	2476	x									x							
Barona Band of Mission Indians	10966								x		x							
Chickaloon Village Traditional Council	15137					x												x
Gila River Indian Community	13619							x				x	x	x				
Great Lakes Indian Fish and Wildlife Commission	15048				x													x
Great Lakes Indian Fish and Wildlife Commission	15454			x	x			x					x					
Keweenaw Bay Indian Community	15497												x					
Lac du Flambeau Band of Lake Superior Chippewa	16538				x													
Muckleshoot Indian Tribe Fisheries Division	16369			x			x											
Navajo Nation Environmental Protection Agency	10117 (duplicate 15180)	x	x	x	x			x	x									
Pyramid Lake Paiute Tribe	17472 (duplicate 19134)			x				x										x
Pueblo of Sandia	2729								x						x			
Quapaw Tribe of Oklahoma (the O-Gah-Pah)	7980			x		x	x	x	x				x					
Red Cliff Band of Lake Superior Chippewa	16572			x														
San Carlos Apache Tribe	15067 (duplicate 17094)	x							x		x	x		x				
Sokaogon Chippewa Community, Sokaogon, Mole	16591				x													
Southern Ute Indian Tribe Growth Fund	15386			x	x	x	x	x	x				x	x	x			
National Tribal Water Council (NWTC)	18922							x										
Arctic Slope Regional Corporation ("ASRC")	15038			x							x		x		x			
Alaska Inter-Tribal Council (included with others)	15173							x										
Native Village of Nuiqsut	19578																	
Curyung Tribal Council	**14927**																	
Swinomish Indian Tribal Community	**N/A**																	
Bridgeport Indian Colony	N/A (2011)																	
Pokagon Band of Potawatomi Indians	N/A (2011)																	
Ute Indian Tribe of the Potawatomi Indians	N/A (2011)																	

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

Specific Comments

Western Governors Association (Doc. #14645)

13.474 State-Tribal Coordination: Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective and consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA. (p. 8)

Agency Response: The agencies support effective consultation, coordination, and dispute-resolution with all affected stakeholders throughout the rulemaking process. For more information on the consultation efforts associated with this rule, please see the subsection on "Consultation" in the summary response above.

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San Carlos Apache Tribe (Doc. # 17094)

13.475 The Tribe is concerned that EPA and USACE failed to comply with EPA Policy on Consultation and Coordination with Indian Tribes (2011) and the goals of Executive Order 13175 to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. EPA and USACE did not engage in meaningful government-to-government consultations with any officials or representative of this Tribe regarding the proposed rule. Non-localized national meetings, webinars and generalized publicity campaigns do not constitute meaningful consultation or dialogue with the Tribe.

The United States, through the Department of the Interior, the EPA and USACE and their officials and officers, as a matter of constitutional, statutory, regulatory, and federal common law, is a trustee and a fiduciary to the San Carlos Apache Tribe and is charged with carrying out trust duties and responsibilities. The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen's Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012).

Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013) required cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities."

Nominally, EPA and USACE should have engaged in direct government-to-government consultations with Indian Tribes or tribal organizations. EPA and USACE failed to initiate such engagements and consultations. There is no question that the proposed rule will impact Indian Tribes nationwide. The failure of EPA and USACE to engage in meaningful consultations is a fundamental flaw in this rulemaking process.

The Tribe's Office of Attorney General participated in the Webinar presented on November 3, 2014 by the River Network entitled Waters of the US Rulemaking: What it means for Tribal Governments. That webinar cannot be considered consultation. In fact, the presenters, including those from EPA, agreed that the webinar would not be considered consultation and that the comments made during the webinar by tribal participants would not be accepted as comments on the rule. Participants were instructed that only comments made officially under the rulemaking process would be considered.

On behalf of the Tribe, I request that in the future, when considering rules that will have such an adverse impact on the Tribe and its resources, the EPA and USACE should initiate proper and meaningful government-to-government consultation with a view to actually addressing our differences.

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In summation, the Tribe believes the rulemaking process was flawed because of a lack of government-to-government consultation with the Tribe. The Tribe believes the rule is overly broad and will infringe on the Tribe's sovereignty and ability to regulate its land and natural resources. Accordingly, the Tribe opposes the proposed rule as currently drafted. (p. 6 – 8)

Agency Response: **EPA acknowledges that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders, and court decisions. The agency remains fully committed to engaging tribes as sovereign governments with a right to self-governance. Consistent with these principles, the agencies consulted with tribes in a meaningful way throughout the rulemaking process and considered tribal views in developing today's rule.**

San Carlos Apache Tribe (Doc. #17094)

13.476 The Rulemaking Process is Fundamentally Flawed

The Tribe is concerned that EPA and USACE failed to comply with EPA Policy on Consultation and Coordination with Indian Tribes (2011) and the goals of Executive Order 13175 to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. EPA and USACE did not engage in meaningful government-to-government consultations with any officials or representative of this Tribe regarding the proposed rule. Non-localized national meetings, webinars and generalized publicity campaigns do not constitute meaningful consultation or dialogue with the Tribe.

The United States, through the Department of the Interior, the EPA and USACE and their officials and officers, as a matter of constitutional, statutory, regulatory, and federal common law, is a trustee and a fiduciary to the San Carlos Apache Tribe and is charged with carrying out trust duties and responsibilities. The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen's Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012).

Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013) required cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities."

Nominally, EPA and USACE should have engaged in direct government-to-government consultations with Indian Tribes or tribal organizations. EPA and USACE failed to initiate such engagements and consultations. There is no question that the proposed rule

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will impact Indian Tribes nationwide. The failure of EPA and USACE to engage in meaningful consultations is a fundamental flaw in this rulemaking process.

The Tribe's Office of Attorney General participated in the Webinar presented on November 3, 2014 by the River Network entitled Waters of the US Rulemaking: What it means for Tribal Governments. That webinar cannot be considered consultation. In fact, the presenters, including those from EPA, agreed that the webinar would not be considered consultation and that the comments made during the webinar by tribal participants would not be accepted as comments on the rule. Participants were instructed that only comments made officially under the rulemaking process would be considered.

On behalf of the Tribe, I request that in the future, when considering rules that will have such an adverse impact on the Tribe and its resources, the EPA and USACE should initiate proper and meaningful government-to-government consultation with a view to actually addressing our differences.

In summation, the Tribe believes the rulemaking process was flawed because of a lack of government-to-government consultation with the Tribe. The Tribe believes the rule is overly broad and will infringe on the Tribe's sovereignty and ability to regulate its land and natural resources. Accordingly, the Tribe opposes the proposed rule as currently drafted. (p. 6 – 8)

Agency Response: **Duplicate Comment (see the response above)**

13.3.7. Executive Order: 13045: Protection of Children from Environmental Health and Safety Risks

No substantive comments that addressed this topic were identified.

13.3.8. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use Compliance, Federalism

No substantive comments that addressed this topic were identified.

13.3.9. National Technology Transfer and Advancement Act

No substantive comments that addressed this topic were identified.

13.3.10. Executive Order 12898: Federal Actions to Environmental Justice in Minority Populations and Low-Income Populations

Summary of Executive Order 12898 Comments

NOTE: This summary includes EO 12898 comments that are part of the Appendix C of the Environmental Justice Report found in the docket.

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The majority of comments in this section expressed concern with the economic impacts of the rule on low-income and minority populations. These issues are not covered by the EO, and are more directly related to the costs benefit analysis developed for the rule (see Compendium 11).

Commenters recommended that EPA expand their communication of the proposed rule and its effects to low income EJ communities, especially those with poor access to clean water. This would involve on-the-ground engagement with community members and creating outreach materials that are community-oriented and multi-lingual.

A few commenters expressed support for the rule indicating that the rule will help to clarify what waterways are protected under the Clean Water Act. Commenters urged the agencies to leave in place all portions of the existing definition that have not been invalidated by the Supreme Court, to remove new definitions and other language that limit jurisdiction in a manner not supported by law or science, remove categorical exclusions that are not supported by law or science, and to rely on all valid jurisdictional tests for categorically protecting waters to the full extent allowed under the Commerce Clause.

Agencies' Response to Executive Order 12898 Comments

Executive Order (E.O.) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

Meaningful involvement from minority, low-income, and indigenous populations, as well as other stakeholders has been a cornerstone of development of the final rule. In compliance with EO 12898, EPA hosted a stakeholder briefing on May 12, 2014, in Washington DC, and an additional 24 meetings between April – November 2014, through which Environmental Justice stakeholders were specifically engaged for technical input and meaningful involvement in the rulemaking process. The rule complies with Executive Order 12898, which requires the Federal agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects on minority, low income, and indigenous populations (E.O. 12898, 1994). The Agencies have determined that this rule will not have disproportionally high and adverse human health or environmental effects on minority, low income, and indigenous populations.

The Clean Water Rule does not establish any specific regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The definition itself imposes no direct impacts on environmental and, or public health for communities at large; therefore, it will have no increased impact on low-income or disadvantaged communities. The rule will increase CWA program transparency, predictability, and consistency. All potential impacts will be measured through CWA program implementation, which is outside of the scope of this rule. The Clean

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Water Rule does not change the current structure of permit and regulatory processes under the Act and instead will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation.

The Clean Water Rule will benefit future implementation of the CWA by clarifying the extent of jurisdictional waters, and identifying where data collection and analysis may be appropriate for future program evaluations.

The agencies received comments from the following organizations and individual stakeholders who expressed concern for environmental justice issues within their respective communities: Audobon California, Cochise County, EJ Coalition of Water, GA Water Coalition, Greybull Valley Irrigation District, Rep. Dennis Hedke, Sen. Larry Powell, Mission Springs Water District, Pamilico-Tar-Riverkeeper, National Religious Partnership for the Environment, Eco-Justice Ministries, NJ Environmental Justice Alliance, City Greens, Local Government Advisory Committee.

The agencies have reviewed and responded to each comment received from EJ stakeholders, and these have been placed in the rule compendium according to the issue(s) raised. To assist members of the public in locating the responses to the comments not related to the EO, we have included the comments below with references to the appropriate compendium.

Specific Comments

New Mexico Department of Agriculture (Doc. #13024)

13.477 Environmental Justice (E.D. 12898), the Regulatory Flexibility Act (RFA), and Impacts to Small Businesses

In the Federal Register notice of this proposed rulemaking, EPA claims that under the RFA the proposed rule will have no effect on small business using the language, "After considering the economic impacts of this proposed rule on small entities, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities" (79 FR 22220). However, language pulled directly from the Economic Analysis states, “As a result of this proposed action, costs to regulated entities will likely increase for permit application expenses."[337] The same document says, "This proposed rule could result in new indirect costs on regulated entities such as the energy, agricultural, and transportation industries; land developers, municipalities, industrial operations; and on governments administering regulatory programs, at the tribal, state and federal levels.”[338] The Federal Register notice and the Economic Analysis

[337] U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, "Economic Analysis of Proposed Revised Definition of Waters of the U'S" Page 32. March 20 14. Available at: http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.
[338] U.S. Environmental Protection Agency & U.S. Amy Corps of Engineers. "Economic Analysis of Proposed Revised Definition of Waters of the U.S."Page 5. March 2014, Available at: http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.

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conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting will come with increased costs to small businesses.

NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses - particularly for the agriculture industries. In the meantime, USDA's 2012 Census of Agriculture provides economic analyses that show a significant amount of agricultural producers can be categorized as small businesses thus likely to experience the impact of regulatory burden. The 2012 Census of Agriculture classifies approximately 75 percent of agricultural operations nationwide as being less than $50,000 in the "classification of farms by the sum of market value of agricultural products sold and federal farm program payments."[339] In New Mexico the percentage of less than $50,000 producers is significantly higher, at nearly 88 percent; therefore, producers in New Mexico could be more economically vulnerable to market fluctuations caused by regulatory burden. NPDES and other permitting costs may have a negative economic impact on small businesses. Therefore, EPA's findings under RFA are not only incorrect but they also conflict with supporting documents.

To this same point, the United States Small Business Administration recently wrote a comment letter to the Agencies requesting them to "withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[340] (p. 22 – 23)

Agency Response: **This comment is not applicable to section 13.2.10. For information on RFA, see comment responses in Compendium 11.**

National Religious Partnership for the Environment (Doc. #14060)

13.478 Our faith traditions teach us to care for vulnerable populations including communities of color and low-income communities. The proposed rule will protect waters in parishes such as Orleans, St. James, West Baton Rouge, Caddo, Terrebonne and Lafourche that have significant populations of African Americans, Native Americans, or low-income communities.

As communities of faith across a broad spectrum of traditions, we understand water as a symbol of preservation, cleansing, and renewal. Water is a gift from God. We urge you to act swiftly to finalize the Waters of the US rule so that we can protect this gift for the health and wellbeing of our people and all creation. (p. 2)

Agency Response: **Thank you for your comment and support of this rule.**

[339] U.S. Department of Agriculture - National Agricultural Statistics Service." 2012Census of Agriculture." 2014, http://www.agcensus.usda.gov/Publications/2012/.

[340] U.S. Small Business Administration. Comments on the Definition of Waters of the U.S."Under the Clean Water ct.
Submitted 10/ 1/14. http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act.

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Additional Comments Noted from Appendix C. of the Environmental Justice Report

Local Government Advisory Council

13.479 The LGAC has concerns about how the agency will incorporate EJ into the final rule; and whether EJ communities will be given consideration in permitting consistent with Executive Order 12898"; The LGAC urges the EPA to further their engagement with EJ communities. The proposed rule could improve access to clean and safe water for these communities but in order to do so, communication of the rule is critical; The LGAC recommends that EPA expand their communication of the proposed rule and its effects to low income EJ communities, especially those with poor access to clean water. This would involve on-the-ground engagement with community members and creating outreach materials that are community-oriented and multi-lingual; The LGAC recommend that the EPA, before issuing a permit such as those for MS4s, analyze the impact to nearby communities and identify whether a community is disproportionately affected. The Committee recommends that is a community is disproportionately affected, a permit should not be authorized".

Agency Response: See section 13.2.10 summary response for information regarding communication on outreach to Environmental Justice stakeholders. For information on the permitting process, see the comment response in compendium 12.

Anonymous: (tracking # 1jy-8buzu-j) - SUMMARY

13.480 Please consider the economic impacts of your policies knowing that your actions will have serious impacts on struggling families, seniors, low-income households and small business owners.

Agency Response: For information on the economic analysis, see comment responses in Compendium 11.

Audubon California

13.481 We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. Additional recommendations include:

1. Categorically define certain non-adjacent "other waters" as "Waters of the United States" and identify additional subcategories of waters that are jurisdictional, rather than requiring case-by-case determinations.

2. Provide for new science by not categorically excluding any of the "other waters." Establish a process that allows evolving science to inform future jurisdictional decisions.

3. Our organizations urge the Agencies to swiftly finalize a rule to clarify that all waters with a "significant nexus" to downstream waters are clearly protected under the Clean Water Act.

Agency Response: Thank you for your support of this rule. For information on "other waters", see comment responses in Compendium 4. For information on adjacent waters see comment responses in Compendium 3.

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Cochise County

13.482 The agencies fail to identify the point on the continuum from non-connectivity to full connectivity at which a significant nexus would occur and instead the determination is left to the judgment of the agencies. The Connectivity report, upon which the proposed rule is based offers a scientific presumption of connectivity for both tributaries and other waters.

Agency Response: **For information on the agencies approach to significant nexus, see the comment responses in Compendium 5. For information on the Connectivity report, see comment responses in section 13.1 of this compendium.**

EJ Coalition of Water

13.483 We urge your agencies to strengthen the categorical protections to be extended to our nation's wetlands. Many non-adjacent waters, referred to in the proposed rule as "other waters" provide critical benefits to the waterways we love, filtering our pollution and preventing flooding. We urge you to follow the best science available on the connectivity of our waterways and use it to shape jurisdictional decisions.

Agency Response: **Thank you for your support of this rule. For information on the agencies approach to "other waters", see comment responses in Compendium 4.**

13.3.11. Environmental Documentation

Comment Summary

Some commenters argued that while EPA is exempt from NEPA under section 511(c) of the CWA, the Corps was obligated to prepare an EIS on the rulemaking. Commenters also expressed concern that while the preamble stated that the Corps had prepared an environmental assessment, none was included in the proposed rule docket.

Agencies' Summary Response

The final EA is available in the rulemaking record. The EA reviewed the reasonably foreseeable impacts of the rule, and the Assistant Secretary of the Army for Civil Works determined they would not be significant. Her decision is documented in a "finding of no significant impact" that can be found in the docket for the rule. While NEPA does not apply to this rulemaking (see CWA section 511(c)) and the Army therefore prepared the EA voluntarily, even if NEPA did apply, preparation of an EIS would not be required.

Regarding the comments on the absence of a draft EA in the proposed rulemaking docket, the preamble to the proposed rule the Corps inadvertently stated that the Corps had prepared a draft Environmental Assessment at the time of the proposal. While a draft had not been prepared at that time, the Corps has now completed its EA and, consistent with its general practice of making EAs at the time of the decision or action, the document is now available in the rulemaking docket. The preamble to the proposed rule was misleading and caused confusion as to whether a draft Environmental Assessment had been finalized at the time of the proposal. The Army has

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now completed the EA and, consistent with its general practice of making this documentation available at the time of the decision or action, the document has been posted in the rulemaking docket.

Specific Comments

Uintah County, Utah (Doc. #12720)

13.484 Environmental Documentation -The COE asks the public to simply take on faith that they have completed an accurate environmental analysis (EA). There is no link to the EA nor is it included as an appendix. It is problematic for the public to accept the conclusions of a document which is entirely selfserving. The statement at the end of Section K., Environmental Documentation (P. 22222), seems to belie the notion that this is simply a definition change.

There is no argument that the COE is not required to make a good decision as a result of the EA. The decision merely has to be informed but does not have to be in the best interest of the people of the United States. In this case, the County is concerned that the EA does not accurately portray the impacts.

Despite the voluminous discussion, background, and rationalization, there is not a compelling purpose and need identified by either Agency for the implementation of this rule. As pointed out in discussions above, the Agencies seem to have glossed over the potential impacts under the Paperwork Reduction Act and the Regulatory Flexibility Act.

Based on the language in Section K., Environmental Documentation, which is apparently drawn from the Decision Record/Finding of No Significant Impact, the COE, at a minimum, will be demanding additional analysis, applications, filings, fees and review periods, etc. The mere fact that the existing COE functions could expand significantly should be a reason for a Finding of Significant Impact and require the preparation of an Environmental Impact Statement (EIS).

The language in Section K., Environmental Documentation, intrudes upon the responsibility of other State and Federal agencies. The proposed rule would insert the Agencies into areas where other agencies currently perform extensive NEPA documentation, which includes the resources proposed by this rule. The implementation of this rule would not relieve those agencies of their responsibilities to evaluate direct, indirect, cumulative and residual impacts to all resources in the project area.

(…) Based solely on the Environmental Documentation, this proposed rule should be withdrawn. The Agencies have failed to properly state the purpose and need for this rule. The Agencies have failed to disclose the scope of impact of the proposed rule. The Agencies have failed to complete and identify the requisite information which would allow for a proper NEPA analysis and for the public to provide meaningful comment on this proposed rule. (p. 6 – 7)

Agency Response: **Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes 'a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]". In this joint rulemaking, the two agencies establish a**

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definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing sections 301, 304, 306, 311, 402 and 404, while the Corps is making substantively identical revisions to their regulations solely under section 404 of the CWA. EPA is exempt from NEPA under section 511(c). This rulemaking implements EPA's authority to determine the scope of CWA jurisdiction. See Opinion of Attorney General Civiletti, 43 Op. att'y. Gen. 197 (1979). Under the narrow circumstances of this rulemaking which defines the scope of CWA jurisdiction for all provisions of the CWA, the exemption in section 511(c) applies to the rulemaking.

Nevertheless, the Army has complied with NEPA. The Army's final EA is available in the public rulemaking record. The EA sets forth the purpose and need for the rulemaking, and discloses the rule's potential impacts. It also indicates that Corps regulatory functions and processes are not anticipated to change, and addresses socio-economic impacts. The agencies also note that economic and social effects by themselves are not intended to require preparation of an environmental impact statement under NEPA. 40 C.F.R. § 1508.14. The agencies disagree that the EA intrudes upon other agencies' responsibilities; NEPA is purely procedural, and the EA simply informs the Army and public about the potential environmental impacts of the rule. The agencies agree implementation of the rule would not relieve agencies from their existing NEPA responsibilities. The agencies believe a meaningful opportunity to comment on the proposed rule was provided.

13.4. NEPA

Specific Comments

State of Alaska (Doc. #19465)

13.485 The preamble to the rule states that the Corps prepared an environmental assessment under the National Environmental Policy Act (NEPA) for this rulemaking[341]. However, the website for the proposed rule apparently does not contain the EA, and it is impossible to assess the adequacy of the document. Moreover, because this rulemaking will likely result in significant impacts, it constitutes major federal action requiring the preparation of an environmental impact statement (EIS) under NEPA[342]. (p. 18)

Agency Response: **See summary response for 13.2.11.**

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

13.486 With that as a preamble, the purpose of this correspondence is to invoke State Coordination between EPA and the Kansas House Committee on Energy and Environment, as required of your Agency by the National Environmental Policy Act343

[341] 79 Fed. Reg. 22222.
[342] 42 U.S.C. 102(c).
[343] 42 USC §§ 601-612.

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and Executive Orders 12372, 13352, and 13575. It is this Committees' intent to evaluate the claims in the QAD using studies required of EPA prior to proposing the WOTUS Rule. (p. 1)

Agency Response: The agencies are unable to discern any State Coordination requirement under NEPA as described in the comment.

13.487 The National Environmental Policy Act (NEPA)[344] of 1970, and concomitant implementation via the Council on Environmental Quality regulations, require preparation of an Environmental Impact Statement (EIS) prior to the publication of the WOWS Rule. Please provide this Committee those portions of the EIS that are relevant and specific to the Kansas counties proposed to be covered by the WOTUS Rule. (p. 2)

Agency Response: See summary response for 13.2.11.

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

13.488 The National Environmental Policy Act (NEPA) of 1970 and its implementing CEQ Regulations[345] require preparation of an Environmental Impact Statement (EIS) prior to publication of the WOTUS Rule.

Please provide this Committee those portions of the EIS relevant and specific to the Kansas counties proposed to be covered by the WOTUS Rule. As you may be aware, there are number of significant, environmental-related Federal Actions taking place simultaneously in Kansas. These include Endangered Species Listings by the United States Fish and Wildlife Service, revision of the Resource Management Plan by Bureau of Land Management, the proposed groundwater Rule by the United States Forest Service, and the problematic Agriculture Conservation Practices Limitation Rule by EPA and US Army Corps of Engineers. Because Environment is the common theme behind all these initiatives, the collective and cumulative significance and intensity of impacts to the Human Environment of all these initiatives is required to be evaluated and published for public comment before any Record of Decisions are made.[346] Please provide this Committee with a demonstration that the NEPA required impacts to culture, custom, industry have been studied and the proposed WOTUS Rule adequately accounts and balances Human and Natural Environments. (p. 2)

Agency Response: See summary response for 13.2.11.

Kansas Senate Committee on Natural Resources (Doc. #15022)

13.489 With respect to The National Environmental Policy Act (NEPA) of 1970~an d its implementing CEQ Regulations,[347] the WOTUS Rule is considered a Major Federal Action. Resultantly, preparation of an Environmental Impact Statement (EIS) was required prior to WOWS publication, and my committee is interested in reviewing the EIS. Please provide those portions of the EIS relevant and specific to the Kansas counties proposed to be covered by the WOTUS Rule.

[344] 42 USC *$5* 4321 -4347; USC $433 1 (a)-(c).
[345] 40 CFR §1501 – 1502.
[346] 40 CFR §1508.27.
[347] 42 USC §§ 4321-4347; 42 USC 4 4331 (a)-(c)

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CEQ Regulations 40 C collectively significant federal actions to be analyzed in the context of socioeconomic circumstances, cultural affects, and downstream future impacts. As you may be aware, there are number of significant, environmental related Federal Actions taking place simultaneously in Kansas. These include Endangered Species Listings by the United States Fish and Wildlife Service, revision of the Resource Management Plan by Bureau of Land Management, the proposed groundwater Rule by the United States Forest Service, and the problematic Agriculture Conservation Practices Limitation Rule by EPA and US Army Corps of Engineers. Because Environment is the common theme behind all these initiatives, the collective and cumulative significance and intensity of impacts to the Human Environment of these initiatives are required to collectively be evaluated. Please provide this Committee with a demonstration of how the NEPA required impacts to culture, custom, industry were evaluated and the proposed WOTUS Rule adequately accounts and balances Human and Natural Environments. (p. 2)

Agency Response: **See summary response for 13.2.11.**

Senate Natural Resource Committee Garden City (Doc. #16427)

13.490 In contrast to stated concerns for human systems, the record indicates EPA has not completed an Environmental Impact Statement for the WOTUS Rule, nor has it issued a determination on its Environmental Assessment, to the glaring neglect of crucial, protective procedures found in the National Environmental Policy Act. (p. 2)

Agency Response: **An EA prepared by the Army reviewed the reasonably foreseeable impacts of the rule, including socio-economic and cumulative impacts. The Assistant Secretary of the Army for Civil Works determined that the adoption of the rule would not have significant impacts on the human environment. Her decision is documented in a "finding of no significant impact" (FONSI) that can be found in the rule making docket. While NEPA does not apply to this rulemaking (see CWA section 511(c)) and the Army therefore prepared the EA voluntarily, even if NEPA did apply, preparation of an EIS would not be required.**

Mesa County, Colorado Board of County Commissioners (Doc. #12713)

13.491 Yet, if the Rule were adopted, causing more water bodies to be subject to Federal oversight, more of Mesa County's capital projects could require permitting from the United States Army Corps of Engineers (USACE). If Mesa County's project were large enough, the additional oversight could trigger the need for a National Environmental Policy Act (NEPA) review and consultation with Fish and Wildlife Service for impacts to Endangered Species Act (ESA). These additional requirements will increase cost and perhaps add years onto a project. (p. 1)

Agency Response: **It is possible that some additional projects may require permitting with adoption of rule, which may in turn trigger a NEPA analysis or require the Army to consult with FWS. Nothing in the rule is directed at capital projects, and the increased clarity and predictability provided by the rule should improve the efficiency of permitting.**

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Big Horn County Commission (Doc. #13599)

13.492 The EPA also failed to consider that this proposed rule is a Major Federal action that requires all Federal Agencies to implement NEPA. (p. 1)

Agency Response: **See summary response for 13.2.11.**

Waters of the United States Coalition (Doc. #14589)

13.493 VII. BECAUSE THE PROPOSED RULE IS AN ACOE ACTION, EPA AND ACOE NEED TO ANALYZE THE IMPACTS UNDER NEPA

All federal agencies must comply with NEPA. (40 C.F.R. § 1500.3.) To do so, federal agencies undertaking any "major Federal action" must analyze the environmental impacts of that action. (42 U.S.C. § 4332(2)(C).) New or revised policies, rules, and regulations constitute major Federal actions when they have the potential to affect the quality of the human environment. (40 C.F.R. §§ 1500.6, 1502.4(b), 1508.18(b).) When a major federal action has the potential to significantly affect the quality of the human environment, an Environmental Impact Statement ("EIS") must be prepared. (42 U.S.C. § 4332(2)(C).)

EPA and ACOE's Proposed Rule revises the definition of the term "waters of the United States." The proposed revision greatly expands the number of waters classified as waters of the United States including man-made conveyances and treatment structures that are part of local government flood control or water supply systems. See Claudia Copeland, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" (April 21, 2014) (Congressional Research Service report noting the Proposed Rule will reach an additional 3% to 17% of the nation's waters).

The Proposed Rule's expansive definition of the term waters of the United States will result in significant impacts to the human environment. It will restrict or entirely prevent the use of many man-made conveyances that provide drinking water to residents, keep streets free of flood waters, and allow for the development of new uses for recycled water, among other uses.

Designating the internal infrastructure as waters of the United States could limit local government agencies' ability to provide critical water supply services, recycling water for re-use, or responding to wildfires and other critical emergencies. The Proposed Rule is therefore likely to result in project-specific and cumulative significant environmental impacts relating to water supplies, hydrology, emergency services, public services and utilities, agriculture, air quality, biological resources, soil erosion, land use and planning, population and housing, and others. These impacts, particularly the impacts to water supply, will be dire in certain areas of the west, including California, which are suffering from unprecedented drought conditions and already experiencing enormous water supply, agricultural, socioeconomic impacts, and other impacts, and these will be further exacerbated by the Proposed Rule.

Due to the likelihood of such significant impacts to the human environment, an EIS that discloses and analyzes these impacts is required prior to the approval or implementation of the Proposed Rule. (42 U.S.C. 5 4332(2)(C); Ocean Advocates v. US. Army Corps of Engineers, 402 F.3d 846,864-65 (9th Cir. 2005).)

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We recognize that EPA may be exempt from certain NEPA requirements. (33 U.S.C. 5 137 1 (c).) However, the Proposed Rule is being promulgated by EPA and ACOE, and no such exemption applies to the latter, nor does ACOE have any applicable categorical exclusion. (See, e.g., Ronald E. Bass et al., The NEPA Book 40 (2d ed. 2001) (EPA exemptions only applicable to EPA); 33 C.F.R. 5 230.9 (listing the Army Corps' categorical exclusions, none of which concern rule revisions).) Accordingly, due to the wide-ranging, significant impacts to the human environment that will result from the Proposed Rule, an EIS is required. (p. 46 – 48)

Agency Response: **As discussed in the Army EA, as compared with existing practices under current regulations and guidance, the agencies predict that there will be an incremental increase in the number of positive jurisdictional determinations under the rule. The agencies disagree with the commenters' assertion that the rule is somehow directed at local government infrastructure and related activities, or designates them as waters of the U.S. The fact that the rule covers man-made conveyances that come within the scope of the rule is not a change – man-made conveyance that are tributaries are regulated under the current regulations. Whether any of the activities identified in the comment will become newly subject to section 404 permitting is speculative. If they do, this would not prevent the activities from going forward. Moreover, the commenters' concerns about any project-specific environmental, socio-economic, and cumulative impacts would be addressed under NEPA in the permitting process. See also summary response for 13.2.11.**

South Big Horn County Conservation District (Doc. #17264)

13.494 Due to the significant expansion of waters and thus lands falling under Clean Water Act jurisdiction, we believe that the NEPA process is triggered and request that EPA complete this process before adopting the rule. (p. 2)

Agency Response: **See summary response for 13.2.11.**

Idaho Association of Commerce and Industry (Doc. #15461)

13.495 NEPA Process – Impacts to waters of the U.S. is an important evaluation criterion under national Environmental Policy Act (NEPA). Furthermore, the NEPA process must demonstrate that alternatives are considered that minimize impacts to wetlands and waters of the U.S. as "practicable" to conform with CWA 404(b)(1) regulations. The NEPA process for mines is already a very lengthy process, often taking many years to complete. The proposed rule and expansion of the definition of waters of the U.S., alternative selection in the NEPA process will be affected, which will likely add further delays to the NEPA process. (p. 10)

Agency Response: **The agencies disagree that a change in the definition of waters of the United States will affect the length of time in which NEPA is completed for a project. The agencies also disagree that the change to the definition of waters of the United States will significantly affect the developments of reasonable alternatives to a proposed action under NEPA.**

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13.496 NEPA Avoidance – For activities on private land, often the only federal action that triggers NEPA is a Section 404 permit. Often mine sites and industrial activities on private land avoid jurisdictional waters and wetlands in order to avoid the NEPA process (for example, it is possible to permit a mine site on private or state land and not have the NEPA process if there is no federal nexus). The proposed rule broadens the definition of waters of the U.S. and therefore, it is possible that avoidance of jurisdictional wetlands and waters is not feasible, resulting in NEPA requirements or the cancellation of projects. (p. 11)

Agency Response: As discussed in the Army EA, as compared with existing practices under current regulations and guidance, the agencies predict that there will be an incremental increase in the number of positive jurisdictional determinations under the rule. Whether mining or other industrial activities will become newly subject to section 404 permitting is speculative. If they do, this would not prevent the activities from going forward.

CEMEX (Doc. #19470)

13.497 The proposed rule is so expansive that it will trigger numerous additional environmental reviews to address such issues as endangered species and historic preservation, which will make it even more difficult and costly to ensure timely supply of aggregates for public works projects essential to economic recovery.

The proposal would interact with the newly-proposed Endangered Species rules to increase the regulatory impact of both sets of rules. (p. 3 – 4)

Agency Response: The agencies disagree that the rule is a significant expansion of jurisdiction. Whether projects related to the supply of aggregates for public works will become newly subject to section 404 permitting is speculative. If they do, this would not prevent the activities from going forward.

A. Schafer (Doc. #2743)

13.498 This rule change will require federal funding for implementation, and following the NEPA requirements, requires conduction of a full environmental impact assessment in order to determine all potential socio-economic impacts, impacts to rural and disadvantaged communities and areas, impacts to irrigatable lands. This is required by law to allow public input in order to define and understand the unintentional consequences of the proposed rule change. (p. 1)

Agency Response: See summary response for 13.2.11.

J.R. Simplot Company (Doc. #15062)

13.499 NEPA Process - Impacts to waters of the U.S. is an important evaluation criterion under National Environmental Policy Act (NEPA). Furthermore, the NEPA process must demonstrate that alternatives are considered that minimize impacts to wetlands and waters of the U.S. as "practicable" to conform with CWA 404(b)(1) regulations. With the proposed rule and expansion of the definition of waters of the U.S., alternative selection in the NEPA process could be affected. (p. 16)

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Agency Response: **The agencies disagree that the change to the definition of waters of the United States will significantly affect the developments of reasonable alternatives to a proposed action under NEPA.**

13.500 NEPA Avoidance - For activities on private land, often the only federal action that triggers NEPA is a Section 404 permit. Often mine sites and industrial activities on private land avoid jurisdictional waters and wetlands in order to avoid the NEPA process (for example, it is possible to permit a mine site on private or state land and not have the NEPA process if there is no federal nexus). The proposed rule broadens the definition of waters of the U.S. and therefore, it is possible that avoidance of jurisdictional wetlands and waters is not feasible, resulting in NEPA requirements or the cancelation of the project. (p. 16)

Agency Response: **As discussed in the Army EA, as compared with existing practices under current regulations and guidance, the agencies predict that there will be an incremental increase in the number of positive jurisdictional determinations under the rule. Whether mining or other industrial activities will become newly subject to section 404 permitting is speculative. If they do, this would not prevent the activities from going forward.**

Jefferson Mining District (Doc. #15706)

13.501 The Rule definition adopted as proposed will most certainly "constitute a major Federal action significantly affecting the quality of the human environment", if not commit an outright and unlawful takings, and therefore any assertion that the proposal would not affect the quality of the human environment, so called, is fraud on the record. This remark is stated to give the appearances that the requirements under law are met for this sort of administrative action and to further undermine the obligations of the federal government to meet the requirements of the NEPA which intends the balance be in favor of the needs of the people, the public, and their property as Congress disposed to them. (p. 5)

Agency Response: **See summary response for 13.2.11.**

Westlands Water District (Doc. #14414)

13.502 III. THE ARMY CORPS OF ENGINEERS SHOULD COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT IN ADOPTING THE PROPOSED RULE.

All federal agencies are required to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq. 40 C.F.R. § 1500.3. Under NEPA, any federal agency undertaking any "major Federal action" that may have an effect on the quality of the human environment must analyze the environmental impacts of that action. (42 U.S.C. § 4332(2)(C).) An agency's adoption of a new or revised policy, rule, or regulation constitutes a major federal action within the meaning of NEPA if the action may potentially affect the quality of the human environment. (40 C.F.R. §§ 1500.6, 1502.4(b), 1508.18(b).) If an agency undertakes such a major federal action, the agency must prepare an Environmental Impact Statement ("EIS") analyzing and describing the effect of its action on the human environment. 42 U.S.C. § 4332(2)(C).

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As discussed above, the Proposed Rule revises the definition of the phrase "waters of the United States" for the purposes of establishing federal jurisdiction under the Clean Water Act. The Proposed Rule greatly expands the requirements of the Clean Water Act, as such requirements apply to man-made conveyances and treatment structures that are part of local government flood control or water supply systems. (See Claudia Copeland, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" (April 21, 2014) (Congressional Research Service report noting the Proposed Rule will reach an additional 3% to 17% of the nation's waters).)

The Proposed Rule's expansion of the reach of the Clean Water Act would result in significant impacts to the human environment by restricting or entirely preventing the use of many man-made conveyances that provide drinking water to residents, keep streets free of flood waters, and allow for the development of new uses for recycled water.

Under the Proposed Rule as currently worded, upland ditches that are part of a local government flood control or water supply system would for the first time be defined as "waters of the United States" and, accordingly, subject to regulation under the Clean Water Act. If these types of man-made structures are so designated, they may no longer be used for treatment, because they would be required to attain TMDL compliance in-stream rather than at the point of discharge.

Designating the water in such internal infrastructure as waters of the United States would prevent local government agencies from using that infrastructure and hence from providing critical water supply services, recycling water for re-use, or responding to wildfires and other critical emergencies. This would result in project-specific and cumulative significant environmental impacts relating to water supplies, hydrology, emergency services, public services and utilities, agriculture, air quality, biological resources, soil erosion, land use and planning, population and housing, and others. These impacts, particularly the impacts to water supply, would be dire in certain areas of the West, including California, which are suffering from historical drought conditions and are experiencing enormous water supply, agricultural, socioeconomic and other impacts. Because of the potential impacts of the Proposed Rule on the human environment, the agencies should prepare an EIS prior to adoption or implementation of the Rule that discloses and analyzes these impacts. (42 U.S.C. § 4332(2)(C); Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864-65 (9th Cir. 2005).)

Although the EPA is exempt from compliance with NEPA in taking certain actions under the Clean Water Act, 33 U.S.C. § 511(c)(1), the exemption does not apply to the Army Corps of Engineers, which is one of two agencies adopting the Proposed Rule. The Army Corps of Engineers is not exempt from compliance with NEPA, and does not have a categorical exclusion from NEPA. See, e.g., Ronald E. Bass et al., The NEPA Book 40 (2d ed. 2001) (EPA exemptions only applicable to EPA); 33 C.F.R. § 230.9 (listing the Army Corps' categorical exclusions, none of which concern rule revisions). Accordingly, because of the significant, wide-ranging impacts to the human environment that would be caused by the Proposed Rule, the Army Corps of Engineers is required to prepare an EIS before adopting the Rule. (p. 29 – 31)

<u>Agency Response:</u> As discussed in the Army's voluntary EA, as compared with existing practices under current regulations and guidance, the agencies predict that

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there will be an incremental increase in the number of positive jurisdictional determinations under the rule. The agencies disagree with the commenters' assertion that the rule is somehow directed at local government infrastructure and related activities, or designates them as waters of the U.S. The fact that the rule covers man-made conveyances that come within the scope of the rule is not a change – man-made conveyance that are tributaries are regulated under the current regulations. Whether any of the activities identified in the comment will become newly subject to section 404 permitting is speculative. If they do, this would not prevent the activities from going forward. Moreover, the commenters' concerns about any project-specific environmental, socio-economic, and cumulative impacts would be addressed under NEPA in the permitting process.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

13.503 Perhaps most importantly, the federal nexus invokes the provisions of the National Environmental Policy Act (NEPA), another costly and time consuming process involving the examination of numerous alternatives, the imposition of additional mitigation requirements, and exposure to costly and lengthy administrative and judicial challenges. This would be true even if the project crosses only a number of dry arroyos or washes which may periodically flow in response to precipitation events. As Water Congress members can attest, for any large project the NEPA process entails years, if not over a decade, of additional work and millions, if not tens of millions, of additional ratepayer or taxpayer dollars in situations involving the construction of necessary water, wastewater and stormwater infrastructure. (p. 4)

Agency Response: The agencies have regulated ephemeral tributaries under current regulations. The agencies disagree that a change in the definition of waters of the United States will significantly affect the length of time in which NEPA is completed for a project. The agencies also disagree that the change to the definition of waters of the United States will significantly affect the developments of reasonable alternatives to a proposed action under NEPA.

Southern Company (Doc. #14134)

13.504 The Proposed Rule Could Significantly Expand Regulatory Requirements and Burdens Under Other Laws and Requirements

This rulemaking also has implications beyond the CWA. The proposal would trigger requirements under other laws, such as the Endangered Species Act (ESA) and NEPA. The issuance of Sections 402 and 404 permits for activities that could potentially impact listed species may give rise to ESA obligations, such as Section 7 consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service and possible mitigation (both for impacts to aquatic resources and threatened or endangered species and their habitat). The fact that this proposal would significantly expand jurisdiction over more waters will necessarily trigger and involve more permits and consultations under these laws.

In one of the states in which Southern Company operates, it is estimated that 40 percent of the more than 100 listed species are dependent upon aquatic habitats. In addition, as the potential for impacts to waters of the U.S. increases with expanded jurisdiction, the

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scope of the Corps' NEPA review may also expand, thereby giving rise to more extensive pre-project review.[348] The primary concern here is the potential scope of review under NEPA for private projects triggered by the issuance of 404 permits. The scope of analysis could expand as impacts to waters of the U.S. increase (due to the expansion of jurisdiction) and greatly slow the pace of permitting. These additional requirements and costs must be taken into consideration. (p. 20)

Agency Response: **The rule itself does not trigger the applicability of NEPA or other laws, and is not a significant expansion of jurisdiction. The agencies disagree that the scope of Army's NEPA reviews may expand, since the rule does not change NEPA or its requirements.**

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

13.505 Failure of Corps to Comply with NEPA

While EPA may not have to comply with NEPA in proposing this rule, the Corps is required to comply with NEPA. We understand that the Corps has prepared an Environmental Impact Assessment (EIA) for the rule, but has chosen to withhold the EIA until after the rule has been issued as final. Such action by the Corps violates the plain language and intent of NEPA, 42 U.S.C. § 4332 (2)(C), thus jeopardizing the entire rulemaking process. (p. 11)

Agency Response: **See summary response for 13.2.11.**

Center for Environmental Law and Policy (Doc. #15431)

13.506 THE RELATED ENVIRONMENTAL ASSESSMENT BY THE CORPS OF ENGINEERS IS BEING INAPPROPRIATELY WITHHELD

The EPA references a Corps-prepared environmental assessment in the preamble to the proposed rule, but this document is not posted on either the EPA website or the Corps website[349] We are informed by the Corps of Engineers that this document is expected to be made available the final rule is published.[350] We object to this withholding; NEPA-preparatory documents are not secret documents. According to the statute itself, the analysis must be undertaken whenever there are "proposals" for "major Federal actions" with significant effects[351], and we are obviously in the presence of a proposal.

This decision to proceed by an unrevealed environmental assessment is a violation of NEPA and it is a violation of the public participation provisions of the Clean Water Act (CWA).[352] (p. 1)

Agency Response: **See summary response for 13.2.11.**

[348] See NEPA Scope of Analysis in the Federal Permitting Context: The Federal Tail that Risks Wagging the Non-Federal Dog, available at https://www.fed-soc.org/doclib/20080314_EnviroDuncan.pdf.
[349] 79 Fed. Reg. 22,222 (April 21,2014).
[350] Personal communication with Cheryl R. Nyberg, Reference Librarian, Gallagher Law Library. University of-Washington School of Law (Nov. 10: 2014).
[351] N EPA, Subsection 102(2)(C), 42 U.S.C. 5 4332(2)(C)
[352] Subsection 101(e) of the Clean Water Act, 33 U.S.C. s 1251(e)

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13.5. OTHER FEDERAL LAWS

Specific Comments

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

13.507 As I am sure you are also aware, EPA is also required, by Executive Orders 12291 and 12866, to file a Regulatory Impact (RI), cost-benefit analysis which would describe all alternatives, including No Action, for those Major Federal Action(s) under consideration. The RI analysis is to include the net benefit of each alternative, along with a discussion of how such analyses were coordinated with local and state governments. Please provide the RI analysis EPA has performed for each Kansas County affected by the proposed WOWS Rule, as well as a description of Coordination EPA has conducted with local Kansans and/or jurisdictions in preparing the WOTUS Rule. (p. 2)

Agency Response: EPA has prepared a cost-benefit analysis, which is addressed in Compendium 11.

13.508 Finally, as you are most likely aware, the citizens of Kansas are currently being subjected to a significant range of Federal Actions, each of which has the potential to impact our citizens in psychological, economic and other measurable ways. These include Endangered Species listings by the United States Fish & Wildlife Service (Lesser Prairie Chicken) and proposed revision of the Resource Management Plan by the Bureau of Land Management, which were presented in February of this year in Salina, Kansas. (p. 2)

Agency Response: Federal actions other than this rule are outside the scope of this rulemaking.

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

13.509 The purpose of this correspondence is to officially invoke coordination between Environmental Protection Agency (EPA) and the Kansas Senate Committee on Natural Resources as required by National Environmental Policy Act[353] and Executive Orders 1237 2, 13575, 1335 2. Please consider this notification of our intent to evaluate - using studies required of EPA prior to proposing the WOTUS Rule - the claims in the Q&A Document. (p. 1).

Agency Response: As explained in sections on Federalism (13.2.5), Tribal Consultation (13.2.6), and RFA/SBREFA (11.1 in Compendium 11), the agency did voluntary (i.e., not legally required) outreach prior to the proposed rule, and the extensive outreach, and extended comment period provided an unprecedented degree of public input, which was fully considered by the agencies in the rulemaking. For additional information on public outreach events, see the docket.

13.510 The Q&A document, Page 6 states that the WOTUS Rule: "would not infringe on private property rights and hinder development." Executive Order 12630 requires EPA to assess,

[353] 42 USC §4331 (a), b)

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account for and fully evaluate the potential for private-property takings, and if the Q&A document is taken at face value, EPA has performed its duty under EO 12630.

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

This is particularly the case for lands adjacent to properties in Conservation Easements, as such programs have the stated goal of lowering property values. Please provide this Committee with specific documentation that the requirements of EO 12630 have been addressed, and in particular how property values may be maintained in the context of lands proximal to those encumbered by Conservation Easements. (p. 2)

Agency Response: See compendium 10 and the Technical Support Document for Responses regarding the Takings Executive Order.

Gila River Indian Community (Doc. #13619)

13.511 E. Greater Federal Regulation of Tribal Lands Goes Against Current Trends

When Congress enacted the Indian Self-Determination and Educational Assistance Act of 1975, federal policy began to revolve around promoting tribal self-determination and transferring certain federal responsibilities to willing tribal nations. Federal policy has continued down this path through the enactment of statutes and regulations that provide tribes with the ability to manage their own lands. For example, in the area of environmental law, the U.S. Fish and Wildlife Service has enacted an Endangered Species Act policy against designating critical habitat for an endangered species on tribal lands. The Service has recognized that it is the tribe, and not the Federal government, that should regulate tribal lands.[354]

The same has been true in Congress, which recently passed the Helping Expedite and Advance Responsible Tribal Homeownership ("HEARTH") Act in 2012. With the HEARTH Act, Congress authorized tribes to control and approve the leasing of their tribal lands; Secretary of the Interior approval is no longer required. The HEARTH Act also allowed tribes to substitute their own environmental review process for leasing decisions, thus supplanting a NEPA review by the Bureau of Indian Affairs. The Proposed Rule, however, goes against these trends, as it will result in more –not less – Federal regulation on tribal lands. (p. 6 - 7)

Agency Response: The HEARTH Act (Helping Expedite and Advance Responsible Tribal Home Ownership) of 2012 creates a voluntary, alternative land leasing process available to tribes by amending the Indian Long-Term Leasing Act of 1955 and is not relevant to this rule. The agencies disagree that the rule is in tension with the trends cited by the commenter, as it conforms the rule to the CWA and relevant caselaw.

[354] Secretarial Order No. 3206 (June 5, 1997).

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Illinois Farm Bureau (Doc. #14070)

13.512 EPA's Social Media Campaign Has Prejudiced the Rulemaking Process

EPA's social media advocacy in favor of the proposed WOTUS rule has prejudiced the rulemaking process. Throughout the rulemaking, EPA staff have asked the public to influence the agency's view of the proposed WOTUS rule. A few months ago, EPA established a website called "Ditch the Myth", which declares the proposed rule "clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources." EPA has now gone so far as to solicit others to seek to influence the agency regarding the proposed rule, urging social media users to "show their support for clean water and the agency's proposal to protect it." These actions raise serious concerns about compliance with the Anti-Lobbying Act.

The integrity of the rulemaking process is in jeopardy, if not already tainted. EPA's social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking. Why should any landowner believe that EPA will seriously and meaningfully examine adverse comments regarding the proposed rule's impact on ditches, for example, when the agency has already pronounced that the proposed rule "reduces regulation of ditches"?

IFB questions whether the WOTUS rulemaking can be conducted in accordance with the Administrative Procedure Act and its objective that agencies "benefit from the expertise and input of the parties who file comments with regard to [a] proposed rule" and "maintain a flexible and open-minded attitude towards its own rules."

IFB is dismayed that the Obama Administration has failed to adhere to its obligations of impartiality under the law. Moreover, the bias has been reflected in comments from non-governmental organizations as well. Based on similar statements from groups such as National Resources Defense Council on the national level and several environmental activist groups in Illinois, it is as though the Administration and its environmentalist allies are of one mindset, eager to paint the proposed rule's critics as anything other than concerned citizens.

The Obama Administration owes the American people, including Illinois farmers, a higher level of discourse. To date, however, the WOTUS rulemaking has been plagued by administrative bias and prejudicial grandstanding. (p. 4)

Agency Response: **See response 13.2.1.**

Palm Beach County MS4 NPDES (Doc. #13218)

13.513 Additionally, the Palm Beach County MS4s support the U. S. House of Representatives efforts in passing legislation that protects States authority to protect our water ways. The Waters of the United States Regulatory Overreach Protection Act (H.R. 5078) prohibits EPA and Corps. From implementing a rule that would redefine WOTUS and requires these agencies to work with the States and local governments to develop recommendations for a regulatory proposal. Within a year after enactment of the law, a draft report would be required to be published in the Federal Register and the public provided with the opportunity to provide comments. Within two years after enactment, a final report would be provided to Congress. (p. 2)

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Agency Response: **The pendency of legislation that would amend the Clean Water Act does not obviate the need as expressed by numerous stakeholders and members of the Supreme Court, to undertake rulemaking to clarify the scope of waters of the U.S.**

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

13.514 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.[355] 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 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 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 . . . ."[356]

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 . . . ."[357] 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.[358] 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.[359] This

[355] 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).
[356] OMB Guidelines § V.5.
[357] OMB Guidelines § V.9
[358] 67 Fed. Reg. 8,452 (February 22, 2002).
[359] 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,

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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. (p. 36 – 37)

Agency Response: **The Information Quality Act (IQA), sometimes referred to as the Data Quality Act, was enacted in 2000 and directed the Director of the Office of Management and Budget (OMB) to issue guidelines providing policy and procedural guidance to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by Federal agencies. Each Federal agency was then required to issue its own guidelines modeled after those issued by OMB. OMB published its flexible, government-wide guidelines on February 22, 2002. EPA issued its Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (Guidelines) in October 2002, to provide non-binding policy and procedural guidance to achieve the purposes of the IQA. Under the Guidelines, EPA ensures and maximizes the quality of information it disseminates by implementing well established policies and procedures within the Agency as appropriate to the information. The Agencies have fully complied with the IQA.**

For information about how EPA ensured the quality of the Connectivity Report, including information about the peer review process, see EPA's responses to comments in Compendium 9.

Portland Cement Association (Doc. #13271)

13.515 In addition to the above concerns based on the proposed rule's legality, breadth and clarity, PCA notes several areas of concerns. The first is based on several indirect the impacts of the rule.

a. Secondary interaction with newly proposed changes to Endangered Species rules

As the Agencies are likely aware, the U.S. Fish and Wildlife and National Marine Fisheries Services (FWS and NMFS) are currently in the middle of two rulemakings under the Endangered Species Act (ESA).360 These rulemakings relate to one of the restrictions on federal government action under the ESA – that agencies of the federal government not act in a way that results in the adverse modification of listed species' critical habitat. In PCA's view, those proposed rules will both expand the potential for a variety of lands to be listed as critical habitat and also reduce the breadth of activities which the government can undertake without those activities being viewed as an adverse modification. In short, the rules will expand the reach of the ESA and limit the ability of the government to act without violating the ESA.

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).

[360] 79 Fed.Reg. 27060 (May 12, 2014) ("Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat") and 79 Fed. Reg. 27066 (May 12, 2014) ("Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat")

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The FWS and NMFS rulemakings are significant in their own right, but are also significant in their interplay with the Agencies' proposed rule redefining Waters of the US. This is because (1) the proposed rule will expand federal jurisdiction over waters and therefore increase the need for federal actions and (2) a large percentage of endangered species are found exclusively in wetland areas. EPA's Office of Water is aware of the latter connection, having tweeted about it upon FWS and NMFS's proposal of their ESA rules.[361]

As a result of the interplay between the CWA and ESA rules, if finalized, there will need to be more and more detailed consultations between the Agencies and the Services and those consultations are more likely to result in delay, permit denial, and/or permit restrictions. The Agencies have failed to include these costs or analyze these impacts in the proposed rule. (p. 28)

Agency Response: It is speculative to conjecture at this time what the interplay of this rule and the Services' rulemaking, as the latter has not been finalized. In any event, the agencies disagree with the commenter's suggestion that this rule significantly expands jurisdiction.

CalPortland Company (Doc. #14590)

13.516 (…) The proposal would interact with the newly-proposed Endangered Species rules to increase the regulatory impact of both sets of rules. (p. 2)

Agency Response: It is speculative to conjecture at this time what the interplay of this rule and the Services' rulemaking, as the latter has not been finalized. In any event, the agencies disagree with the commenter's suggestion that this rule significantly expands jurisdiction.

National Association of Home Builders (Doc. #19540)

13.517 d. The Proposed Rule will have Adverse Impacts on Other Federal Programs.

Before the Agencies can issue any CWA permit, they must first comply with other federal statutes, including Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. These additional requirements can be particularly burdensome, further delaying permits and adding to the already steep regulatory costs home builders must incur.

i. Increases in Clean Water Act Permits will Trigger Additional Endangered Species Act Section 7 Consultations.

The Endangered Species Act (ESA) requires all federal agencies to consult with the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration (collectively referred to as the Service) whenever a proposed federal action may adversely affect an endangered species or designated critical habitat.[362] A jurisdictional

[361] The tweet occurred the day the Services' proposed rule was published in the Federal Register (May 12, 2014) and stated "May is #wetlands month. Did you know that 1/3 of threatened & endangered species in the US live only in wetlands? go.usa.gov/22j4"
[362] 50 C.F.R. § 402.03.

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determination by the Corps and obtaining a CWA Section 404 wetlands permit is clearly covered by the ESA's regulatory definition of a federal action, which includes all activities or programs of any kind authorized, funded, or carried out by federal agencies including granting of licenses and permits.[363] Once the ESA's Section 7 consultation requirements have been triggered by the federal action, the Corps, along with the Service, must complete the ESA Section 7 consultation process prior to issuing the CWA permit. The ESA Section 7 consultation process has two separate routes: informal and formal consultation.

During an informal consultation, the Corps, with input from the Service, has 180 days to prepare a biological assessment that identifies whether or not the issuance of the CWA Section 404 permit is likely to adversely affect an endangered species or adversely modify designated critical habitat. Once the Corps has completed the a biological assessment, the Service has 30 days to review it to determine whether the proposed action is likely to adversely affect an endangered species or adversely modify designated critical habitat. If the issuance of the proposed CWA Section 404 permit is likely to adversely affect an endangered species or adversely modify critical habitat, formal consultation is required.[364]

During the formal consultation process, the Service has 90 days to prepare a Biological Opinion (hereinafter, BiOp) that contains the Service's opinion on whether or not the federal permit, as proposed, is likely to jeopardize the continued existence of an endangered species, or result in the destruction or adverse modification of critical habitat. The BiOp must include a summary of all the information the Service has based its opinion upon, a review of the potential effects of the proposed permit on the species or critical habitat, and a "jeopardy" or "no jeopardy" determination. If the Service concludes the issuance of the CWA permit is likely to jeopardize the continued existence of an endangered species, or adversely modify designated critical habitat (e.g., a "jeopardy biological opinion") the Service must identify reasonable and prudent alternatives (RPAs) that if adopted, will reduce and/or mitigate the impacts so that the issuance of the permit is not likely to jeopardize the continued existence of an endangered species (e.g., "no jeopardy biological opinion").[365] If the Corps agrees to adopt all the RPAs contained in the BiOp, they become binding terms and conditions of the proffered permit. Typically, these RPA's involve reducing the size of proposed land development projects (i.e., loss of buildable lots) and providing additional species monitoring and reporting. Once accepted, the Service will issue the Corps and the permit applicant an "incidental take statement," which exempts both parties from the ESA Section 9 "take" prohibitions.[366]

The ESA Section 7 consultation process, as it is currently implemented, is onerous and problematic, making it the subject of numerous oversight reports by the Government Accountability Office (GAO). A 2004 report titled "Endangered Species -More Federal Management Attention is needed to Improve the Consultation Process," evaluated the

[363] 50 C.F.R. § 402.02.
[364] 50 C.F.R. § 402.12(k)(2).
[365] 50 C.F.R. 6 402.14(h).
[366] 50 C.F.R. 4 402.1qi)

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existing Section 7 consultation program and found a great deal of confusion regarding roles and responsibilities between the various federal action agencies (e.g., EPA, the Corps, US Forest Service WSFS]) and the Services during the Section 7 consultation process. Furthermore, GAO found it impossible to determine with any certainty the extent of the delays within the Section 7 consultation process because the Services failed to track, monitor, or report the significant amount of time spent before the federal action agency formally began the consultation This confusion and failure to keep track of actions frequently results in excessive permitting delays impacting federal agencies and private landowners alike. For example, a review by FWS following GAO's recommendations found that routine CWA Section 404 nationwide permits issued by the Corps for private dock building activities had been delayed by over two years, costing private landowners approximately $10,000 in additional construction costs per permit[367] of federal jurisdiction under the CWA that triggers these ESA requirements in areas designated as critical habitat. If one pictures two nearly identical properties one of which is deemed jurisdictional and the other is not, it is only the one under CWA jurisdiction that is also implicated under ESA. Landowners whose property becomes subject to ESA's Section 7 consultation process due to the necessity of obtaining CWA Section 404 permit face significant permitting delays and additional compensatory measures under the ESA. At a minimum, EPA and the Corps must consider the economic impact stemming from the expanded scope of CWA jurisdiction and the greater number of ESA Section 7 consultations. (p. 132 – 134)

Agency Response: **This rule does not affect any existing requirements that may apply under other federal statutes, and their applicability will be site-specific. Any such requirements are due to independent obligations imposed by those laws. The economic analysis in the record did consider permit application costs, but due to the variability in the applicability of such statutes, the lack of scalable data provided by commenters, and the difficulty in assessing these values at a national level in a meaningful way the agencies are unable to quantify these impacts. In any event, the agencies disagree with commenter's assertion that the rule will result in significant expansion of jurisdiction leading to significantly greater obligations under other statutes that may apply on a case-by-case basis.**

ii. Increased Number of Clean Water Act Permits will Trigger Additional National Historic Preservation Act Section 106 Requirements.

With the expansive "tributary," "adjacent waters," and "other waters" definitions in the proposed rule, more waters will be deemed jurisdictional under the CWA, in turn requiring more federal permits for land development, home building, and other activities on private property. In addition to prompting ESA Section 7 consultation, federal CWA permits trigger burdensome requirements under the National Historic Preservation Act (NHPA) of 1966.

Section 106 of the NHPA requires federal agencies issuing permits or providing funds for projects to consider the effects of those projects on properties included in or eligible for

[367] GAO (2004) More Federal Management Attention Is Needed to Improve the Consultation Process, GAO-04-91 available at http://www.docsearch/repandtest.html, page 12.

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inclusion in the National Register of Historic Places.[368] As such, any project that involves CWA Section 404 permits will require the Corps to consider the impacts of the project on historic resources. Historic properties may include prehistoric or historic districts, sites, buildings, structures, objects, sacred sites, and traditional cultural places.

Before issuing any CWA permit, the Corps must first determine whether the issuance of the permit could affect an historic property. If so, the Corps must identify the appropriate State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) to consult with during the process. The Corps must also plan to involve the public, and identify other potential consulting parties. If the Corps finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with the permit. Alternatively, if the agency finds that historic properties are present, it proceeds to assess possible adverse effects. If the Corps and the SHPO/THPO agree that there will be no adverse effects, the Corps can proceed with the permit and any agreed-upon conditions. If, however, the Corps and the SHPO/THPO find that there are adverse effects, or if the parties cannot agree and the Advisory Council on Historic Preservation (ACHP) determines that there will be adverse effects, the Corps begins consultation to seek ways to avoid, minimize, or mitigate the adverse effects. The Corps then consults to resolve adverse effects with the SHPO/THPO and others, including local governments, permit or license applicants, and members of the public. Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed-upon measures that the Corps will require the permittee to take to avoid, minimize, or mitigate the adverse effects. The requirements contained within the MOA are incorporated into the CWA permit.[369]

While the goal of NHF'A Section 106 is to complete the evaluation of whether the proposed project may affect an historic property early in the process to ensure minimal impacts on that property, satisfaction of many of the requirements can be time consuming and costly to the permit applicant. Delays in project scheduling between the Corps, SHPO/THPO, the public, and other involved parties are common. This will only add to the costs and delays home builders face when trying to conduct their daily business. I Indeed, many cities and towns have historically been built along river floodplains. With the expanded definition of "neighboring" that automatically asserts jurisdiction over any water or wetland within the floodplain, many projects in metropolitan areas that include a pond, small stream, or ditch would now require a CWA Section 404 permit. And, in the event the project has the potential to impact an historic property, which may be commonplace in older cities, those I permits could be held up or even denied as the Corps works through the NHPA Section 106 process. (p. 134 – 135)

<u>Agency Response:</u> This rule does not affect any existing requirements that may apply under other federal statutes, and their applicability will be site-specific. Any such requirements are due to independent obligations imposed by those laws. The economic analysis in the record did consider permit application costs, but due to the variability in the applicability of such statutes, the lack of scalable data provided by

[368] 16 U.S.C. § 470a.
[369] 33 C.F.R. 5 325, Appendix C to Part 325, "Procedures for the Protection of Historic Properties."

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commenters, and the difficulty in assessing these values at a national level in a meaningful way the agencies are unable to quantify these impacts. In any event, the agencies disagree with commenter's assertion that the rule will result in significant expansion of jurisdiction leading to significantly greater obligations under other statutes that may apply on a case-by-case basis.

Ohio Coal Association (Doc. #15163)

13.518 The Proposed Rule Does Not Provide Additional Clarity as U.S. EPA Claims.

The Agencies indicate that the purpose of the Proposed Rule is to clarify the scope of Clean Water Act ("CWA") jurisdiction in a manner consistent with U. S. Supreme Court precedent. The current Proposed Rule, however, does not achieve that objective. Rather, due to several confusing, overly broad, and internally inconsistent definitions and statements contained in the Proposed Rule and the Agencies' supporting materials, the Proposed Rule injects more uncertainty into current CWA regulations, causing potential conflicts with other statutory requirements. We also note that the Proposed Rule even conflicts with President Obama's Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects ("E.O. 13604").

The Proposed Rule fits within the scope of federal permitting activities contemplated by E.O.13604 as many of the listed infrastructure activities, including transportation, ports and waterways, water resource projects, electricity generation, and pipelines, are likely to include waters of the United States' considerations. Coal is the building block of many of these infrastructure projects. As E.O. 13604 recognizes, the "United States must have fast, reliable, resilient, and environmentally sound means of moving people, goods, energy, and information" in order to "maintain our Nation's competitive edge." 77 Fed. Reg. 18887. This goal "depends in critical part on Federal permitting and review processes." Id.

Ohio Coal's members depend upon efficient permitting processes at the local, state and federal level to produce and transport the coal that is vital to our nation's infrastructure and energy production in an environmentally sound and timely manner. The Proposed Rule, however, will lead to increased uncertainty for infrastructure projects that impact jurisdictional waters, which will, in turn, result in decreased productivity that is antithetical to the aims of E.O.13604. Worse still, this uncertainty pertains primarily to a subset of smaller, marginal waters, and therefore only implicates minimal environmental concerns at a great cost to the regulated community. As evidenced by Justice Kennedy's "significant nexus" test in Rapanos v. United States, 547 U.S. 715 (2006), it is incumbent to make clear, decisive demarcations with respect to such waters and to only assert federal jurisdiction over a limited set of waters.

Ohio Coal urges the Agencies to withdraw the current proposal and take sufficient time to consult with industry, states, localities, small businesses and other regulated communities before re proposing a more sensible rule. Such action would allow the Agencies to properly assess the current scope of both state and federal regulatory programs, understand where clarifying language is needed and what impacts such language would have on the regulated communities. Such action also would enable the Agencies to make fully informed, thoughtful decisions about how to strike the balance between regulation

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of waters while still allowing for efficient, reliable permitting processes vital to economic growth. (p. 2 – 3)

Agency Response: The agencies are fully implementing the directions contained in this Executive Order and nothing in this rule will affect such compliance.

Utah Mining Association (Doc. #16349)

13.519 The Current Proposal Does Not Provide Necessary Clarity, Deviates from President Obama's Federal Permitting Executive Order, and Should be Withdrawn

The EPA and the Corps (collectively, Agencies) indicate the purpose of the proposed rule is to clarify the scope of CWA jurisdiction in a manner consistent with Supreme Court precedent. The current rule, however, does not achieve that objective. Rather, due to several confusing, overly broad, and at times inconsistent definitions and statements contained in the rule and the Agencies' supporting materials, the proposal runs the serious risk of injecting more uncertainty into current CWA regulations, causing potential conflicts with other statutory requirements, and running afoul of President Obama's Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects.

This rulemaking fits squarely within the scope of Executive Order 13604, as many of the listed infrastructure activities including transportation, ports and waterways, water resource projects, renewable energy generation, electricity generation, and pipelines are likely to implicate waters of the U.S. Minerals and metals are the building blocks of all of these infrastructure projects. For example, mining produces the raw materials necessary for multiple types of energy production, including solar, wind, and hydropower generation, in addition to supplying affordable and reliable coal and uranium generated electricity. Minerals extracted by the U.S. mining industry also provide the base of nearly all manufacturing supply chains. As E.O. 13604 recognizes, the "United States must have fast, reliable, resilient, and environmentally sound means of moving people, goods, energy, and information" in order to "maintain our Nation's competitive edge." This goal "depends in critical part on Federal permitting and review processes." (p. 1 – 2)

Agency Response: The agencies are fully implementing the directions contained in this Executive Order and nothing in this rule will affect such compliance.

North Dakota Soybean Growers Association (Doc. #14121)

13.520 The agencies' WOTUS proposed rule does not comply with the Information Quality Act's requirements as implemented under the Office of Management and Budget's (OMB) guidelines.[370] The agencies issued the proposed rule based upon an EPA report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. The report purports to establish a scientific basis for the connectivity of isolated, often temporary, "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

[370] See Treasury & General Governmental Appropriations Act for fiscal year 2001, Pub. L. No. 106---554 § 515(a); 44 U.S.C. § 3516 (notes).

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local) jurisdiction for these waters. This argument is a significant change concept in the proposed rules and meets OMB's definition of "influential" information. (p. 5)

Agency Response: **The Information Quality Act (IQA), sometimes referred to as the Data Quality Act, was enacted in 2000 and directed the Director of the Office of Management and Budget (OMB) to issue guidelines providing policy and procedural guidance to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by Federal agencies. Each Federal agency was then required to issue its own guidelines modeled after those issued by OMB. OMB published its flexible, government-wide guidelines on February 22, 2002. EPA issued its Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (Guidelines) in October 2002, to provide non-binding policy and procedural guidance to achieve the purposes of the IQA. Under the Guidelines, EPA ensures and maximizes the quality of information it disseminates by implementing well established policies and procedures within the Agency as appropriate to the information. The Agencies have fully complied with the IQA.**

EPA's responses on the Connectivity Report are contained in Compendium 9.

Jefferson Mining District (Doc. #15706)

13.521 The proposed rule appears to be in conflict with Executive Order 13573 - Establishment of the White House Rural Council the policy of which is "*To Enhance the Federal Government's efforts to address the needs of rural America*". Disregarding rural land disposal rights, status, and needs by imposing a commercial character upon these is not lawful and will not effect the mission the Executive Order intends, which in part is, to "(b)*coordinate and increase the effectiveness of Federal engagement with rural stakeholders, including agricultural organization, small business, education and training institutions, health care providers, telecommunications providers, research and land grant institutions, law enforcement, State, local and tribal governments, and nongovernmental organizations regarding the needs of rural America*," such as coordinating with Jefferson Mining District. (p. 4)

Agency Response: **The agencies have done extensive outreach with a broad cross section of stakeholders (see section 13.2), including those identified in this executive order.**

13.522 The proposed rule violates other Executive Orders such as E.O. 12630, takings assessments. (p. 4)

Agency Response: **See Legal Analysis in compendium 10 and the Technical Support Document for Responses regarding the Takings Executive Order.**

Central Arizona Project (Doc. #3267)

13.523 Intersection with Endangered Species Act: Applying for a federal permit may also trigger a requirement to consult with the Fish and Wildlife Service under Section 7 of the Endangered Species Act, and entail additional time and expense, if any endangered species or its critical habitat is located in the area. One such species that could be affected is the Sonoran Desert Tortoise habitat, which is under review by the Fish and Wildlife

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Service for inclusion as a threatened or endangered species and which has habitat along the CAP canal. (p. 5)

Agency Response: **This rule does not affect any existing requirements that may apply under other federal statutes, and their applicability will be site-specific. Any such requirements are due to independent obligations imposed by those laws. The economic analysis in the record did consider permit application costs, but due to the variability in the applicability of such statutes, the lack of scalable data provided by commenters, and the difficulty in assessing these values at a national level in a meaningful way the agencies are unable to quantify these impacts.**

The Clean Energy Group Waters Initiative (Doc. #14616)

13.524 Recognizing the importance of the Administration's climate and clean energy goals, we caution that it appears premature for the agencies to proceed with a clarification of the extent of WOTUS' jurisdiction at a time when internal procedures are underway to modernize and streamline the permitting process. As proposed, the WOTUS rule could undermine efforts to modernize permitting, such as Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects.30 If jurisdictional clarity is necessary, we recommend that a concurrent process take place such that permit reform and jurisdictional issues are resolved simultaneously, rather than the current approach. A concurrent process would help avoid permitting delays and confusion associated with regulatory changes. It would also ensure proper coordination and goal alignment with some of the key components of the President's Climate Action Plan, such as the QER. (p. 13)

Agency Response: **The agencies are fully implementing the directions contained in this Executive Order and nothing in this rule will affect such compliance.**

CropLife America (Doc. #14630)

13.525 Proposal Will Add Compliance and Legal Uncertainty for Pesticide Users

We are particularly concerned about impacts on public and private pesticide users and their efforts to meet Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[371] and CWA requirements created when the agencies intend to (a) regulate ephemeral conveyances regardless of the frequency, intensity or duration of their flow; (b) rely on vague and self-reinforcing definitions for jurisdictional features, such as "floodplain," "riparian area," "neighboring" and "tributary;" (c) lack biological and chemical metrics for a "significant nexus" among individual or aggregated "other waters;" (d) expand jurisdiction over adjacent "wetlands" to categorically include all adjacent "waters;" (e) regulate most manmade canals and drainage ditches; and (f) apply the proposed new categories of WOTUS across all land uses, climatic zones, ecoregions, and topographies. We believe the net result would be a great expansion of federal jurisdiction over minor waters and man-made conveyances that have not previously been defined as WOTUS; a chaotic encroachment on state authorities and budgets; and result in adverse impacts on

[371] See generally 7 U.S.C. 136 et seq.; see also EPA, Federal Insecticide, Fungicide, and Rodenticide Act and Agriculture, http://www.epa.gov/agriculture/lfra.html (last visited Nov. 5, 2014).

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public and private pest control operators responsible for maintaining the availability of safe, healthy and abundant food, public health, forests and other natural resources, utility and transportation rights-of-way, parks and other public recreation areas.

Since its publication, agency officials repeatedly have sought to reassure the public, states and Congress that the proposal would not expand the CWA regulation of WOTUS, but the continued controversy and widespread criticism suggests that most stakeholders disagree. We share this skepticism and believe that the proposed rule would result in the categorical federalization of millions of miles of ephemeral, intermittent, seasonal and manmade conveyances not previously regulated by rule.[372] We are concerned this would adversely affect agriculture, forestry and other land use activities on public and private lands where these conveyances occur, including weed, insect, disease, invasive species and mosquito control activities by states, municipalities, businesses and farmers. This would increase compliance risks and costs, and increase legal uncertainty for all involved. In 2013 we urged the agencies to conduct a proper rulemaking instead of guidance to define WOTUS; what the agencies have proposed in 2014, however, is entirely improper. Without adequately evaluating costs or science, engaging states or municipalities, conducting a formal small-business dialogue or proposing a rule adhering to applicable law, the proposed categories would improperly broaden federal CWA jurisdiction, complicate pesticide use and compliance requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and CWA and increase the potential for federal enforcement and penalties, as well as citizen suits. CLA is very concerned that the proposed expansion of WOTUS jurisdiction would adversely affect the legal use of FIFRA-registered pesticide products and create significant confusion and legal uncertainty under both FIFRA and CWA for public and private entities engaged in pest control activities, whether using products labeled for terrestrial use or aquatic use, both of which require water-focused environmental risk assessments discussed later in these comments.[373] (p. 3)

Agency Response: **Agencies' Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This narrowing is to be consistent with Supreme Court decisions.**

[372] The proposed rule states that the agencies intend to treat all perennial, intermittent and ephemeral streams as per se jurisdictional, and the preamble indicates that the agencies will identify categorical tributaries using U.S. Geological Survey (USGS) maps and other appropriate information. WOTUS Proposed Rule, 79 Fed. Reg. at 22,202. Recent USGS maps prepared for EPA indicate a total of approximately 8.1 million miles of perennial, intermittent and ephemeral streams across the 50 states, all of which would be categorically regulated as tributaries under the proposed rule. U.S. House of Representatives Committee on Science, Space, and Technology, EPA State and National Maps of Waters and Wetlands, http://science.house.gov/epa-maps-state-2013#overlay-context (last visited November 5, 2014). This is a 131% increase from the 3.5 million miles of regulable streams in EPA's latest National Water Quality Inventory Report to Congress.

[373] See infra FIFRA Registration of Pesticides Includes Water-Focused Risk Assessments.

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This rule does not affect any existing requirements that may apply under other federal statutes, and their applicability will be site-specific. Any such requirements are due to independent obligations imposed by those laws. In any event, the agencies disagree with commenter's assertion that the rule will result in significant expansion of jurisdiction leading to significantly greater obligations under other statutes that may apply on a case-by-case basis. Also see compendium 11 for an economic analysis of the rule.

Red River Valley Association (Doc. #16432)

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

Agency Response: The pendency of legislation that would amend the Clean Water Act does not obviate the need as expressed by numerous stakeholders and members of the Supreme Court, to undertake rulemaking to clarify the scope of waters of the U.S.

13.6. SUPPLEMENTAL COMMENTS ON PROCESS CONCERNS AND ADMINISTRATIVE PROCEDURES

Specific Comments

Western Urban Water Coalition (Doc. #0838)

13.527 EPA's Science Advisory Board (SAB) is currently reviewing the draft Connectivity Report which, the preamble states, serves as the scientific basis of the proposed rule. By issuing the proposed rule for comment before the completion of the SAB review, the EPA and the Corps are hindering the public's ability to make comments based on all of the available information. The WUWC believes that any public comments would be premature prior to the SAB finalizing its review. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.

Department of Agriculture, New Mexico (Doc. #0854)

13.528 Our preliminary concern is that the rule continually references a report (Report) that is not yet finalized, entitled *"Connectivity of streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence."*

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The draft rule states: *"The Report is under review by EPA's Science Advisory Board and the rule will not be finalized until that review and the final Report are complete."* While we agree the rule should not be finalized until the Report is complete, - we do not agree that the draft rule should reference the Report in its current iteration - especially because of the explicit warning printed on every page "DRAFT – DO NOT CITE OR QUOTE."

Our recommendation is that the peer-reviewed literature be finalized by addressing and incorporating public comments before the EPA uses it to endorse other federal actions. Any major changes to the Proposed Rule as a result of findings from the Report should be addressed in a second draft of the Proposed Rule (argued further below). (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

U.S. Congressman Chris Collins, U.S. House of Representatives et al. (Doc. #1434)

13.529 Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report - which the agencies point to as the foundation of this rule - has been neither peer-reviewed nor finalized. The EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," was sent to the EPA's Science Advisory Board to begin review on the same day the rule was sent t OMB for interagency review. The science should always come before a rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

New Mexico Farm and Livestock Bureau (Doc. #3969)

13.530 With the inconclusiveness and the blatant disregard for the APA we strongly urge the IR be removed. If left in place there may be devastating impacts to current farming and ranching, as well as, future establishment of operations. Contrary, to the claims of the agencies, there is no significant benefit to the industry. If the agencies were to collaborate with the industry in the future it would be the pleasure of the NMFLB to participate in any and all rule making processes. (p. 1)

Agency Response: **Pursuant to Congressional direction, the Interpretive Rule was withdrawn.**

Delta Conservation District (Doc. #4719.2)

13.531 We believe the EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A review and Synthesis of the Scientific Evidence" is highly questionable and flawed. We question the scientific evidence and timing of this proposal in light of the fact

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that the study was sent to the Science Advisory Board to begin review on the same day it was sent to OMB for interagency review. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

Falls County, Texas (Doc. #4758)

13.532 (…) AND WHEREAS, the EPA and the Corps relied on a draft synthesis of more than 1,000 published and peer-reviewed scientific reports summarizing current understanding of the connections or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. This draft is currently being reviewed by EPA's Science Advisory Board (SAB) and while the EPA states that it will not take any final action on its 20 14 proposed rule until a final report is approved by the SAB, that approval could come after the time for public comment on the proposed rule change has ended. (p. 3)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

House of Representatives, Alaska State Legislature (Doc. #4879)

13.533 Agencies have developed the proposed rule without the benefit of a completed independent scientific review of the EPA's Science Advisory Board's review. Proposing rules before all the relevant information is completed and reviewed calls into question whether the science presented is free from any influences by the agencies involved. (p. 1)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

L. Banks (Doc. #5554.2)

13.534 10. Having worked flood control and navigation issues with the Corps, USFWL and EPA for 44 years, it seemed the Corps had to abide by the NEPA process on every potential project or even on minor changes in regulation of existing projects. I don't understand why the EPA shouldn't have to abide by NEPA when pursuing an action which they believe will have such a drastic impact on the quality of waters throughout the USA! (p. 1 – 2)

Agency Response: **See section 13.3 summary response for information regarding NEPA in compendium 13.**

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Montana Association of Counties (Doc. #7334.2)

13.535 Compliance with NEPA

I find it ironic that the EPA has made little, if any, effort to cooperate with state and local governments in this rule making process in spite of the mandate in 42 U.S.C. §4321 et seq. (1969), the National Environmental Protection Act (NEPA), Section 101, Title I states that Congress…….

"declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (p. 4)

Agency Response: See section 13.3 summary response for information regarding NEPA in compendium 13.

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

13.536 C. The Proposed Rule Would Render The Clean Water Act In Excess Of Congress's Powers Under The Commerce Clause

In SWANCC, the Supreme Court rejected a previous attempt by the Corps to expansively interpret the term "waters of the United States," in part based upon the cannon of constitutional avoidance. As the Court explained, the Corps may not adopt an interpretation of the CWA that would create significant questions regarding whether the CWA exceeded Congress' constitutional authority. 531 U.S. at 174. Without deciding whether the Corp's assertion of CWA authority would exceed constitutional bounds, the Court reasoned that Congress did not intend to invoke its constitutional authority to its outermost limits, and instead "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" Id. (quoting 33 U.S.C. § 1251(b)). Both the four-Justice plurality in Rapanos and Justice Kennedy stressed that these concerns remain live as the Court interprets the CWA going forward. The plurality explained that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power." Rapanos, 547 U.S. at 738. And Justice Kennedy noted that the significant nexus test "prevents problematic applications of the statute." Id. at 782.

The Court's concerns that the CWA not be interpreted to reach to the limits of Congress's Commerce Clause authority apply with special force to the Proposed Rule. While SWANCC and Rapanos involved discrete examples of the Agencies' overreach into intrastate matters, the Proposed Rule is a wholesale assertion of virtually limitless authority over broad swaths of intrastate waters and lands. For many of the proposal's applications discussed above, the waters and lands covered are entirely outside of Congress' authority under the Commerce Clause, such as non-navigable intrastate waters that lack any significant nexus to a core water, trenching upon state authority, including in areas of non-economic activity. See generally United States v. Lopez, 514 U.S. 549,

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561 (1995); United States v. Morrison, 529 U.S. 598, 613 (2000). And for many other applications of the Proposed Rule, those waters and lands could only be regulated under a statute that sought to assert the full force of Congress' constitutional authority, such as application to the aggregated isolated waters the Proposed Rule includes on a case-by-case basis. The Supreme Court in SWANCC specifically held that the CWA is not such a statute. 531 U.S. at 173-74. Instead, the CWA—unlike the Proposed Rule—specifically respects the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U. S. C. § 1251(b). (p. 11)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

The rule implements, and is consistent with, the interpretations of the Supreme Court in the *Rapanos* and *SWANCC* decisions because the rule only covers waters that have a significant nexus with traditional navigable waters, and therefore within federal authority over channels of interstate commerce.

John Ford Ranch (Doc. #9512)

13.537 In developing this WOTUS rule, your agencies- the EPA and ACE- did not "follow the proper transparent rulemaking process that is dictated by the Administrative Procedure Act." A rule of this magnitude needs to go through the normal rulemaking procedures. The EPA and ACE should not be given the right to make regulatory changes without being subject to the legislative procedures that are in place in America. This proposed WOTUS has massive negative implications not only for the production of food and fiber in America, but will also affect every individual person, town, municipal, local, and state governments; simply by being put into effect without proper study, scientific documentation, involvement of municipalities and property owners, without consideration of consequences to the people and to the economy of America. It amounts to a governmental grab of jurisdiction over private property engaged in agricultural production, along with every other individual in America. Rather than adopting WOTUS, your agencies need to be placed under increased Congressional oversight. (p. 2)

Agency Response: **See summary responses in sections 13.2 and 13.2.1 for information regarding the rulemaking process and Administrative Procedure Act in compendium 13.**

Eddy County Board of Commissioners (Doc. #9693)

13.538 Proposed rule raises federalism concerns that could impose large costs. Executive order 131 32- Federalism, federal agencies are required to work with state and local governments on proposed regulations that may or will have substantial direct compliance cost. Agencies have determined "Waters of US" as indirect costs and do not trigger federalism. Commissioners disagree and believe the proposed rule changes will have significant direct costs to our county.

Areas that are put in to the jurisdiction of the Waters of the US triggers other federal laws, besides the 404 or pesticide permits just to name a couple, will also involve Environmental Impact Statements, National Environmental Policy Act, and also triggers any issue with endangered species. This will cost money and time. Permit will require

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applicant to mitigate the impacts of a project sometimes with considerable expense. Conditions may be attached to permits for maintenance activities and specific required conditions that result in time consuming negotiations in a process that could take years. (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

O'Bannon Cook (Doc. #9878)

13.539 Improper Agency Advocacy of the Proposed Rule

The proposed rule is still in the public comment phase. As the EPA well knows, the purpose of the comment phase is to receive input from the public and from the citizens and entities that will be affected by the proposed rule.

In an apparent effort to browbeat opposition and stifle the very input which is essential to the rulemaking process, the EPA's website (http://www2.epa.gov/uswaters/ditch-myth) engages in an aggressive campaign of belittling opposition as purveying "myths" and "misconceptions." In other words, instead of soliciting commentary, the EPA is attempting to ensure that otherwise interested citizens will either be persuaded by the propaganda being disseminated by the EPA, or will come to view opponents of this proposed rule as enemies of the truth. This is reprehensible behavior by a government agency in any functioning democracy. (p. 2)

Agency Response: **See section 13.2 summary response for information regarding the rulemaking process in compendium 13.**

The Anti-Lobbying Act does not prohibit the agencies from seeking input from the public on a rulemaking or restrict the agencies from educating or informing the public on a rulemaking under development – i.e., the types of activities described by the commenter. As noted in a recent Comptroller General opinion, "agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials" – e.g. persuasive statements in "individual social security statements mailed to over 140 million Americans," and letters "encouraging prosecutors to work with legislators to update local marijuana laws". B-325248, U.S. Comp. Gen., Sept. 9, 2014. See also B-319075, U.S. Comp. Gen., April 23, 2010, and B-304715, U.S. Comp. Gen., April 27, 2005.

M. Seelinger (Doc. #12879)

13.540 It is clear in the opinions of the Supreme Court Justices that there is a difference between jurisdictional and non-jurisdictional waters. What is not clear, and in fact these proposed regulations make it much less clear, what exactly is a ""Waters of the US."

Furthermore, I draw your attention to the 199 additional documents posted to the Regulation.gov docket folder in the last two weeks. They in fact have not been posted and the public is greeted with this 12 page notice:

Additional Supporting Materials for Docket EPA-HQ-OW-2011-0880

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> EPA will be adding the following documents to the docket. Copyrighted material is publicly available only in hard copy. Publicly available docket materials are available electronically at http://www.regulations.gov or in hard copy at the Water Docket, EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

> To what purpose do these documents serve? Why at this juncture are the Agencies concerned with copyright issues? It does beg the question of whether these copyright issue were addressed in the SAB report. Perhaps this should be disclosed.

> How does this serve the public trust when the vast majority of these documents are only available by taking a trip to Washington, D.C. If the agencies feel that these documents are necessary to support their case for further regulations, then they should resolve the stated copyright concerns and publish them on the website in their entirety. Otherwise these 199 documents should be removed from the docket. (p. 2)

In general it is not uncommon for a rulemaking, especially one of this size and with this kind of technical basis, to have many copyrighted references listed in the docket. Copyright law and shear volume constrains EPA from posting their content at all or in their entirety in the electronic docket, but the references are available for review by the public.

The~~se~~ references listed for this rule were supplemental, supportive scientific literature. Commenters do not need to review the references in order to understand the rule and its basis and to comment effectively. The references are there, however, for to direct the public to more background information.

<u>Family Farm Alliance (Doc. #12983)</u>

13.541 1. The agencies have only recently reviewed the adequacy of the underlying science, but have asked for commenters to provide complex technical information or recommend specific approaches within a range of proposals that are not well defined in the proposal.

> The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (connectivity report), which was recently reviewed by the SAB. However, EPA only extended the comment period for an additional 25-days to allow for the SAB report to be incorporated into the public record, which does not allow for meaningful analysis and response to the SAB report. There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters[374]," and the public deserves the opportunity to comment on the conclusion of that review process before the report is

[374] See 79 Fed. Reg. at 22,192.

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finalized. Also, the SAB made several recommendations to the EPA on the proposal, and the public, including the scientific community, should have the opportunity to comment on those recommendations as well. (p. 4)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

Sitka Economic Development Association (Doc. #13023)

13.542 (…) WHEREAS, Under Executive Order 13 132 - Federalism, federal agencies are required to consult and work with state and local governments on proposed regulations that have substantial direct compliance costs; and

WHEREAS, as per H.R. 5078, titled "Waters of the United States Regulatory Overreach Protection Act of 2014" and passed by the House of Representatives on September 9, 2014, the Congress of these United States agrees that development of the proposed rule "Definitions of Waters of the U.S. Under the Clean Water Act" violates Executive Order 13 132; and (…) (p. 1 – 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

The pendency of legislation that would amend the Clean Water Act does not obviate the need, as expressed by numerous stakeholders and members of the Supreme Court, to undertake rulemaking to clarify the scope of waters of the U.S.

Todd Wilkinson (Doc. #13443)

13.543 EPA should conduct a formal SBAR Panel and consider alternative regulatory approaches. The Agencies proposed rule is seriously procedurally defective. On the date the Agencies published its proposed WOTUS rule EPA1s Science Advisory Board had not completed its review of the report. Given the complex and controversial conclusion, until the public is given the opportunity to fully evaluate peer reviewer's comments on the Report it cannot be relied upon to make public policy. The Agencies must withdraw the proposal until they are able to comply with the Information Quality Act. (p. 2)

Agency Response: **See section 11.1 summary response for information regarding RFA/SBREFA in compendium 11.**

See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.

Colorado Wastewater Utility Council (Doc. #13614)

13.544 Furthermore, we are concerned that the proposed new rule has been issued for comments before the SAB has concluded its review of EPA's connectivity study. This connectivity study is supposed to form part of the scientific basis for the regulation. Because the

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hydrology is fundamentally different in the arid West, we need assurances that this connectivity study will take into account these differences. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

M. Smith (Doc. #14022)

13.545 I have concerns with the process used to create this proposal, and specifically whether impacted state and local groups such as townships were adequately consulted throughout the process. (p. 1)

Agency Response: **See summary responses in sections 13.2 and 13.2.5 for information regarding the rulemaking process and Federalism in compendium 13.**

Plumas County Board of Supervisors (Doc. #14071)

13.546 The rulemaking should not have been initiated before the issuance of the draft science report.

Your agencies have stated that the draft science report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence is informing the proposed rule. However, you are moving forward with the rulemaking before the report has been finalized and released, making it impossible to truly use the conclusions from the report to inform this proposal. Such an approach is scientifically incongruous as it lacks the logical nexus that is always required in the establishment of a legal basis of an assertion. We agree with RCRC that moving forward with the proposed rule before the science report is finalized is bad public policy. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

Legislative Council on River Governance (Doc. #14791)

13.547 (…) WHEREAS, the EPA and the Corps have not fulfilled statutory obligations to fully consult with the states, thus undermining Executive Order 13132's consolation criteria; and (…) (p. 2)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

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

13.548 Jurisdiction is improperly expanded as the science supporting the sought after connectivity has not been supplied.

The Agencies published the proposed rule prior to the science upon which it is supposedly based having been finalized; something that should have occurred prior to the

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proposed rule having ever been formulated. EPA's Connectivity Report is still not finalized and has only recently been peer-reviewed. While the Report documents the presence of connections between waterbodies, it appears to fail in supplying the scientific basis needed to determine when such connections may or may not significantly affect downstream waters. The voluminous amount of data released after publication of the proposed rule is too complex to have reviewed in the limited time allowed, and specific scientific comments cannot be provided, instead, we offer that when policy is crafted and an implementing rule drafted all in advance of peer-reviewed sound science being published, transparency is lost and data driven decision-making has not occurred. Going forward the Agencies intend that all adjacent waters be categorized as jurisdictional, claiming a significant nexus to jurisdictional waters. Under the proposed rule, all tributaries (including ephemeral streams and manmade ditches which may be dry most of the year), all adjacent waters and all adjacent wetlands would be subject to federal jurisdiction. Drainage ditches would be considered jurisdictional unless they fall under one of the two categorical exclusions: 1) those ditches located in uplands with less than perennial flow (another undefined term used in the proposed rule for which there are varying working definitions), and 2) those ditches that do not contribute flow either directly or indirectly to jurisdictional waters. The basis for this expanded jurisdiction is deeply flawed in that it relies on a faulty construction of the significant nexus text and is not shown to be supported by sound science. This ill-founded and improper action, considering the predictable outcome of expanded jurisdiction and regulatory authority, is arbitrary and capricious. (p. 5)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

Devon Energy Corporation (Doc. #14916)

13.549 The Administrative Procedures Act was not followed when the Agencies proposed this Rule prior to releasing the SAB Review. The determination of applicable science, which provides the underpinnings to the Proposed Rule, is not complete or finalized. However, the Proposed Rule cites the Connectivity Report which was concurrently being peer-reviewed by the SAB during the Public Comment process and was finally posted to Federal Register on Oct. 24, 2014. The process of simultaneously evaluating the science during the comment process makes it impossible for parties that may be subject to the Proposed Rule to provide significant source of support for this Proposed Rule. The Agencies failed to observe the requirement of the federal Administrative Procedures Act by not timely providing the results of the SAB Review prior to the comment period for this Proposed Rule. (p. 3)

Agency Response: **See section 13.2.1 summary response for information regarding the Administrative Procedure Act in compendium 13.**

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The Heritage Foundation (Doc. #15055)

13.550 For nearly 70 years The Administrative Procedure Act[375] (APA) has helped to ensure that the public has a meaningful opportunity to provide comments on proposed regulations. Yet, the proposed rule ignores this basic requirement.

In July 2013, the EPA assembled a Scientific Advisory Board (SAB)[376] to review a draft report the agency developed called the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.* [377]

According to the EPA, "This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters…Any final regulatory action related to the jurisdiction of the Clean Water Act rulemaking will be based on the final version of this scientific assessment, which will reflect EPA's consideration of all comments received from the public and the independent peer review.[378]

Yet the proposed rule was developed well before the Connectivity report was finalized (it still has not been finalized). The EPA sent its proposed rule to OMB on September 17, 2013, and released its draft Connectivity report on the same day.[379] The scientific advisory panel did not meet to review the report for the first time until December 16, 2013 -months after the proposed rule was sent to OMB.[380]

The agencies have put the "cart before the horse." The proposed rule should have only been developed once the Connectivity report had been finalized. This would have allowed the final report to inform the proposed rule. Since the final report is being developed after the proposed rule, it has no bearing on the proposed rule.

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[375] Administrative Procedure Act, 5 U.S.C Subchapter II.

[376] Thomas Armitage, Designated Federal officer, U.S. Environmental Protection Agency Science Advisory Board Staff Office, letter to Acting Director Christopher Zarba, July 29, 2013., http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/7724357376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf (accessed November 14, 2014).

[377] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft),* September 24, 2013, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed November 14, 2014).

[378] U.S. Environmental Protection Agency, "Report Information," http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed November 14, 2014).

[379] The report was made available on September 17, 2013. It was published in the Federal Register on September 24, 2013. Federal Register Vol. 78, No. 185 (September 24,2013), pp. 58536-58537, http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/html/2013-23198.htm (accessed November 14, 2014). The SAB submitted its review of the EPA's draft report on October 17, 2014. David Allen, Science Advisory Board Chair, and Amanda Rodewald, SAD Panel for the Review of the EPA Water Body Connectivity Report Chair, letter to Administrator Gina McCarthy, October 17,2014, http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/AF1A28537854F8AB85257D74005003D2?$File/EPA-SAB-15-001+unsigned.pdf (accessed November 14, 2014).

[380] EPA Scientific Advisory Board, "Meeting: Panel for the Review of the EPA Water Body Connectivity Report 12/16/2013 to 12/18/2013," http://yosemite.epa.gov/sab/sabproduct.nsf/MeetingCal/A243CB99328D3BF085257BBE0074E4E2?OpenDocument (accessed November 14, 2014.)

The public is being given the opportunity to provide comments on the proposed rule, but the rule does not reflect the science that the agencies will be using to develop the final rule; the EPA has expressly made clear that the final report will be the scientific basis for the final rule.[381]

If EPA's improper process were to stand, it would undermine the rulemaking process. Agencies could develop proposed rules with limited support and then use reports and studies after-the-fact to validate what the agency has already proposed. The agencies could even use their own studies.

This process will hurt the legitimacy of the SAB's review of the draft Connectivity report, and both the final report and the final rules. By not waiting for the final report before developing the proposed rule, the EPA is making the policy decisions look like a foregone conclusion. In addition, the EPA would have an incentive to limit the number of changes to the final report since it is supposed to be the scientific basis for the final rule. If there are too many changes to the final report, this could require the agency to reflect those changes in the final rule, thereby potentially causing logical outgrowth doctrine problems.[382]

When there is a significant difference between proposed and final rules, courts may decide that agencies must start the process all over again by drafting new proposed rules. According to the D.C. Circuit Court of Appeals, "Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."[383]

The public should have a meaningful opportunity to provide comments on a proposed rule that reflects the science that will inform any final rule. Without this opportunity, the value of the public comments is significantly weakened. (p. 1 – 3)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act in compendium 13.

Federal StormWater Association (Doc. #15161)

13.551 [B]esides lacking statutory authority or legal precedent, the proposed rule is procedurally flawed due to the agencies' failure to comply with the Administrative Procedures Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Federalism Executive Order. (p. 2)

Agency Response: See summary responses 13.2.4 and 13.2.5 for information regarding Unfunded Mandates and Federalism in compendium 13. For information regarding RFA/SBREFA see section 11.1 summary response in compendium 11.

[381] Public comments, like the final report, also can influence the final rule, but unlike this report, there is no prior agency commitment to use the comments, including as the scientific foundation for the rule. Further, the final report will be EPA's own document.

[382] In addition, the objectivity of the SAB process (regardless of who was on the SAB) is put into question because the SAB could want to limit the number and scope of recommended changes to avoid any type of logical outgrowth doctrine problems.

[383] *Environmental Integrity Project v. U.S. Environmental protection Agency*, 425 F.3d 992 (D.C. Cir. 2005).

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Southern Illinois Power Cooperative (Doc. #15486)

13.552 The proposed rule was developed via a flawed process, where the rule was developed before review of the underlying science is complete. (p. 10)

Agency Response: See sections 13.2 summary response for information regarding the rulemaking process in compendium 13.

Western Landowners Alliance (Doc. #16553)

13.553 Interpretive Assurances. EPA staff have informed us that they refer to preambles for guidance in other rulemaking, and would like to do so here. The proposed definition itself is fairly short, but its implications are difficult to assess throughout all CWA programs. The assurances that EPA has provided should be documented in the preamble. If there is any potential for the preamble to not encapsulate regulatory intent in these regards, and usable as such in the future, it should be expanded to do so. That said, "normal practices" should not allow pollutant dumping associated with exempt activities. (p. 2)

Agency Response: The rationale for the rule is explained in the preamble and other documents in the record for the rule. As discussed in those documents, the rule is consistent with the CWA and Supreme Court precedent. To the extent the commenter's reference to "normal practices" this rule does not affect the application of the normal farming exemptions under section 404(f).

Salinas Valley Water Coalition (Doc. #15625)

13.554 The Proposed Rule's unconstitutionally over broad definition of "the waters of the United States" impermissibly expands the authority of the USEPA and USACE. The Interpretive Rule and MOU violate the Administrative Procedure Act by rewriting the 404 exemptions under the guise of an interpretative rule in order to expand their authority beyond waters of the United States to land uses. We urge that the Proposed Rule and its associated Interpretative Rule be withdrawn due their constitutional, procedural and substantive defects. (p. 2)

Agency Response: See section 13.2.1 summary response for information regarding the Administrative Procedure Act in compendium 13.

The Interpretive Rule has been withdrawn. All comments on the Interpretive Rule are outside of the scope of this rulemaking.

City of Jackson, Mississippi (Doc. #15766)

13.555 Furthermore, once jurisdictional, a project could then trigger other federal regulatory requirements created by the National Environmental Policy Act ('NEPA"), the Endangered Species Act, etc. These programs involve studies and public comment periods, all of which cost additional time and money. Each of these steps would impose significant expenses and time delays on local governments with limited resources such as ours, preventing activities necessary to maintain public health and safety. (p. 3)

Agency Response: See section 13.3 summary response for information regarding NEPA in compendium 13.

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Associated Governments of Northwest Colorado (Doc. #16434)

13.556 Stay the current rulemaking process until the scientific assessment is final and the credibility of the Connectivity Report is established; and

Conduct a negotiated rulemaking process. (p. 2)

Agency Response: The negotiated rulemaking process is a discretionary pre-proposal mechanism that can be used to develop a rule. Some considerations in choosing what process to use are resources and how best to effectuate the Agencies priorities. In embarking on this rulemaking process, EPA elected not to engage in a negotiated rulemaking process, choosing instead to engage in notice and comment rulemaking, supplemented by extensive public engagement prior to issuing a proposal. The process for developing this rule included pre-proposal opportunities for affected parties to provide input to the agencies (for detailed information see the sections on 13.2.5 on Federalism, 13.2.6 on Tribal Consultation, and 11.1 on RFA/SBREFA in compendium 11). Moreover, since the rule has been proposed and the Agencies have received over one million comments, it would be inappropriate at this point to dismiss all of those comments and restart the rulemaking through a negotiated rulemaking process.

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

13.557 WHEREAS, the EPA and Corps' attempt at initiating WOTUS constitutes failure to comply with Executive Orders 12866 Regulatory Planning Review (1993) and 13563 Improving Regulation and Regulatory Review (2011)—which require that the regulatory system ensure, among other things, regulations are consistent, written in plain language, and are easy to understand—the proposed rule fails on all accounts; and

WHEREAS, nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the EPA and Corps. This amounts to "mission creep", which is enabled by not complying with the Executive Orders directives on regulatory planning. This is not only inappropriate, it is in violation of Executive Orders on regulatory planning; and (…) (p. 6)

Agency Response: See section 13.2.2 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563) in compendium 13.

American Gas Association (Doc. #16173)

13.558 The Administration has laid out a detailed timeline and has already taken significant steps to encourage federal agencies to expedite infrastructure permitting for energy projects. Presidential Orders and action items include:

- Presidential Memorandum (2011): Providing transparency, accountability and certainty into infrastructure permitting and review processes.
- Executive Order 13604 (2012) – Improving Performance of Federal Permitting and Review of Infrastructure Projects: To move people, goods and energy, rehabilitate infrastructure, create jobs, and support growth.

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- Blueprint for a Secure Energy Future (2012): Reducing reliance on foreign oil, saving families and businesses money at the pump, and positioning the U.S. as the global leader in clean energy.
- Executive Order 13605 (2012) – Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources and Associated Infrastructure
- Executive Order 13604 Steering Group (2012 – 2014): Under the leadership of OMB and CEQ, federal agencies have completed a comprehensive review to identify best practices for infrastructure permitting.
- Presidential Memorandum (2013) – Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures.
- Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure Permitting (2014): Recommending specific action items to ensure that agency staff implementing the Clean Water Act is fully engaged in utilizing the flexibility of existing regulations, policies and guidance and identifying additional actions to facilitate high-quality, efficient, and targeted permitting decisions and reviews.

AGA has worked continuously with policymakers to explain the importance of timely, efficient and transparent permitting of water resource impacts. For example, Army Corps water resource permits are crucial for timely completion of natural gas projects—whether new construction, maintenance, emergency work, or replacement. In many areas of the country, AGA members are struggling to get timely decisions on their permitting applications. Adding the multiple requirements of the Proposed Rule will further delay project completion timelines, and similar effects will be felt in any energy infrastructure sector that relies on timely federal water resource permits.

Additionally, the Proposed Rule would interfere with the successful implementation of federal law encouraging the acceleration of permitting reviews for natural gas pipeline projects. The 2014 Water Resources Reform and Development Act ("WRRDA") will kick-start utility project applicants' ability to fund independent third party project managers within the Army Corps, to expedite the evaluation and processing of permits. WRRDA authorizes the Army Corps to accept funds from non-federal public interests, including public utility companies and natural gas companies to expedite the processing of permits within the Army Corps' regulatory program. Any positive gains in agency time, project timelines, and reduced costs for project reviews could be quickly reversed if the Proposed Rule is implemented, adding dollars and days to each review for individual natural gas projects.[384] (p. 14-15)

<u>Agency Response:</u> The final rule does not establish any new regulatory requirements, and is not inconsistent with the Administration's commitment to implement its programs pursuant to the above statutes. Instead, it is a definitional

[384] See Joint Associations Letter to Bruce Carlson, U.S. Army Corps of Engineers, Water Resources Reform and Development Act, Section 1006: Expediting the Evaluation and Processing of Permits (Filed October 31, 2014) (available on AGA website).

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rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. It also does not upset the cooperative federalism of the Act that has been undertaken to implement the Clean Water Act.

Atlantic Legal Foundation (Doc. #17361)

13.559 3. Scientific Basis

The proposed rule is based extensively upon a scientific analysis entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the "EPA Report"). However, this Report has not yet been properly peer reviewed by the Science Advisory Board (SAB). It is troubling that the proposed rule was promulgated before its foundational scientific basis could be examined. We understand that the SAB is still conducting its Panel review and its panel members have recently expressed their view that the EPA Report will require extensive revisions.[385] Such disregard for peer review, which is an essential safeguard for scientific credibility, calls into question the agencies' adherence to the Administrative Procedure Act and the rule-making process. The science analysis and peer review should always precede a rulemaking especially where the scientific and legal concepts are inextricably linked. (p. 5)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.

R.D. Primrose (Doc. #18799)

13.560 (…)Implications regarding the Endangered Species Act (ESA}: I express extreme concern regarding the additional regulatory and economic burden that will be placed on our landowners, businesses and residents in being forced complying with ESA Section 7 consultation requirements as a result of the Proposed Rule. When the Proposed Rule as written is broadly enforced by the EPA and USACE regarding permitting requirements, the ensuing federal nexus will require ESA Section 7 consultation across New Mexico for normal and customary agricultural and ranching practices that is not required today, as there are no agricultural or ranching exemptions contained within the ESA. The additional burden and potential ESA take findings will undoubtedly cause irreparable

[385] On June 5, 2014 SAB Panel members reviewed and approved a draft SAB report which "recommends a substantial number of revisions to improve the clarity of the [EPA] Report, better reflect the scientific evidence, provide more quantitative measures, and make the document more useful to decision-makers." SCIENTIFIC ADVISORY BOARD, PANEL MEMBER COMMENTS ON THE DRAFT (6-5-14) SAB REVIEW OF THE DRAFT EPA REPORT CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE 7 (2014). It further recommends "that EPA clearly set forth the definitions used in the Report to be consistent with the definitions proposed for rulemaking and that any differences between the regulatory and scientific terminology be explained and described in terms of how it may affect interpretation of the conclusions reached." Id at 8.

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economic harm to landowners and threaten to undermine and potentially eliminate the customs and culture of their rural communities. (p. 2)

Agency Response: See section 13.4 summary response for information regarding Other Federal Laws in compendium 13.

Anonymous (Doc. #18801)

13.561 (…) 7) Any expansion that could occur as a result of this rule needs to be very specific related to each sector of the regulated community and should be reviewed by the affected stakeholders. The vagueness of the proposed rule has raised many concerns about interpretation and expansion of the Waters of the United States. EPA and USACE has communicated that it is not the intention or the spirit of the proposed rule to expand jurisdiction. The proposed rule needs modification to place the intent and spirit of the EPA and USACE into the proposed rule very clearly so as to eliminate these concerns. (…) (p. 2)

Agency Response: See summary responses and 13.2.5 for information regarding Federalism in compendium 13. For information regarding RFA/SBREFA see section 11.1 summary response in compendium 11.

13.562 (…) 8) Clarification of definitions is greatly needed and overdue. However, in the attempt to provide clarification, more confusion has resulted. A sector by sector approach is needed. Stakeholders in these sectors need to be more involved in the process of rule modification to address the concerns that have been expressed by the various sectors. (p. 2)

Agency Response: See summary responses and 13.2.5 for information regarding Federalism in compendium 13. For information regarding RFA/SBREFA see section 11.1 summary response in compendium 11.

Alcona Conservation District (Doc. #19345)

13.563 We believe the EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A review and Synthesis of the Scientific Evidence" is highly questionable and flawed. We question the scientific evidence and timing of this proposal in light of the fact that the study was sent to the Science Advisory Board to begin review on the same day it was sent to OMB for interagency review. (p. 2)

Agency Response: See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.

City of Morgan City, Louisiana (Doc. #19346)

13.564 As Mayor of the City of Morgan City, I am concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management. As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters.

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In particular, based on the copy of the proposed rule, I am deeply concerned that the Agencies believe that this proposed rule does not have federalism implications and therefore do not need to comply with Executive Order 13132. 1 respectfully disagree.

Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

By changing the definition of "Waters of the United States," the proposed rule will have a direct effect on the distribution of power and responsibilities among the various levels of government. Currently, there are many waters that are subject to state regulation only. However, the proposed rule will significantly expand the scope of federal regulation, stripping the States of any governing authority. Given this expansion, I am at a loss to identify any water that would not be subject to federal regulation unless specifically exempted. Such an expansion in federal jurisdiction would fundamentally alter our ability to make decisions regarding the use of land within our borders. Due to the fact that States often regulate more waters than are encompassed by the current definition of "waters of the United States" it is not clear what benefit the expansion of federal authority is designed to achieve. (p. 2)

Agency Response: **See summary responses and 13.2.5 for information regarding Federalism in compendium 13.**

D. Watson (Doc. #19347)

13.565 Recently, I went to the EPA website looking for information regarding their proposed definition of CWA waters. Unfortunately, I was unable to find a map and corresponding list showing, designating, and identifying the waters they were referring to. Did I miss a link? If not, I feel that the EPA is missing a golden opportunity to clarify their definition with actual examples. In hindsight, wasn't this exactly the problem (not enough specific information) with the original definition? (p. 2)

Agency Response: **As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.**

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

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Western States Water Council (Doc. #19349)

13.566 A. Connectivity Report

EPA has indicated that its draft connectivity report will serve to inform the final rule on CWA jurisdiction. However, the draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, the connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule in the Federal Register for public comment.

Additionally, many western states have submitted individual comments for the Environmental Protection Agency's (EPA) Science Advisory Board (SAB) to consider in its review of the draft connectivity report. EPA should carefully evaluate the SAB's consideration of these comments and any subsequent recommendations from the final report. Waiting until the report is finalized will give EPA more information to consider, and may possibly lead to revisions that improve the rule before its publication for public comment. (p. 2)

Agency Response: **See section 13.1 summary response for information regarding concerns about timing/overlap of the science document and review process, SAB review of the rule, and the Connectivity Study in compendium 13. For additional information on the final Connectivity Report and how it was considered in the development of today's rule, please see Compendium 9.**

13.567 F. State Consultation

As noted in the Council's prior correspondence and meetings with your agencies, the western states remain concerned about the process EPA and the Corps are using to develop this rule.

In 2011, the Council asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed rulemaking would better ensure the treatment

However, the submission of a draft rule on CWA jurisdiction to OMB for interagency review without any substantive state consultation in the development of the rule raises significant concerns that your agencies will use a process that is no better than the one they used to develop the draft guidance. In particular, we remain concerned that individual states will not have the opportunity to provide substantive feedback until after EPA and the Corps have developed a draft rule and published it for public comment in the Federal Register.

While we recognize that EPA and the Corps have participated in various meetings and calls with the Council and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid misinterpretations and

unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

In sum, EPA and the Corps should not wait until the public comment period to involve the states on a collective and individual basis in the development of the draft rule. States are co-regulators and are therefore separate and apart from the public. As such, waiting until the public comment period to consult with the states, both individually and collectively, in the development of the draft rule ignores their role as co-regulators and will not allow for meaningful state input or consideration of state concerns. (p. 3 – 4)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

M. Sedlock (Doc. #19524)

13.568 Issue 5: Failure to comply with Executive Orders 12866 (1993) and 13563 (2011)

References: FR page 22188, column 1. *This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of ''waters of the United States'' protected under the Act.*

FR page 22189, column 1. *…the agency's request comment on alternate approaches to determining whether ''other waters'' are similarly situated and have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas*.

FR page 22189, column 1. *In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which ''other waters'' should be considered similarly situated for purposes of a case-specific significant nexus determination.*

FR page 22189, column 2. *The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.*

FR page 22189, column 2. *…the agencies also request comment on determining which waters should be determined non-jurisdictional.*

FR page 22189, column 2. *The agencies seek comment on how inconclusiveness of the science relates to the use of case specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.*

FR page 22189, column 2. *The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.*

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FR page 22190, column 1. *This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment.*

Discussion: Executive Orders 12866 Regulatory Planning and Review (1993) and 13563 Improving Regulation and Regulatory Review (2011) require that the federal regulatory system ensure, among other things, regulations that are consistent, written in plain language, and easy to understand. The proposed rule fails on all counts.

The stated purpose of this proposed rule, as evidenced by its title, is to define the "Waters of the United States" under the Clean Water Act, and as stated elsewhere (see above references), to increase clarity as to the scope of "waters of the United States". As has already been addressed, above, that term does not need to be defined. The CWA and the Supreme Court have already very adequately provided a definition. However, the proposed rule goes on to request comments that address so many other issues, and in such a self-referential and circular manner, that the proposed rule becomes nearly impossible to understand.

The Agencies have not published a proposed rule, but rather a request for the public to do the Agencies' own work. Rather than publish a proposed rule that presents definitions of terms and alternatives to those definitions in a consistent and easy to understand manner for the public to analyze and evaluate, the Agencies have created a rule that goes back and forth between confusing definitions scattered throughout the document and soliciting additional comments about definitions of terms that are not found anywhere near the request for comments. (See Issue 1 above, "bait and switch" discussion).

In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited, above) are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda.

Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission creep", which is enabled by not complying with the Executive Orders directives on regulatory planning.

Recommendation: Withdraw the proposed rule. It is inappropriate and in violation of Executive Orders on regulatory planning. (p. 11 – 13)

Agency Response: See section 13.2.2 summary response for information regarding Executive Order s for Regulatory Planning (12866) and Review and Improving Regulation and Regulatory Review (13563) in compendium 13.

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13.569 6: Failure to list all supporting documents.

FR page 22188, column 2. All documents in the docket are listed in the http:// www.regulations.gov index.

Discussion: FR page 22188, column 1 states that the proposed rule is published "in light of" court cases. Column 3 of the same page refers to the SWANCC and Rapanos court cases.

The SWANCC and Rapanos decisions are crucially important to understanding the whole reason the Agencies contend that the proposed rule is necessary, yet the Agencies have not made them available in the docket under "Supporting & Related Material. This is not only unfair to the public, but it is also a false statement made in the proposed rule.

Recommendation: Provide links to the SWANCC and Rapanos court cases as well as any other caselaw "in light of" their important connection to the proposed rule. (p. 13)

Agency Response: **The *SWANCC* and *Rapanos* decisions are publicly available.**

Alpine County Board of Supervisors, County of Alpine, California (Doc. #20492)

13.570 The rule was developed without proper engagement of local and state governmental partners

The CWA identifies state and local governments as partners in enforcing and implementing the Act, yet your agencies have proposed a rule that imposes all costs and responsibilities on these other partners. In Congressional testimony, the U.S. Environmental Protection Agency (EPA) representatives have been unable to name any public interests your agencies engaged with during development of the rule, which not only violates the spirit of the CWA, but also underscores the inadequate analysis of local impacts that will result from this rule. If your agencies decide to move forward with a change to the definition of 'Waters of the U.S.," we strongly urge you to redraft the proposed rule and fully engage local and state governments in a meaningful process to draft the new rule. (p. 3)

Agency Response: **See section 13.2.5 summary response for information regarding Federalism in compendium 13.**

Upper Makefield Board of Supervisors Township, Upper Makefield Township, Bucks County, Pennsylvania (Doc. #20494)

13.571 (…) WHEREAS. Upper Makefield Township is also cognizant of the many administrative and regulatory burdens placed on local government, and we oppose any Federal mandates brought about by this rulemaking action, specifically as addressed under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the prívate sector; and

WHEREAS, Upper Makefield Township opposes any change to the definition of "Waters of the United States" that would directly regulate and affect our Township and serve as an Unfunded Mandate for our community; and (…) (p. 1)

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Agency Response: **See section 13.2.4 summary response for information regarding Unfunded Mandates in compendium 13.**

Michigan House of Representatives (Doc. #20504)

13.572 (…) WHEREAS, The proposed rule would create greater uncertainty for businesses and homeowners rather than providing clarity. The proposed rule will add new definitions for key technical terms that introduce ambiguities and vagaries into federal regulation. Confusion will inevitably lead to further litigation, tying up our com1s, delaying economic development, and wasting taxpayer money; and (…) (p. 2)

Agency Response: **For information regarding RFA/SBREFA see section 11.1 summary response in compendium 11.**

ATTACHMENTS AND REFERENCES

Comments included above in this document discuss the Proposed Rule, and some include citations to various attachments and references, which are listed below. The agencies do not respond to the attachments or references themselves, rather the agencies have responded to the substantive comments themselves above, as well as in other locations in the administrative record for this rule (e.g., the preamble to the final rule, the TSD, the Legal Compendium). In doing so, the agencies have responded to the commenters' reference or citation to the report or document listed below as it was used to support the commenters' comment. Relevant comment attachments include the following:

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33 C.F.R. 320 (Doc. #8377.1, p. 1)

40 C.F.R. 230 (Doc. #8377.1, p. 1)

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BNA. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. U.S. & Carabell v. U.S.*, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (Doc. #14134, p. 8)

Brown Exp., Inc. v. US., 607 F.2d 695,700 (5th Cir. 1979) (Doc. #15376, p. 6)

California Fish & Game Code §§1600-1602(Doc. #16489, p. 27)

California State Water Resources Control Board, Guidance for Regulation of Discharges to Isolated Waters, June 25, 2004. (Doc. #16489, p. 28)

Citizens to Preserve Overton Park v. Yolpe, 40 1 U.S. 402, 416 (1971). (Doc. #14751, p. 14)

City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 201 (2d Cir.2010). (Doc. #15018.1, p. 15)

Committee on Transportation & Infrastructure, Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule, June 11, 2014 http://transportation.house.gov/calendar/eventsingle.aspx?EventID=378392 (Doc. #14992, p. 5)

Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 531 (D.C. Cir. 1982). (Doc. #8674, p. 2)

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